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A non-ideal approach to freedom of movement

Denise Vargiu

December 2019

A dissertation submitted to the University of Bristol in accordance with the requirements for award of the degree of Doctor of Philosophy in the Faculty of Arts

Word Count: 61,522

Declaration

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's *Regulations and Code of Practice for Research Degree Programmes* and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

SIGNED: **DATE:**

Abstract

Based on a non-ideal framework, my thesis analyses structural wrongful discrimination in migration at the borders of membership and territory and argues that an international moral human right to freedom of movement is needed.

My thesis' methodology is non-ideal for two reasons. First, my work acknowledges historical processes of injustice and domination in the context of migration and border control. Second, my thesis, rather than theorizing for an ideal of perfect justice in migration, investigates degrees of improvements of justice in migration and freedom of movement. Using racial and gender discrimination as lenses of analysis, my thesis argues that the state unilateral control of the border is structurally and inherently wrongfully discriminatory. Indeed, my thesis claims that state unilateral border control is based on processes of racialization, and that the way migration is governed re-shapes past racialized and racist relationships of domination. Moreover, my thesis argues that policies at the borders of membership channel migrant agency into assigned gender roles and this is instrumental in maintaining stereotypical gender structures that reproduce patterns of gender inequality, discrimination, and subordination.

Consequently, starting from the acknowledgement of the right to non-discrimination as an internationally-recognised human right, my thesis argues that unilateral state control of the border constitutes a threat to the human right to non-discrimination. My argument for an international human right to freedom of movement is based on the justification of a new human right through a "derivative approach". In this case, a new human right is needed to prevent the violation of another existing human right, and my thesis argues that a human right to freedom of movement is needed in order to make violations of the right of non-discrimination less likely.

Finally, my thesis examines issues of feasibility concerning international freedom of movement. Discussing the objection that an international human right to freedom of movement is not feasible in practice, my thesis explores the possibility of a transitional theory of justice in migration, which takes feasibility into account. In this case, my thesis argues for the greatest possible freedom of movement (with the end-goal of fully open borders), which is realized by attaining the maximum possible degree of open borders in terms of the right to enter and stay in any country.

To sum, given that borders are intrinsically wrongfully discriminatory and that a human right to freedom of movement is morally justified, my thesis claims that for an international human right to freedom of movement to be possible, state policies and the international governance of migration should aspire to maximize open borders.

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INTRODUCTION

My thesis examines a non-ideal approach to international freedom of movement. I argue for a moral human right to freedom of movement across countries grounded on the right to non-discrimination. Examining issues of feasibility, I advocate a feasible approach to open borders that aims to achieve the greatest possible freedom of movement and the maximization of open borders.

An international human right to freedom of movement means the freedom for a person of any citizenship or nationality to leave any country (the right to emigrate), the freedom to enter and stay in any country (the right to immigrate) as well as the freedom to move within any country. However, through the chapters of this thesis in some cases I refer specifically to a human right to emigrate and in other cases to a human right to immigrate. This is because in some cases I need to highlight issues concerning the right to leave a country and in others I argue specifically for the right to enter any country. This does not mean that I am arguing for two different rights but that in some cases I need to cast light on specific aspects of a human right to freedom of movement.

I believe that a human right to freedom of movement is needed for a number of reasons. Firstly, internal membership in liberal democracies is becoming more unequal in terms of the distribution of rights; practices like the deprivation of citizenship and the restriction of criteria for the acquisition of citizen rights are worsening, and targeted at specific categories of persons. Secondly, external borders are becoming increasingly wrongfully discriminatory in a way that violates human rights. These are reasons for concern, and I believe that a right to international freedom of movement would make more difficult to act in a wrongfully discriminatory way against persons' basic right to equal treatment.

Finally, I believe that a human right to international freedom of movement would protect other freedoms and rights, in particular those of refugees and irregular immigrants, who find themselves trapped within exclusionary practices at or within the border of the nation-state. Therefore, my thesis argues that freedom of movement is needed both for the

fairness of membership status and for excluding wrongful discriminatory criteria in the selection of would-be members.

There are three themes that are fundamental to my thesis and that often overlap throughout the chapters of the thesis.

The first is that migration control is inherently racialized and gendered in a wrongful discriminatory way; the second is that a human right to freedom of movement is needed on grounds of non-discrimination and the third is that issues of feasibility and freedom of movement can be overcome through a transitional theory of justice in freedom of movement and open borders.

The first theme provides a foundation, an urgent reason to advocate for an international human right to freedom of movement: the wrongful discrimination based on precarious membership, racialization and gender at the borders of membership and territory is a structural aspect of border control and of the state right to exclude migrants. This leads to the second theme of the thesis - the urgent need for an international moral human right to freedom of movement. Indeed, the structural (not contingent) wrongful discrimination at the borders implies the violation of the right of non-discrimination, and this justifies through a derivative approach a human right to freedom of movement across state borders. A derivative approach to a moral human right is based on the idea that a specific right might be required to make the violation of another right already existent less likely (Nickel).¹

The third theme refers to the possibility that this right is feasible. In this case, freedom of movement requires the implementation of some degree of open borders. My original argument is for a transitional approach to justice based on the achievement of the greatest possible freedom of movement and the maximization of open borders. In this way, many of the (supposed) issues of feasibility raised by critics of open borders might be addressed. At the same time, I am not merely looking for “more open borders”, but the agreed goal of the global governance of migration would be the constant improvement of international freedom of movement.

¹ Nickel, James W. 2007. *Making Sense of Human Rights*. 2nd ed. Malden MA: Blackwell, pp.87-91.

Finally, it is important to specify that my thesis concerns voluntary migration rather than issues raised by refugee status, asylum policies and forced migration. Therefore, these topics are only marginally examined in my thesis. Issues surrounding membership and the right to enter for asylum seekers can be advocated for with stronger humanitarian arguments and stronger approaches to distributive justice than voluntary migration. The point of exploring voluntary migration is that it requires to argue for a human right to international freedom of movement, not for the most in need, but for everybody. Nevertheless, such an approach would protect also the most in need, such as refugees and stateless persons who would not be stopped at the frontier. Therefore, advocating for freedom of movement for voluntary migration includes also the freedom for refugees and stateless persons to travel and stay anywhere. An argument for freedom of movement of refugees and asylum seekers could exclude voluntary migration (indeed, also theorists for the state right to discretionary control of the border recognise some duty of states to protect refugees) and could also exclude *de facto* refugees that are not recognised as *de jure* refugees.

A theory for a human right to freedom of movement (to immigrate) would offer extensive protection to refugees because, independently from the outcome of their application, they would already have the right to move safely and stay in any country. Thus, a human right to freedom of movement would limit the exploitation of irregular migrants whose lack of status is determined by the border and by regulations about membership. Indeed, even though specific legislation for refugees is needed, freedom of movement would include and make equal all those categories that a selective approach to membership has put at the margin: asylum seekers, irregular migrants, temporary workers, workers who have their membership linked to a specific job like domestic workers, and dependent visas. A human right to freedom of movement means that migration is always regular.

The thesis is divided into seven chapters. The first chapter will explain the methodology of the thesis, focusing on non-ideal theory. Methodologically, the thesis uses Rawls's distinction between ideal and non-ideal theory.² This refers to an approach to

² Rawls, John. 2005 [1971]. *A Theory of Justice*. Original ed. Cambridge Ma: Belknap Press, pp.245-247. On non-ideal theory and idealization, the chapter focuses on Sen, Amartya. 2010. *The Idea of Justice*. London: Penguin; Mills, Charles W. 2005. "'Ideal Theory' as Ideology." *Hypatia* 20(3): 165-184.

political theory in which, rather than looking for a way to frame the ends we should try to pursue, it looks at ways for achieving such long-term goals step-by-step. In this case, non-ideal theory is transitional (provisional and intermediate) to the end promoted by ideal theory. For instance, the goal of an international human right to freedom of movement is sustained by a theory for a feasible approach to open borders based on the maximization of openness. This is a gradual step towards achieving the ideal goal of full freedom of movement and fully open borders.

The chapter will examine how the concept of realism can be understood within migration; in particular, the section will challenge the idea that starting from realism implies starting exclusively with the nation-state.³ I will argue that starting from realism is on the one hand related to subjectivity (e.g. the subjectivity of political philosophy as a discipline and its approach to the world) and on the other related to what elements of reality enter into the philosophical analysis.⁴ Therefore, the section argues that starting from realism includes, inevitably, a partial understanding of reality. The thesis will argue that within migration theory, starting from realism means the interpretation of a multifaceted process; on the one hand, migration is a process that involves the individual and the nation-state and on the other hand, it is a process among sovereign states and international political organizations. The section will state that a realistic and non-ideal approach to migration theory must include the global governance of migration and the human rights approach to migration endorsed by the United Nations.

Chapter Two aims to offer a philosophical framework to situate the thesis in the debate about freedom of movement but it also explains why questions about freedom of movement and membership have become central to the philosophical debate.

The critical approach to methodological nationalism plays a pivotal role in the analyses of the reality of migration and its influence in political philosophy. Beginning from describing some

³ Miller, David. 2017. "Migration and Justice: A Reply to my Critics." *Critical Review of International Social and Political Philosophy* 20(6): 763-773.

⁴ For a general understanding of the philosophical debate on realism, the chapter will refer to Williams, Bernard and Geoffrey Hawthorn. 2008 [2005]. *In the Beginning was the Deed: Realism and Moralism in Political Argument*. Princeton NJ: Princeton University Press; Shklar, Judith N. 1998. *Political Thought and Political Thinkers*. Chicago: University of Chicago Press; Sleat, Matt (ed). 2018. *Politics Recovered: Realist Thought in Theory and Practice*. New York: Columbia University Press; Sleat, Matt. 2013. *Liberal realism: A Realist Theory of Liberal Politics*. Manchester: MUP.

empirical facts and data about international migration, the chapter considers that migration has been on the one hand encased in interpretations biased by methodological nationalism (Sager, Dumbrava, Wimmer and Glick Schiller)⁵ and on the other hand it represents a challenge to the traditional way of understanding political theory (Cole).⁶ In particular I examine how the traditional understanding of the polity as a bounded society with a stable and settled citizenry is not able to respond to the challenges of an unequal globalized society.

While Sager⁷ suggests that political philosophies of migration are biased by methodological nationalism *tout court*, I consider the debate on methodological nationalism to be more fragmented: I argue that philosophies for the right to exclude tend to apply traditional categories of analysis about the political association to defend the state discretionary control of the borders. On the other hand, philosophies for freedom of movement and open borders (or more open borders) inevitably look for categories of analysis that goes beyond methodological nationalism.

Within this simplified polarization of the debate in the political philosophy of migration I situate my thesis among the human rights-based approaches to freedom of movement, those approaches that aim to justify an international human right to freedom of movement. Within this framework I argue for a human right to freedom of movement across countries based on the right of non-discrimination.

Chapter Three focuses on explaining why discrimination is wrong. Highlighting definitions of discrimination in the human rights practice and in political philosophy, the chapter shows the peculiarity of a definition of wrongful discrimination in migration. Accepting a non-moralized definition of discrimination, the chapter focuses on the concept of wrongful discrimination as differentiation that create disadvantage to groups or individuals.⁸ However, I argue that in a framework of non-ideal theory a definition of

⁵ Sager, Alex. 2018. *Toward a Cosmopolitan Ethics of Mobility: The Migrant's-Eye View of the World*. Mobility & Politics. Cham, Switzerland: Palgrave Macmillan; Dumbrava, Costica. 2014. *Nationality, Citizenship and Ethno-Cultural Belonging: Preferential Membership Policies in Europe*. Houndmills Basingstoke: Palgrave Macmillan; Wimmer, Andreas, and Nina Glick Schiller. 2002. "Methodological Nationalism and the Study of Migration." *European Journal of Sociology* 43(2): 217–40.

⁶ Cole, Phillip. 2000. *Philosophies of exclusion. Liberal Political Theory and Immigration*. Edinburgh: Edinburgh University Press.

⁷ Sager, *Cosmopolitan Ethics*, p.24.

⁸ Sangiovanni, Andrea. 2017. *Humanity Without Dignity: Moral Equality, Respect, and Human Rights*. Cambridge MA: Harvard University Press; Eidelson, Benjamin. 2015. *Discrimination and Disrespect*. Oxford: OUP.

wrongful discrimination needs to be specific to the context. Indeed, wrongful discrimination at the borders of membership or territory cannot be analysed through categories based on cases of one-to-one wrongful discrimination. This is because wrongful discrimination in migration includes not only the traditional understanding of explicit discrimination (overt state policies against certain groups) but also implicit processes of historical and social injustice that are consistent through time. Within this framework, overt wrongful discriminatory policies are only a symptom of a much more consistent wrongfully discriminatory process in migration that does not end with the end of such policies.

Finally, in order to back up my argument that a human right to freedom of movement is needed in order to, at least, make discrimination in migration less likely (or improve justice in migration), I explore two ways to ground the idea that wrongful discrimination is morally wrong. The first is based on the shared principle that wrongful discrimination demeans the equal moral worth of individuals.⁹ The second strategy (similar to the cantilever argument)¹⁰ is based on considering the widespread consensus about the wrongness of wrongful discrimination in the human rights practice and in the political theory of migration sufficient to consider wrongful discrimination morally wrong; and, in this case the burden to prove otherwise is let to those who disagree.

Chapters Four and Five explore the structural wrongful discrimination in migration through the categories of precarious membership, racialization, and gender wrongful discrimination.

Chapter Four examines precarious membership statuses in liberal democracies. It argues that contemporary liberal democracies are characterized by a stratification of unequal memberships; and this stratification puts at the bottom undocumented migration and at the top citizenship-for-investment programmes. The chapter also argues that legal citizenship is becoming more precarious. In this case the chapter examines the hardening of the criteria for naturalization focused in particular on reinforcing the principle of the genuine link, the end of *unconditional jus soli* as a way to acquire citizenship, and the implementation of practices of denationalization for dual citizens. Moreover, I argue that the joined critical analysis of

⁹ Hellman, Deborah. 2008. *When is Discrimination Wrong?* Cambridge MA: Harvard University Press.

¹⁰ Carens, Joseph H. 2013. *The Ethics of Immigration*. Oxford Political Theory. New York: OUP, pp.237-9.

different processes of precarious membership shows that there is a trend in states policies that predictably affect persons often identified as of non-white descent.

Chapter Five examines racialization and gender wrongful discrimination at the borders. Beginning with Charles Mills's definition of the racial contract, the chapter argues that the border is intrinsically racialized and borders are on the one hand an instrument to maintain historical racialization and on the other hand create (or participate in) new processes of racialization.¹¹ These processes lead to the implementation of patterns of structural wrongful discrimination at the borders of the nation-states. Such patterns embed migration control and state policies; the chapter argues that, for instance, the application of the kinship principle tends to favour the dominant group and undermines other minoritarian groups. These patterns of wrongful discrimination create a situation in which some have a *de facto* right to freedom of movement while others are stuck at the borders of membership.

The second part of this chapter explores the role of gender wrongful discrimination at the borders. The chapter argues that the border creates a tension between gender roles and gender identity, and it examines this aspect through the analysis of female migration. In particular, the chapter critically highlights that the literature focuses mostly on immigration and either leaves emigration aside or considers emigration an acquired right. By contrast, I argue that female migrants are wrongfully discriminated in emigration and immigration. They are discriminated in emigration because several countries consider women second-class citizens and forbid them the freedom to leave. I argue that such wrongful discrimination is exacerbated by the state's unilateral control of the borders in immigration. They are discriminated in immigration because the border is instrumental in maintaining social and cultural patterns of gender discrimination. Indeed, the border acts according to stereotypical gender roles in which female migrants in order to gain membership are pushed into certain sectors of the job market considered typically "feminine" or enter easily into unskilled jobs. The point here is that migrants must balance out their perceived and self-constructed gender identity with the gender role that the receiving country is expecting them to perform and is therefore stereotypical assumed in migratory selection processes.

¹¹ Mills, Charles W. 1997. *The Racial Contract*. Ithaca NY: Cornell University Press.

Chapter Six argues that structural wrongful discrimination at the border justifies a moral international human right to freedom of movement. The chapter critically examines human rights practice and its approach to freedom of movement, and argues that a human right to freedom of movement serves to reduce wrongful discrimination. In the light of Nickel and Shue's¹² approach to human rights I argue, through a derivative strategy, for a human right to immigrate. My argument is complementary to other human rights-based accounts to freedom of movement across countries but applies a different methodology based on a non-violation account of human rights.

In the light of what I argue throughout the thesis about structural wrongful discrimination in migration, I suggest that a human right to freedom of movement across borders is urgently needed to reduce the violation of the right of non-discrimination. It is the structural pattern of wrongful discrimination at the border – consistent across time and nations – that constitutes the systematic violation of the right to non-discrimination. Therefore, I argue that an international human right to freedom of movement across borders is not only *helpful* to reduce discrimination but *essential*.

Chapter Seven examines issues of feasibility and freedom of movement. I argue that issues of feasibility can be surmounted through a transitional theory of justice based on the achievement of the greatest possible freedom of movement and the maximization of open borders. By a transitional approach to justice, I mean a theory based on the improvement of justice rather than the immediate achievement of full justice.¹³

This chapter will examine the concept of open borders and argues that a feasible definition of open borders aims at achieving the greatest possible freedom of movement. This implies the maximization of open borders under feasible conditions within a given context. A feasible approach to open borders based on the maximization of openness is the (non-ideal) step-by-step approach to achieve the long-term goal of fully open borders and full freedom of movement. In this case, the realization of a human right to freedom of movement through the global governance of migration and state policies should aim to achieve the greatest

¹² See Nickel, *Making Sense of Human Rights*, and Shue, Henry. 1996. *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. 2nd ed. Princeton NJ: Princeton University Press.

¹³ Sen, *The Idea of Justice*, pp.7-9.

possible freedom of movement that is attainable in the world we live in, but with the goal of open borders.

Maximization¹⁴ refers to the extension of open borders to their greatest and most feasible extent in a given context. Rather than focusing on a theory for porous borders or more open borders, the thesis will examine the possibility of *maximizing* open borders (in a given framework and time). A set of contextualised factors must be considered for granting the maximum possible freedom of movement within a framework of global governance of migration. The difference between a theory for more open borders or for porous borders (Benhabib)¹⁵ and a theory for the maximization of open borders is that the goal of maximising open borders imposes a duty on states that is much stronger than the duty for more open borders. Indeed, a theory that focuses on achieving the greatest possible freedom in open borders aims at the maximization of openness as a goal of the political association in itself. On the other hand, a theory for no borders (Hayter)¹⁶ would create concerns for those cases where there are reasons for protecting borders, such as the case of a unique ecosystem that needs to be safeguarded.

¹⁴ *Maximization* does not refer to any school of political theory. It simply means “extension to its greatest possibility”.

¹⁵ Benhabib, Seyla. 2004. *The Rights of Others: Aliens, Residents, and Citizens*. Cambridge: CUP, pp.87-88 and 211.

¹⁶ Hayter, Teresa. 2003. “No Borders: The Case against Immigration Controls.” *Feminist Review*, (73)73: 6–18.

CHAPTER ONE: METHODOLOGY

1.1 Introduction

The methodology of the thesis is based on a non-ideal framework for the analysis of both an international moral human right to freedom of movement and a feasible approach to open borders. While the first aims to respond to the question about who has the right to control borders (who has the right to what) and is procedural, the second aims to explore the feasibility of open borders (without discussing their justification) and is substantive.

This chapter is divided in two sections. Section 1.2 examines some aspects of the relationship between ideal/non-ideal theory that are relevant for this thesis and explains that the thesis falls into the category of non-ideal theories for two reasons: it takes into account processes of oppression and discrimination in migration; and the thesis is based on a transitional approach to justice in migration.

Section 1.3 examines issues of realism, and the meaning of starting from realism in migration theory as a multifaceted concept dominated by ongoing processes in which the nation state is just one actor.

1.2 Between ideal and non-ideal theory

This thesis moves within a non-ideal theory framework. However, it is worth outlining that the thesis does not necessarily endorse the primacy of non-ideal theory over ideal theory in principle (there are very good things in both ideal and non-ideal theory) and it does not share the idea that a good political theory must always be rooted in non-ideal theory, because this would restrict the spectrum of investigation for political philosophy. Indeed, the so-called feasibility constraint cannot be a normative parameter with which to evaluate the results of political philosophy tout court. This is not only because the definition of what a feasible constraint is depends on philosophy itself, but also because it is hard to justify how a single normative concept could constrain the freedom of investigation within political philosophy, and it is not clear why ideal theory should not be pursued only because it is not immediately applicable in practice.

Nevertheless, this disagreement about the primacy of non-ideal theory over ideal theory does not mean that it is not worth covering the gap in the literature about the feasibility of open borders within non-ideal theory, especially because some of the critiques of freedom of movement are based on consequentialist and empirical arguments. For that reason, the thesis explores both the possibility of a moral human right to immigrate and a scalar approach to open borders within non-ideal theory. Hence, the thesis focuses on exploring several degrees of openness, rather than defining open borders as an analysis dominated by binary concepts (such as openness/closedness, inclusion/exclusion).

I believe that the philosophical analysis of migration should include real-world contexts of discrimination in migration, especially focused on gender and racialization, and I think that these factors are better analysed within a framework of non-ideal theory. To explain the non-ideal approach of this thesis, I shall examine some aspects of the philosophical debate over ideal and non-ideal theory, and clarify what distinguishes ideal from non-ideal theory.

The variety of interpretations of the meaning of ideal and non-ideal in recent decades reflects the variety and complexity of the discussions over the methodology of political philosophy. Among the scholars that offered a conceptual systematization of the ideal/non-ideal debate are John Simmons, Laura Valentini, Alan Hamlin and Zofia Stemplowska.¹⁷ They trace the beginning of the ideal and non-ideal debate in John Rawls's political theory.¹⁸

Aiming to define the basic structure of a just society, Rawls examines the principles of justice to which individuals would agree to in an abstract situation. Starting from the idealization of a closed society based on mutual recognition among citizens, Rawls's ideal theory implies the assumption that individuals will act according to the principles of justice, and the presumption of socioeconomically favourable conditions which allow the implementation of the principles of justice.¹⁹ Rawls also refers to non-ideal theory as a

¹⁷ Simmons, A. John. 2010. "Ideal and Nonideal Theory." *Philosophy and Public Affairs* 38(1): 5–36; Valentini, Laura. 2012. "Ideal Vs. Non-Ideal Theory: A Conceptual Map." *Philosophy Compass* 7(9): 654–64; Hamlin, Alan, and Zofia Stemplowska. 2012. "Theory, Ideal Theory and the Theory of Ideals." *Political Studies Review* 10(1): 48–62.

¹⁸ Rawls, *A Theory of Justice*. On the other hand, Lea Ypi traces back the origin of the ideal and non-ideal debate at least to Plato's Republic. See Ypi, Lea. 2010. "On the Confusion between Ideal and Non-Ideal in Recent Debates on Global Justice." *Political Studies* 58(3): 536–55.

¹⁹ Rawls, *A Theory of Justice*, pp.245-247.

situation in which the principles of justice are chosen under less favourable circumstances.²⁰ Spelling non-ideal theory out, Rawls says that it consists of two subparts: historical contingencies and natural limitations; and issues concerning injustice such as war, civil disobedience and so on.

The work of Simmons, Valentini and Hamlin and Stemplowska highlight how, starting from Rawls, a central meaning of ideal theory in the philosophical debate is strict or full compliance, as opposed to the understanding of non-ideal theory as partial (or non-full) compliance.²¹ Full compliance assumes that citizens will follow and conform to the demands of justice, completely and at all times, whereas partial compliance accepts that they may not. Some of the questions examined by the recent non-ideal debate investigate what to do if individuals do not comply with the requirements of justice, how many citizens might comply, and to what degree they might comply to the principles set out by ideal theories.²²

Another meaning relevant to ideal and non-ideal theories concerns the relationship between facts and principles i.e., whether facts should or should not be taken into account within the philosophical analysis of justice. Valentini calls this part of the ideal/non-ideal debate as utopian versus realistic theories.²³ Utopian theories suggest that the principles of justice should be independent from facts.²⁴ However, realistic theories claim that political philosophy should consider the impact of feasibility constraints for normative theories.²⁵

Similarly, Colin Farrelly suggests that non-ideal theory implies fact-sensitivity (real world circumstances are considered) and ideal theory means fact-insensitivity (justice is independent from issues of feasibility).²⁶ Farrelly considers philosophies like that of Rawls as

²⁰ Rawls, *A Theory of Justice*, p.247.

²¹ Simmons, "Ideal and Nonideal Theory", pp.7-18; Valentini, "Ideal Vs. Non-Ideal Theory", pp.655-656; Hamlin and Stemplowska, "Theory, Ideal Theory and the Theory of Ideals", pp.49-50.

²² See Valentini, "Ideal Vs. Non-Ideal Theory", pp.655-656; Miller, David. 2013. *Justice for Earthlings: Essays in Political Philosophy*. Cambridge: CUP, pp.206-27; Hamlin and Stemplowska "Theory, Ideal Theory and the Theory of Ideals", pp.49-50.

²³ Valentini, "Ideal Vs. Non-Ideal Theory", pp.656-660.

²⁴ For instance, see Cohen, Gerald A. 2003. "Facts and Principles." *Philosophy & Public Affairs* 31(3): 211-45; Cohen, Gerald A. 2008. *Rescuing Justice and Equality*. Cambridge, MA: Harvard University Press.

²⁵ For instance, see Williams, *In the Beginning Was the Deed*; Geuss, Raymond. 2008. *Philosophy and Real Politics*. Princeton NJ: Princeton University Press.

²⁶ Farrelly, Colin. 2007. "Justice in Ideal Theory: A Refutation." *Political Studies* 55(4): 844-864. See also Hamlin and Stemplowska "Theory, Ideal Theory and the Theory of Ideals", pp.50-51.

insufficiently fact-sensitive.²⁷ He claims that Rawls's hypothesis of both a closed society and full compliance are idealised assumptions, and they collapse in what O'Neill calls idealization. According to O'Neill idealization means that, within liberal theory, features of the real world and its agents are idealized in order to justify a specific theoretical conceptualisation; instead, in political theory abstract reasoning should be done without idealization.²⁸

These concepts are particularly important for the non-ideal methodology of this thesis. Scholars such as O'Neill, Young and Mills highlight how inequalities and oppressions in real world circumstances are ignored by liberal theory, and this can also be said for the analysis of migration.²⁹ Therefore, to explain the non-ideal methodology of this thesis I shall examine some of O'Neill, Young and Mills philosophical arguments.

O'Neill argues that agents in political theory are idealized because they have qualities that human beings lack, like independence and admirable compliance.³⁰ Moreover, choices of idealization are not unbiased: justice becomes "blind to gender and nationality" and overlooking these characteristics is instrumental in choosing principles of justice that fit the privileged in society.³¹ O'Neill says that idealized accounts of justice fail to account for the perspective of those (such as women) that carry out reproductive and productive tasks, whose lives are defined by relations of dependence and interdependence and who sometimes have limited control over the circumstances of their lives because of a lack of resources.³² On nationality, O'Neill highlights how the closed society has been idealized in political theory. She outlines how Rawlsian idealized accounts of justice presuppose that "reasoning about justice can and should begin by assuming a closed society". However, she argues that the same idea of a closed society "is an idealization that assumes predicates which

²⁷ Farrelly, "Justice in Ideal Theory: A Refutation", pp.848–849.

²⁸ See O'Neill, Onora. 1987. "Abstraction, Idealization and Ideology in Ethics." *Royal Institute of Philosophy Lecture Series 22*: 55-69.

²⁹ O'Neill, "Abstraction, Idealization and Ideology in Ethics", pp.55-69, and O'Neill, Onora. 1997 "Political Liberalism and Public Reason: A Critical Notice of John Rawls, Political Liberalism." *The Philosophical Review* 106 (3): 411-28; Young, Iris Marion. 1990. *Justice and the Politics of Difference*. Princeton NJ: Princeton University Press; Mills, "'Ideal Theory' as Ideology", p.168.

³⁰ O'Neill, "Abstraction, Idealization and Ideology in Ethics", pp.55-69.

³¹ O'Neill, Onora. 1990. "Justice, Gender and International Boundaries." *British Journal of Political Science* 20(4): 439-59, p.439.

³² O'Neill, "Justice, Gender and International Boundaries", p.440.

are false of all existing human societies” such as the idea of citizens sharing a political identity in a self-sufficient democracy.³³

The issue of neglecting real-world circumstances in liberal theory is also highlighted by Iris Marion Young³⁴ who argues that philosophical investigation should start from historical contexts of injustice, inequality and social exclusion. She criticizes how philosophers, in order to fulfil the condition of objectivity, abstract from specific historical circumstances and remove the social contingencies of human life.³⁵ According to Young oppression is structural, based on unchallenged norms, habits and cultural stereotypes. The theorization of abstract liberal societies does not help to highlight processes of injustice, and groups that are oppressed because of their gender, race and class suffer injustice as a result of “the everyday practices of a well-intentioned liberal society”.³⁶ Therefore, starting philosophical analysis with hypothetical liberal societies presupposes leaving aside historical injustices, for instance excluding slavery, domination and colonialism from the analysis.

Similarly, Mills argues that ideal theory relies on the idealization of actual societies and starts from “the abstract and undifferentiated equal atomic individuals of classical liberalism”.³⁷ Consequently, ideal theory abstracts from relations of domination and exploitation among persons and therefore it does not show how basic institutions are shaped by oppression. This implies that:

Fundamental social institutions such as the family, the economic structure, the legal system, will therefore be conceptualized in ideal-as-idealized-model terms, with little or no sense of how their actual workings may systematically disadvantage women, the poor, and racial minorities.³⁸

³³ O'Neill, "Political Liberalism and Public Reason", pp.411-28.

³⁴ Young, *Justice and the Politics of Difference*. For a comparison between ideal and non-ideal theory in Rawls and Young see Jaggar, Alison M. "L'Imagination au Pouvoir: Comparing John Rawls's Method of Ideal Theory with Iris Marion Young's Method of Critical Theory" in Tessman, Lisa (ed). 2009. *Feminist Ethics and Social and Political Philosophy: Theorizing the Non-Ideal*. Dordrecht: Springer.

³⁵ Young, *Justice and the Politics of Difference*, pp.4-5.

³⁶ Young, *Justice and the Politics of Difference*, p.41.

³⁷ Mills, "'Ideal Theory' as Ideology", p.168.

³⁸ Mills, "'Ideal Theory' as Ideology", p.169.

According to Mills, idealization implies not only silencing the unequal relationships that institutions create in terms of gender, racialization and class but also misconceiving how such institutions work. He calls this way of undertaking philosophy the *ideal-as-idealized* model. Mills offers an alternative philosophical model that he calls *ideal-as-descriptive*, which abstracts without idealizing:

What one wants are abstractions of the ideal-as-descriptive-model kind that capture the essentials of the situation of women and non-whites, not abstract away from them. Global concepts like patriarchy and white supremacy arguably fulfil this role [...] These terms are abstractions that do reflect the specificities of group experience, thereby potentially generating categories and principles that illuminate rather than obfuscate the reality of different kinds of subordination.³⁹

The goal of this philosophical model is theorising without marginalising the actual world; therefore, a descriptive model takes into account some of the most important aspects of a given phenomenon rather than considering the most preferable aspects of it, as an idealized model does. In this way, issues about oppression, domination and injustice become material for non-ideal theory and this is relevant also for the philosophy of migration.

Shelley Wilcox considers Mills's descriptive model a useful methodological tool for migration theory.⁴⁰ She argues that a non-ideal approach to migration should include a "descriptive model of real-world migration" focused on the specific circumstances of a given area and the historical (and present) relations between countries. For this reason, in line with the arguments of the non-ideal debate, Wilcox believes that, in non-ideal theory, justice in migration should be based on a bottom-up approach. Rather than looking for perfect principles of justice in migration, she believes that a bottom-up approach needs to consider real-world migration and its background conditions with the "aim to identify what justice requires in this context".⁴¹ This thesis agrees that a non-ideal approach to the philosophy of

³⁹ Mills, "'Ideal Theory' as Ideology", p.173.

⁴⁰ Wilcox, Shelley. "Toward a Nonideal Approach to Immigration Justice" in Boonin, David (ed). 2018. *The Palgrave Handbook of Philosophy and Public Policy*. Cham: Palgrave Macmillan.

⁴¹ Wilcox, "Toward a Nonideal Approach to Immigration Justice", p.194. Wilcox believes that both arguments for open and closed borders fail to be non-ideal.

migration understood as non-idealization is needed, especially with a focus on real-world circumstances, feminism and race studies. Therefore, this thesis, looking for a non-ideal methodology within the philosophy of migration, takes into account the work of O'Neill, Young and Mills criticising idealization, as well as their focus on processes of domination and oppression. Such categories are considered the necessary background for the non-ideal philosophical analysis of migration. Critiques of ideal theory as blind to nationality, gender and race are particularly important for the philosophy of migration because transnational processes of oppression and domination shape the social status and life of migrants. The methodology of this thesis is non-ideal because it contextualises the philosophical analysis of migration within historical and ongoing processes of injustice and domination that are based on gender and racialization.

This thesis claims that idealizations about migrants and immigration as a phenomenon that happens between ideal equal and independent states overlook processes of injustice and wrongful discrimination in migration in order to define states as inherently *moral* and therefore *right* in their choices of limiting freedom of movement according to their needs. This thesis considers wrongful discrimination on the grounds of race and gender as unavoidably entrenched with border control and freedom of movement.⁴²

Another aspect of the ideal and non-ideal debate that is important for the methodology of this thesis is the approach to non-ideal theory as transitional theory. Valentini defines this branch of the debate as end-state (ideal) versus transitional (non-ideal) theories.⁴³ In this case, ideal theory defines the ultimate end of non-ideal theory, which instead examines *how* such an end can be achieved progressively: whereas ideal theory is based on a long-term goal for framing the political, non-ideal theory looks at how to achieve such a goal step by step and therefore it is transitional to the goal set by ideal theory. In *A Theory of Justice* Rawls considers ideal theory prior to non-ideal theory.⁴⁴

This priority has been criticised by Amartya Sen,⁴⁵ who claims that non-ideal theory does not need to be framed by ideal theory: we do not need to have a general theory of

⁴² This non-ideal focus on migration will be developed especially in Chapter Five.

⁴³ Valentini, "Ideal Vs. Non-Ideal Theory", pp.660-662.

⁴⁴ Rawls, *A Theory of Justice*, p.245-246.

⁴⁵ Sen, *The Idea of Justice*, pp.7-9.

justice to understand that something is unjust (for instance, to understand that discrimination is unjust we do not need to know what a fully just society should be like). Hamlin and Stemplowska highlight the contrast between Rawls and Sen approaches in terms of transcendental (ideal) and comparatives (non-ideal) philosophical theories, between perfect justice and local improvement of justice. On the one hand, there are transcendental theories of justice that identify social arrangements that should be perfectly just; and on the other, there are comparative theories that evaluate and rank different social arrangements.⁴⁶

Transitional and comparative understandings of non-ideal theory can help this thesis to highlight processes of injustice in migration and to explain processes of improvement of justice in migration. Indeed, in this thesis the search for the greatest possible freedom of movement and the maximization of open borders is based on the possibility of *improving* justice in migration and on recognising what injustice in migration is. The point is to improve justice or to reduce injustice in migration, rather than to achieve perfect justice in migration. In this case, justice in terms of open borders and freedom of movement improves progressively. Indeed, the maximization of open borders (the openness of borders is extended to its maximum possibility in a given context) is transitional to the goal of achieving fully open borders, and therefore it aims to realise a human right to freedom of movement progressively.⁴⁷ In this case, non-ideal theory works as transitional theory for improving justice in migration and this transitional theory of justice becomes a way to overcome issues of feasibility in freedom of movement.

In this thesis, a human right to freedom of movement can be seen as the ideal long-term goal of a transitional non-ideal theory of open borders. This does not mean that this thesis needs a general (ideal) theory of justice to understand what injustice in migration is, but it means that this thesis applies a *specific* field-focused end (or ideal) for justice in migration: from a transitional perspective of justice, a human right to freedom of movement without constraints becomes an ideal of justice to achieve step by step.

⁴⁶ Hamlin and Stemplowska, "Theory, Ideal Theory and the Theory of Ideals", pp.51-52.

⁴⁷ The concept of maximization is explained in depth in Chapter Seven. Moreover, Chapter Seven examines issues of feasibility in relation to open borders and the idea of a transitional approach to open borders with the end goal of fully open borders.

How is this ideal chosen? It is chosen using a non-ideal comparative approach to justice: starting from a settled and recognised human right, the right to be free from discrimination, a human right to freedom of movement is justified through a derivative approach from the latter (a right derived from another right).⁴⁸ Therefore, when the thesis argues for a human right to freedom of movement, it means a human right to move freely across countries as a way of reducing discrimination. Moreover, this thesis aims to respond to the criticism that open borders are not feasible in practice, and to the criticism that, for that same reason, the prospect of open borders can be addressed only within the realm of ideal theory.⁴⁹ Instead, in this thesis the issue of feasibility could also be considered transitional.⁵⁰

In summary, this thesis, considering some aspects of the ideal/non-ideal debate, justifies open borders and freedom of movement by adopting the methodological distinction between abstraction and idealization and the transcendental/comparative or end-state/transitional approaches to non-ideal theory.

1.3 Realism

This section examines a critical definition of realism methodology within political theory. It also explores a possible meaning of realism, and investigates some elements of realism in the political philosophy of migration. Firstly, it is worth distinguishing realism from non-ideal theory. Realism refers to scholarship rooted in Bernard Williams and Judith Shklar's work and it is based on the distinction between ethics and politics (Williams)⁵¹ and anti-utopianism (Shklar).⁵² Non-ideal theory gathers a wide body of works that started with Rawls and which, roughly, claim partial compliance and some link with feasibility. More specifically, issues of partial compliance and feasibility are strictly connected to the applicability of principles of justice. Non-ideal theory investigates how much citizens will comply with principles of justice

⁴⁸ On a derivative approach see Chapter Six.

⁴⁹ Many interesting things have been said on the side of ideal theory. See Cohen, "Facts and Principles"; Cohen, *Rescuing Justice and Equality*; Valentini, Laura. 2011. "Introduction: The Problem of Global Justice." in *Justice in a Globalized World: A Normative Framework*. Oxford:OUP; Valentini, "Ideal vs. Non-ideal Theory".

⁵⁰ See Simmons, "Ideal and Nonideal Theory"; Valentini, "Ideal vs. Non-ideal Theory".

⁵¹ Williams, *In the Beginning was the Deed*, pp. 1-17.

⁵² Shklar, *Political Thought and Political Thinkers*, pp.3-19.

and feasibility is understood as the applicability of such principles in the real world; in this case, the fundamental question is how far principles of justice can be action-guiding. Therefore, non-ideal theory maintains a strong link between ethics and politics: between what should be done (what is just) and what is done. Sleat argues that realism is different from non-ideal theory on two specific grounds.⁵³ First, realism recognises conflict and disagreement as a fundamental aspect of political life rather than something that needs to be fixed by political theory. Second, realism separates ethics from politics; politics is investigated as it is and not how it should be. Therefore, realism does not look for moral values that must be applied to politics.

Realism started as a reaction against a specific way to do political liberalism based on the research of some ethical principles applied to the political realm. However, an agreed definition of realism is difficult to find, given the variety of scholarships that it gathers together. Scholars seem to agree that realism is far from a coherent body of literature.⁵⁴

Matt Sleat suggests that realism is an umbrella term that gathers together various political works, often in disagreement with each other, but sharing a set of theoretical assumptions.⁵⁵ Similarly, Galston says that realism emerges “as a kind of community stew where everyone throws something different into the pot”.⁵⁶ What gathers realists around the same pot is the belief that “high liberalism represents a desire to [...] escape from politics” and dissatisfaction with “high liberal theory”⁵⁷, such as the work of Rawls and Dworkin.

The shared dissatisfaction among realist scholars comes from two sources: the primacy of ethics over the political within liberalism; and the utopian outcomes (e.g., the idea of full compliance) of its philosophical investigation. For the primacy of ethics, realists tend to refer to the writings of Bernard Williams and for anti-utopianism, to the work of Judith Shklar.⁵⁸ Indeed, despite seeking an origin within the history of philosophy in the works of

⁵³ As above, contrary to Sleat, Valentini considers realism an approach that is part of non-ideal theory. See Valentini, “Ideal Vs. Non-Ideal Theory: A Conceptual Map”, pp.656-660. On the distinction between non-ideal theory and realism, see Sleat, Matt. 2016. “Realism, Liberalism and Non-Ideal Theory or, Are There Two Ways to Do Realistic Political Theory?” *Political Studies* 64(1): 27–41.

⁵⁴ Sleat, *Politics Recovered: Realist Thought in Theory and Practice*; Sleat, *Liberal Realism: A Realist Theory of Liberal Politics*.

⁵⁵ Sleat, Matt. “The Resurgence of Realist Political Theory” in *Liberal Realism: A Realist Theory of Liberal Politics*, p.2.

⁵⁶ Galston, William. 2010. “Realism in Political Theory.” *European Journal of Political Theory* 9(4): 385–411, p.386.

⁵⁷ Sleat, “The Resurgence of Realist Political Theory”, p.2.

⁵⁸ Shklar, *Political Thought*, pp.3-19.

Machiavelli and Hobbes, it seems widely accepted that contemporary realism started with Bernard Williams. According to Williams, moralism (or political moralism) refers to those philosophies where the moral has priority over the political (Williams includes here both utilitarianism and Rawlsian philosophy), either because the moral sets up the values and principles that must be applied to the political, or because it constrains the political.⁵⁹ On the other hand, political realism gives greater autonomy to the political and makes use of distinctive political concepts such as power and legitimation.⁶⁰ By “political” Williams means mainly political disagreements, such as the interpretation of concepts like freedom or equality or disagreements about the field of application.⁶¹ He does not mean, as moral disagreement does, the different reasons that bring people to a decision. In this way Williams aims to distinguish political realism from both applied ethics and legal philosophy. The separation between ethics and politics also changes how realists do philosophy; and, rather than structuring a moral theory about how things should be, as Galston says, realists begin where a given political community is, based on anti-utopianism and the rejection of the possibility of full compliance.⁶² These elements form Williams’s bottom-up approach to political theory, as opposed to the top-down nature of political moralism.⁶³ Part of this bottom-up approach is indebted to Judith Shklar’s liberalism of fear, where the aim of government is fundamentally to prevent the worst outcome.⁶⁴

There is a lot to say about what the focus on realism represents for political philosophy altogether. On the one hand, the discussion about realism and ideal and non-ideal theory outlines a wider crisis of the scope of political philosophy and its methodology. Therefore, certain scholarship seems to be evaluating how much political philosophy must be non-ideal in order to be worthwhile as a discipline. We see, then, the attempt to narrow political theory to some kind of empirical discipline like a form of political science; and, accordingly, thinking becomes a tool for achieving some practicality. On the other hand, the debate on realism and ideal/non-ideal theory has spread to different areas of political investigation; and,

⁵⁹ Williams, *In the Beginning was the Deed*, p.2.

⁶⁰ Williams, *In the Beginning was the Deed*, p.77.

⁶¹ Williams, *In the Beginning was the Deed*, p.77.

⁶² Galston, “Realism in Political Theory”, p.395.

⁶³ Williams, *In the Beginning was the Deed*, p.84.

⁶⁴ Shklar, *Political Thought*, p.11.

consequently, the primacy of realism and non-ideal theory over ideal theory has also become an evaluative criterion (non-ideal is good, ideal is bad) of different branches of political thought. It is within this framework that we find the question of realism and ideal non-ideal theory playing a normative role in the debate on migration, open borders and freedom of movement. It is this aspect of the debate that I am interested to analyse. This is not because I agree to the primacy of the paradigm of non-ideal theory and realism, but because for the opponents of open borders such a paradigm has also become a criterion to defeat the validity of theories for open borders that are easily dismissed as unfeasible and socially incompatible through the lens of realism.

However, it is one thing to say that philosophy should, methodologically, start from realism and another to say what starting from realism (or starting from things as they are) means in a specific field like the political philosophy of migration. Indeed, in the case of migration in political theory I need to establish what I am talking about when I say “starting from realism”.⁶⁵ I could, for instance, think that there are some things that are more relevant than others in the facts of migration. As a scholar, I could then make choices about what I consider relevant and I could ground such choices on temporality (e.g. do I look only at the time we live in? Or do I also look at historical processes and their injustices?) or space (which realism are we talking about? Which political entities among those existents are I am looking at in migration?). I must also consider that my understanding of realism is limited by my knowledge as scholar, and the way in which I perceive meaning in the world I am in. Thus, I must be aware of the partiality both of my understanding, my knowledge and of any analysis of justice I could achieve. This does not mean that the results of my philosophical research are insufficient, but rather that there are many valid paradigms in migration for interpreting philosophical concepts and I am articulating only one of them.⁶⁶ Therefore, I think that the *things as they are* matter is, for political philosophy, always a reduction of all the possible aspects of migration: a kind of simplification of the complexity of reality that is achieved through some choices and these choices have meanings and critical value because they define not only the object of analysis but also its direction. This simplification of reality that

⁶⁵ On this concept and a critique of Miller’s realism see Fine, Sarah. 2017. “Migration, Political Philosophy, and the Real World.” *Critical Review of International Social and Political Philosophy*, 20(6): 719-725.

⁶⁶ See Sen, *The idea of justice*.

philosophy does is far from neutral; on the contrary, it is very partial. Nevertheless, this does not mean that philosophical research is vitiated, unnecessary or misleading. I can grasp some elements from reality that highlight a perspective about a general understanding of “things as they are” and such examination raises issues of justice that need to be addressed also in theoretical (philosophical) terms. In the case of this thesis, I can narrow the scope of the investigation to issues of justice in migration and freedom of movement within the debate of political philosophy.

It is worth noticing that, within the political theory of migration, realism is highly selective in defining what reality is. Such selectivity usually considers the nation state as the sole focus of political analysis. However, this thesis needs to consider both political movements and constraints given by international bodies to national politics which, in their complexity, represent the political realm formed by tensions that run in opposite directions. More precisely, in the political philosophy of migration, the assumption that realism matches the nation state is at the origin of the misrepresentation of migration as a process that involves mainly immigrants and the host state. In the literature, this is linked to the domination of the perspective focused mainly on immigration into wealthy Western countries and the way they respond to the question of immigrants pressing at their borders, rather than examining migration and mobility as a global, multifaceted process. This approach influences also the debate on open borders: the question become essentially one of states, border control and non-citizens.

Moreover, the same justification of non-ideal theory as well as issues of realism have become a tool for criticising theories that advocate for open borders as utopian and unrealistic. An example of this is David Miller’s⁶⁷ critique that political philosophy should start from realism, from nation-states as they are, considering also their inequalities and injustices rather than “imagining a world with unhindered freedom of movement”.⁶⁸ Therefore migration (especially immigration) is considered an issue of non-ideal theory and in this case, the assumption seems to be that open borders are not achievable in a non-ideal framework; and, if we start from the world as it is, we will end up finding justificatory reasons for the claim

⁶⁷ Miller, “Migration and Justice: A Reply to my Critics”, pp.763-773; see also Miller, *Justice for Earthlings*.

⁶⁸ Miller, “Migration and Justice: A Reply to my Critics”, p.765.

of democratic states to control their borders. However, as Sarah Fine⁶⁹ states, there is a clear tension between Miller's idealised vision of the benign nation-state and of national communities and his approach to the "world as it is". His idealised conception of the nation-state deviates from "the world as it is" and this does not make clear when the passage from the description of the real world to the prescriptive argument happens.

In this thesis I consider starting from things as they are as an approach that cannot be reduced to the assumption of the existence of the state and its borders (that is what a good part of political theories mean when referring to starting from realism); but starting from realism means also considering the formation of transnational political bodies such as the African Union (AU) and the European Union (EU), which blur the borders of membership and sovereignty among states. It also implies the recognition that mass movements of populations are pressing at the borders of the nation-state and challenging the same definition of borders. Moreover, a realistic approach to migration must consider all the actors involved in the global governance of migration; for instance, including the United Nations' (UN) endorsement of a human rights-based approach to migration⁷⁰ (migrants' human rights are considered particularly vulnerable to violation, therefore, according to the UN they need special attention), taking into account organisations like the International Organization for Migration (IOM), the International Labour Organization (ILO) and Non-Governmental Organizations, as well as the drafting of several documents: the Universal Declaration of Human Rights (UDHR)⁷¹ of 1948, and among others, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁷² of 1990 and the Global Compact on Migration of 2018.⁷³ Moreover, it must take into account the conventions for the protection of refugees like the 1951 Convention Relating to the status of Refugees.⁷⁴

⁶⁹ Fine, "Migration, Political Philosophy, and the Real World", p.721.

⁷⁰ On the UN human-rights based approach to migration, see United Nations Office of the High Commissioner for Human Rights (OHCHR). 2012. *Migration and Human Rights: Improving Human Rights-Based Governance of International Migration*. Available at: <https://www.refworld.org/docid/5243e8e74.html>.

⁷¹ United Nations General Assembly. 1948. *Universal Declaration of Human Rights*. Available at: <https://www.refworld.org/docid/3ae6b3712c.html>.

⁷² United Nations General Assembly. 1990. *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. Available at: <https://www.refworld.org/docid/3ae6b3980.html>.

⁷³ Asylum Access. 2018. *Global Compact on Migration: Recommendations for a Compact with a Rights Based Approach*. Available at: <https://www.refworld.org/docid/5b2a56504.html>.

⁷⁴ United Nations General Assembly. 1951. *Convention Relating to the Status of Refugees*. Available at: <https://www.refworld.org/docid/3be01b964.html>.

Secondly, I think that starting from realism within the political philosophy of migration means that we can understand freedom of movement and migration as a process that is set according to two different frames. The first is the relation between the individual and the state as a political entity; and, the second is the relation among states as free and equal political entities. Most of the literature about movement across borders within political philosophy focuses on the first of these processes, the relation between the individual and the state. Usually it refers to the relationship between the state and the migrant (immigrant) defined also as non-citizens, temporary workers, long term resident and other similar categories. Within this approach, migration is mainly examined as an issue about immigration of non-citizens claiming their right to enter or stay in a given country, or as the right of refugees to find asylum in a given country. Philosophers such as Miller and Wellman⁷⁵ start from this relational perspective about the individual and the state in their analysis of the right of the state to exercise discretionary control of borders.

However, in the world we live in, freedom of movement is often a process agreed among states and international organizations. For instance, the EU is an agreement between states that guarantees the freedom of movement of more than 300 million people within its borders. A similar but more recent example is the Free Movement Protocol signed by 44 African states.⁷⁶ The goal of the African Union is the removal of visa requirements for all African citizens in all African countries, allowing 90 days stay and the right of residence for any African citizen in any of the countries that have signed the agreement. This may grant freedom of movement for more than one billion people. Therefore, migration and open borders are not an issue between the individual and the state, but more often open borders is a process facilitated by agreements between states and the aggregation of states together in international organizations.

⁷⁵ Miller, David. 2016. "Is There a Human Right to Immigrate?" in Fine, Sarah and Lea Ypi (eds). *Migration in Political Theory: The Ethics of Movement and Membership*. Oxford: OUP; Miller, David. 2016. *Strangers in Our Midst: The Political Philosophy of Immigration*. Cambridge MA: Harvard University Press; Wellman, Christopher H. and Phillip Cole. 2011. *Debating the Ethics of Immigration Is There a Right to Exclude?* Oxford: OUP.

⁷⁶ A draft of the Protocol is available at: https://au.int/sites/default/files/newsevents/workingdocuments/33023-wd-pa20330_e_original_free_movement_protocol.pdf. On 2018 African Union meeting for freedom of movement and market see: <https://au.int/en/pressreleases/20180319/note-editors-african-union-will-enhance-free-movement-and-single-air>.

However, within the debate in political philosophy, removing borders through agreements between states seems much less problematic than the unauthorized immigration of individuals to a foreign country. Perhaps the reason is that in the perspective of political philosophy, the relationship between states is a relation among equals; states are equally sovereign structures, and their legitimacy depends on their mutual recognition. It follows that the rules of freedom of association apply to the relationship among states and this is probably why this approach to open borders is less problematic for scholars who defend the state right to exclude. However, in the relationship between the state and the immigrant there is a profound difference of status (a body politic and a foreign individual; a juridical body and a physical person), so it is not clear how, once the right of self-determination has been achieved by a people that is unified in a state against other peoples and other states, the same principle is applied to individuals that are not attempting to destroy such self-determination but rather are asking to be part of it.

In the light of this analysis we can see that the issue is not whether borders are open or closed, but who has the right to what and why. The fact that states agree among themselves to open their borders is not problematic for theorists who argue for the state discretionary right to exclude: it keeps intact the principle that states have the right to control their own borders. However, uncontrolled immigration defies the basic principle of the state-centric approach within political philosophy: the state as a self-contained, self-controlled and complete entity in itself. Starting from this problem, what is needed is a new outlook as to what political boundaries and political institutions are from the point of view of freedom of movement. What is needed is a change in our perspective on the nation-state as the centre of our political analysis and shifting the focus from the state towards a human right to freedom of movement at a global level.

Therefore, the methodology of this thesis is based on realism and non-ideal theory. Within this framework, it considers facts and issues about migration as complex and multifaceted and therefore a simplified philosophical approach to issues raised about migration in terms of the dichotomy nation state/immigration control needs to be inserted into a global international system based on transnational and global relations among a plurality of actors.

1.4 Conclusion

This chapter has examined the methodology of the thesis based on realism and non-ideal theory. Firstly, this chapter has highlighted how the thesis falls into the category of non-ideal theories for several reasons, including the fact that the thesis starts from historical contexts related to migration, borders and the global governance of migration. The thesis can be further specified as a transitional theory (non-ideal). For instance, the maximization of open borders can be understood as the gradual (transitional) approach to achieve a more ideal freedom of movement, as stated in the first part of the thesis. Secondly, the chapter has focused on realism, in particular challenging the idea that “starting from things as they are” implies starting exclusively from the nation state. On the contrary, this chapter has argued that the idea of “starting from realism” includes many factors related to philosophy as a discipline and to the process of migration itself. In particular, the thesis considers starting from realism in the field of migration as a process that involves the individual and the nation-state and as a process between states. Moreover, the analysis of migration cannot exclude the global governance of migration and the human rights approach to migration endorsed by the UN. Therefore “starting with realism” as a methodology in the field of migration implies a more complex vision than starting exclusively from the nation state.

CHAPTER TWO: MIGRATION AND POLITICAL THEORY

2.1 Introduction

This chapter offers a brief overview of how the reality of migration and the political philosophy of migration have challenged the traditional categories of political theory about the political association as a bounded and self-contained society. Within this framework, the chapter shows how the thesis fits into the debate on freedom of movement and the political philosophy of migration.

The analysis develops around the concept of methodological nationalism and shows how philosophical approaches that put the state at the centre of the philosophical investigation have been challenged by international migration. In particular, the chapter examines issues about migration and membership within the social contract theory; and subsequently, using the same critique of methodological nationalism, it considers the main arguments both for the state discretionary control over borders and for freedom of movement. Thus, this chapter situates the thesis among the investigations that justify a human right to freedom of movement.

This chapter is divided as follow: section 2.2 gives some empirical information about international migration and its definitions; section 2.3 examines methodological nationalism in political theory and explores the role of migration in questioning such an approach; section 2.4 examines how migration has challenged settled categories of the state and membership within the social contract theory; section 2.5 analyses the debate within the political philosophy of migration through the lens of the critique of methodological nationalism; and section 2.6 shows how this thesis fits into the debate about migration and freedom of movement.

2.2 Some facts about migration

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in Article 2 defines a migrant worker as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or

she is not a national".⁷⁷ The Convention focuses on defining a *migrant worker*; however, it does not provide a definition of *migrant*. Indeed, there is not, at a global level, a recognised and accepted definition of who is a *migrant*, and therefore such definitions differ according to the discipline that is investigating migration. Focusing on international migration (mobility across countries) rather than internal migration (mobility within a state), statistical research that investigates population data generally considers an international migrant to be a person who lives in a country other than her country of birth or citizenship. Sociology, however, tends to refer to international migration as temporary or permanent mobility of persons across political boundaries. Within this framework, a migrant is both an emigrant (a person who is leaving her place of origin/residence) and an immigrant (a person entering a receiving country).

The International Organization for Migration defines 'migrant' as "an umbrella term" which reflects "the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons" and, according to the IOM, this definition applies regardless of the legal status of the migrant.⁷⁸ Therefore, an international migrant is a person who moves across political and territorial borders independent of whether that migration is voluntary or forced, and independent of her legal status (or the legal status that such a person might acquire) under domestic or international law. The term 'migrant' includes documented and undocumented migrants, migrant workers (seasonal or long-term), refugees and asylum seekers, smuggled and trafficked persons, and other categories such as people who move for the purposes of family reunification, and finally international students (who are often considered to be immigrants in national statistics).⁷⁹

Despite the fact that migration research and the public debate in wealthy countries of the global North mostly focuses on international migration, the United Nations Human

⁷⁷ United Nation Convention adopted by the General Assembly - Resolution 45/158. 1990. Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>.

⁷⁸ IOM definition of migrant, available at: <https://www.iom.int/who-is-a-migrant>.

⁷⁹ See the *International Convention on the Protection of the Rights of All Migrant Workers*, and Global Migration Group (UN et al.). 2008. *International Migration and Human Rights, Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights*, pp.7-12. Available at: https://unfpa.org/sites/default/files/pub-pdf/int_migration_human_rights.pdf.

Development Report (UN HDR) shows that far greater numbers of people move within their own country.⁸⁰ In 2009 an estimated 740 million people were internal migrants, whereas 214 million people were international migrants.⁸¹ The 2020 IOM Report states that in 2019 the number of international migrants rose to 272 million.⁸² Of this, an estimated 48% are women. The UN HDR gives some more detailed empirical information about migration.⁸³ A factor to take into account is geographical proximity: half of all international migration happens within macro geographical regions (North America, Europe, Oceania, Latin America and the Caribbean, Asia, Africa). For instance, 20% of the total of international migration happens between Asian countries. Moreover, within these macro areas, 40% of migrants move to a neighbouring country.⁸⁴ Another factor to consider is that two-thirds of migrants move to a country with a higher Index of Human Development (HDI) than their country of origin.⁸⁵ Therefore, people mostly move to countries with a longer life expectancy, a better education index and a higher gross national income than their own, although not necessarily to very wealthy countries.

These patterns of international migration are led, among other factors, by inequality and border restrictions. Inequality is not only a pull factor for migration (people tend to move to a country that is better off than their own), but also a constraint. Indeed, “despite the fact that people moving out of poor countries have the most to gain from moving, they are the least mobile”.⁸⁶ Border constraints and state policies that restrict immigration raise the costs of mobility that can become affordable only for those who “have enough resources, possess skills that are sought after in the new host country, or are willing to run very high risks”.⁸⁷

⁸⁰ United Nations Development Programme. 2010. *Human Development Report 2009, Overcoming Barriers: Human Mobility and Development*. New York: Palgrave Macmillan, pp.21-46. Available at: http://hdr.undp.org/sites/default/files/reports/269/hdr_2009_en_complete.pdf.

⁸¹ UN HDR, p.21.

⁸² IOM. 2019. *World Migration Report 2020*, p.19. Available at: https://publications.iom.int/system/files/pdf/wmr_2020.pdf.

⁸³ UN HDR, pp.22-25.

⁸⁴ UN HDR, p.24.

⁸⁵ The Human Development Index has been set up by the United Nations to “emphasize that people and their capabilities should be the ultimate criteria for assessing the development of a country” and it gathers statistics about life expectancy and health, education, and a decent standard living measured by the gross per capita national income. See <http://hdr.undp.org/en/content/human-development-index-hdi>.

⁸⁶ UN HDR, p.24.

⁸⁷ UN HDR, p.24.

Therefore, border constraints create a selection process prior to any possible application for admission in receiving countries. It is, indeed, the existence of border controls that sets up the conditions for the exclusion of the poorest and the worst-off. In this case, the criteria involved in or implied by the selection process, the costs that the border creates for applicants and the risks of crossing it undocumented, have the consequence of limiting people's chances to participate equally in international mobility.

From this perspective, migration questions the fairness of border control and the moral acceptability of exclusionary states policies. It also questions settled approaches and theories about the state and its boundaries, about political and social membership and about global justice.

2.3 Migration and political theory

In an age characterized by increased international mobility, the fact that migration has become a theme of political philosophy comes as no surprise. In particular, within the theoretical framework of liberal democracies, the discussion about migration challenges the traditional debate on membership and the state; moreover, mobility, freedom of movement, and questions of who has the right to control state borders, have come under investigation in the literature. While some scholars defend the state right to unilateral control over borders, others argue for open borders and freedom of movement and scrutinise not only the ideal cohesive ground that constitutes the nation-state, but also the state as the essential centre of political analysis.

Alex Sager argues that the Anglo-American tradition, from Hobbes to Rawls, has considered the state as its unit of analysis.⁸⁸ According to him, such methodological nationalism (the nation-state as the starting point of philosophical analysis) has strongly influenced the ethics of migration hitherto (although philosophers have started challenging such methodological bias). Sager outlines fundamental similarities in how thinkers conceived of the polity as bounded, circumscribed and stable.⁸⁹ Nor has this problem been confined to political philosophy and political theory: following the criticism of methodological nationalism

⁸⁸ Sager, *Cosmopolitan Ethics*, p.17.

⁸⁹ Sager, *Cosmopolitan Ethics*, p.18.

started by the sociologist Herminio Martins,⁹⁰ scholars such as Andreas Wimmer and Nina Glick Schiller have shown that migration studies mirror and presupposes the normalization of the nation-state as a privileged category of analysis.⁹¹ Indeed, selecting criteria for membership assumes, by default, a methodological nationalist approach. The normative question about *how* individuals live together implies investigating the type of institutions that they agree to establish, the way those institutions are run, by whom, and the competing ideas of justice and legitimacy that give them a foundation. Migration is treated as an abnormal phenomenon in need of justification in a situation where states are seen as the main political actors.⁹²

However, even though migration studies have shown a methodological-nationalist bias, recent migration scholarship has played an important role in destabilizing the assumption that the nation-state is at the centre of analysis in traditional political philosophy. As Phillip Cole states, migration challenges the scope and the object of analysis of political theory as they have been conceived until now. Cole argues that in a post-colonial world the global migration of people calls for the re-shaping of political theory and, in particular, of liberal theory. He argues that there is a tension, or even a contradiction, “between the liberal principle of moral equality and the perceived need for closure of liberal polities”.⁹³

In the spirit of the approach to migration taken by Cole and Sager, this analysis revives the idea that migration has challenged the way we understand political theory. If the goal of political philosophy is to frame the categories and the paradigms that define political and social spaces, then the political philosophy of migration challenges the way in which political philosophy has understood society as bounded by citizenship and territory, and questions who should belong to the political community. In this way, the study of migration upsets the traditional idea of finitude and completeness that is typical of the traditional understanding of the body politic.

⁹⁰ Martins, Herminio. 1974. “Time and Theory in Sociology” in John Rex (ed). *Approaches to Sociology. An Introduction to Major Trends in British Sociology*. London & Boston: Routledge & KeganPaul.

⁹¹ Glick Schiller and Wimmer, “Methodological Nationalism”, pp.217-240.

⁹² Sager, *Cosmopolitan Ethics*, pp.20 and 26.

⁹³ Cole, *Philosophies of exclusion*, pp.2-3.

The investigation of migration has also focused on the existence of a number of unequal memberships in liberal democracies. For example, if the presence of precarious membership statuses, the worsening of the conditions for acquiring membership and the increasing application of deportation law challenge people's basic rights, then there is a need to think about alternative solutions that preserve membership rights or their value, or that can provide other protections that substitute for membership. One example is a human right to freedom of movement, including the right to immigrate.

Moreover, the debate on migration has shed light on the presence of a plurality of actors in the contemporary political discourse: the issue of membership and belonging is no longer only an issue of citizenship and the focus on the domestic arena cannot answer issues of mobility, migration and the political in a broader sense. All these aspects of the debate are themes for political and philosophical investigation; and, for this reason, political philosophy needs also to redefine what a political community is and the meaning of membership and political participation. Therefore, within such a complex framework, the persistent attachment of political philosophy to the theorization of the state as a bounded, self-sufficient and detached polity means that it is no longer able to respond to the political and philosophical issues of the time we live in.

As Zygmunt Bauman has pointed out, on the one hand, the order and control represented by the nation state is eroded by the lack of governability of the globalization of the economy; and, on the other, the global order guaranteed by the Cold War has been replaced by the lack of a global consensus about global issues and a feeling that nobody is in control and there is no such thing as a world order.⁹⁴ If until very recently political philosophy could focus on the state as the primary political subject, Bauman outlines how – in a time dominated by the globalization of the economy and finance – the world order cannot be maintained by a weakened nation state that has been left in control only of the territory and the population.⁹⁵ Moreover, the globalization of economics, finance and communications makes the nation-state resemble a smaller regional structure, and this explains also the rise and empowerment of interstate political structures. We can add here that such a process is

⁹⁴ Bauman, Zygmunt. 2013. *Globalization: The Human Consequences*. Hoboken: Wiley, p.58.

⁹⁵ Bauman, *Globalization*, pp.65-67.

mirrored by the increased number of voices asking for global governance of migration. Indeed, the request for a human rights-based approach in the governance of migration by the United Nations and the attempt to create an international governance of migration through the Global Compact for Migration weakens the idea that the nation-state can deal with migration as an issue of internal sovereignty.⁹⁶

2.4 The social contract theory and the challenge of migration

This section examines how the analysis of migration within political philosophy questions some assumed categories of the tradition of the social contract theory.

Looking at the history of philosophy, we can see that the aim of political theory has often been to investigate what a just government and a just state are, understanding how people should govern themselves and which type of shared political structure they should establish in order to live together. If we think of political theory as a discipline about “how we ought collectively to live together”,⁹⁷ we notice that migration challenges both the idea that politics is about the closed society and definitions of who belongs to such a society. In sum, political philosophy is about the normativity of *how* we live together in political terms, and migration is a challenge to the traditional meaning of this concept.

Within the traditional approach to political theory, the collective subject standardly consists of the definite and presumptively sedentary individuals that form the political community. This feature is shared by many approaches: for instance, by theorists of different schools of the social contract (e.g. Rawls, Gauthier or Harsanyi) as well as by communitarians (e.g. Walzer).⁹⁸ A trait of social contract theories is that the collective subject is constituted by the participants in the social pact or in the original agreement; they are conceived of as having initiated the political community. For Hobbes, for example, they are the pre-political multitude before the settlement of the state. Once the state is settled, they become *a people*

⁹⁶ On the UN human rights-based approach to migration, see OHCHR, *Migration and Human Rights, Improving Human Rights-Based Governance of International Migration*; the Global Compact on Migration is available at: <https://www.iom.int/global-compact-migration>.

⁹⁷ Farrelly, Colin P. 2003. *An Introduction to Contemporary Political Theory*. London: Sage, p.ix.

⁹⁸ Rawls, *A theory of Justice*; Gauthier, David P. 1986. *Morals by Agreement*. Oxford: Clarendon Press; Harsanyi, John. 1975. “Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls’s Theory.” *The American Political Science Review* 69(2): 594–606; Harsanyi, John. 1977. *Rational Behavior and Bargaining Equilibrium in Games and Social Situations*. Cambridge: CUP; Walzer, Michael. 1985 [1983]. *Spheres of justice: A Defense of Pluralism and Equality*. Oxford: Blackwell.

and those who do not fit in must leave, like a stone that is discarded because it does not fit into the construction of a building.⁹⁹ Therefore, the first characteristic of the membership of the political community thus conceived is its stability over space and time: the fact that a group of individuals are supposed to be already present and permanently settled in a given territory or hypothetical place (like the Hobbesian or Lockean state of nature) when the analysis of the political (the *how*) begins. Essentially, they are assumed to be already there. The definition of the *multitude* in Hobbes's *Leviathan* (the people as they are before settling the government) is that of *the many* as opposed to the *one person* that constitutes the commonwealth. However, Hobbes does not need to explain further what this multitude is or how it has been formed; the multitude is somehow a given. It is there, or it appears from nowhere, as if they "sprung out of the earth, and suddenly (like mushrooms) come to full maturity, without all kind of engagement to each other".¹⁰⁰

Similarly, in *A Theory of Justice*, Rawls does not explain how the *parties* that make the choice behind the veil of ignorance have arrived there. Focusing on the thought experiment, Rawls distinguishes between a pre-political state (the veil of ignorance) and a subsequent political state. From this perspective, Rawls's philosophical argument – in the thought experiment – is based on a pre-political original position in the same way that early modern philosophies were based on a pre-political state of nature.¹⁰¹ Rawls's thought experiment is based on *parties* that do not know anything about themselves (the contingencies about themselves). However, the assumption of a closed society is already present in the original position.¹⁰² In philosophical terms, this means that the pre-political *parties* are not a group formed by people in mobility, nor a group with mostly or partly temporary members. The elements of sedentariness, stability through time and closedness (that are assumed rather than explained in the thought experiment) are a pre-condition for the subsequent well-ordered society and for the political discourse not only for Rawls but also for a broad tradition of political philosophy.

⁹⁹ Hobbes, Thomas. 1949 [1651]. *De Cive: or the Citizen*. New York: Appleton-Century-Crofts, p.48.

¹⁰⁰ Hobbes, *De Cive*, p.100.

¹⁰¹ Rawls, *A theory of Justice*, pp.136-142.

¹⁰² See Sager, *Cosmopolitan Ethics*, p.18.

However, the idea that the collective subject is somehow given and defined before the political association is challenged by the theory and the reality of migration. Indeed, the same contractarian devices that organize and justify the closed society might also be turned into instruments for challenging the assumption of the collective subject as given and defined once and for all. Membership within the social contract theory presumes a citizenry entirely focused within the political association and among unrelated societies; by contrast, the philosophical analysis of migration demonstrates how societies are inevitably interrelated and how holding a more or less powerful citizenship reduces or improves life chances and opportunities without fault or merit of one's own. In this case, the question is about how to justify to everybody a set of fair rules for migration. Christopher Bertram illustrates this aspect of membership with the example of the "passport in the barrel".¹⁰³ This example is a version of the veil of ignorance in which individuals, in order to explore fair rules for governing migration, are deprived of any information about their nationality. In a case like this, individuals, while picking any passport from the barrel, are also picking their own political and social belonging before anything else. The consequence of this is that individuals choose not only their nationality but thereby also more or less powerful citizenship; and, therefore, they pick their political status as well as a higher or lower chance of becoming economic or forced migrants. This aspect of mobility across states but also across memberships (a person is a citizen of some state, but the same person can also be a migrant, a guest worker, a permanent resident or an undocumented migrant) challenges the basic (and maybe unnoticed) assumption of the Rawlsian veil of ignorance: the fact that the parties behind the veil of ignorance actually know something very important about themselves. They know that they are already members of a given society and will continue to be so.

Within the history of political philosophy, a further aspect to consider is the contradiction between the liberal ideal of an association of free and equal individuals and the reality of who was effectively part of the political association. Indeed, not all the individuals present in the territory of a state were included and entitled to participate in the decisions of the political community. The fact that political membership did not include everybody was not seen as questionable in many texts of the history of political philosophy and different

¹⁰³ Bertram, Christopher. 2018. *Do States Have the Right to Exclude Immigrants?* Cambridge: Polity Press, pp.57-59.

categories of people were excluded from membership in different circumstances. For instance, the political exclusion of women and servants is justified by philosophers such as Locke and Kant¹⁰⁴ and despite some voices of dissent¹⁰⁵ mainstream political philosophers mainly reflected the conventions of their time, considering the exclusion of women and servants non-problematic and usually dedicating only a few lines to such issues. Similarly, Charles Mills's analysis of the racial contract has highlighted how the category of whiteness shaped the nature and understanding of the political association.¹⁰⁶ Therefore, in such cases the exclusion of persons from the group of equal members was twofold: external, towards the alien and the non-citizen; and internal, towards those who, even though they were part of the society, were excluded from the political sphere because of their gender, economic or social status or ethnic background.

It is well known that the rise of feminism, abolitionist movements and anti-segregationist movements has contributed to the end of the exclusion of individuals from political participation; and, in parallel, the justification for their legitimate exclusion from the polity has disappeared in political theory.¹⁰⁷ On the other hand, feminism, minority and ethnicity studies have also widely contributed to our understanding of how exclusion is still present in non-formal situations and how this influences and limits the choices and opportunities of individuals. Therefore, it is worth noting that conceptual categories like gender and race have also challenged the standard way of conducting political philosophy and such categories also overlap within migration. These three categories share the fact of contributing to questioning and destabilizing the standard definition of the individual as an abstract political member of the society within the traditional approach to political philosophy.

¹⁰⁴ On the influence of colonialism, slavery and racism on contemporary migration, see Chapter Five.

¹⁰⁵ For instance, see Wollstonecraft, Mary. 2010 [1792]. *Vindication of the Rights of Woman: With Strictures on Political and Moral Subjects*. Auckland: Floating Press; de Gouges, Olympe. 2018 [1791]. *The Declaration of the Rights of Women: The Original Manifesto for Justice, Equality and Freedom* London: Hachette. Moreover, de Gouges was a member of the "Society of the friends of the Blacks", a French society for the abolition of slavery. Such a society was co-founded by Condorcet in 1788.

¹⁰⁶ On Mills and racialisation, see Chapter Five.

¹⁰⁷ See also Sager, *Cosmopolitan Ethics*, p.18.

To conclude, migration highlights the contradiction between an inclusive model of the polity and its exclusionary territorial and theoretical boundaries. Indeed, within political philosophy the traditional definition of the polity reflects the idealization of a structure focused on equality and freedom as the untouchable basis on which the polity relies. However, migration highlights the contradiction between such abstract and universal approaches to individuals as equals, and the citizen embodied by identity and culture. As has happened for concepts like gender and racialization, migration enters political philosophy as a challenge to an ordered set of ideas in which the coincidence between the ideal of an equal and free citizenship and its concrete definition seemed possible. Migration, therefore, on the one hand challenges both the traditional understanding of the role of political theory and, on the other has been able to become an autonomous field within political theory.

2.5 The debate within the political philosophy of migration

This section shifts the focus from the relationship between migration and traditional political theory to the dominant themes within the political philosophy of migration and situates the thesis within this debate. Rather than offering a detailed description of the scholarship, this section aims to show how methodological nationalism (and its critique) shapes also the debate within the political philosophy of migration in themes such as border control and freedom of movement.

Sager argues that the debate in the political philosophy of migration has mostly been defined by biases of methodological nationalism about the society and the state, and this also by those philosophies that advocate open borders.¹⁰⁸ Therefore, he argues that political philosophy has not been able to recognise “how profoundly migration disrupts dominant political categories”.¹⁰⁹ By contrast, I think that the debate in the political philosophy of migration is dominated by a tension between old and new categories of analysis. In this case, philosophical approaches that defend state unilateral control over borders tend to be more in line with traditional philosophical categories of analysis about the state as a self-contained entity, in which issues about justice, equality and freedom are first approached within the

¹⁰⁸ Sager, *Cosmopolitan Ethics*, p.24; and Sager, Alex. 2016. “Methodological Nationalism, Migration and Political Theory.” *Political Studies* 64(1): 42–59.

¹⁰⁹ Sager, *Cosmopolitan Ethics*, p.24.

polity. On the other hand, I think that the open borders/freedom of movement debate, although in some aspects is still anchored to state-based categories of analysis, *inevitably* ends up shaping new conceptual frameworks about justice, equality and freedom, challenging the same roots of the state as the unit of analysis of political theory.

In order to highlight such a distinction, the debate on migration can be simplified as a polarization between theories for the state discretionary right to control the borders of membership and territory, and theories that argue for freedom of movement and open (or more open) borders. The opposition that has been presented in earlier sections of this chapter between the state as the privileged unit of analysis of traditional political theory, and migration as a challenge to such categories, also mirrors different theoretical positions in the specific debate within the political philosophy of migration.

Such polarization is evident in the crucial role of the concept of immigration within the theoretical debate. The focus on admission policies and the right to enter and stay represent the key issues in the tension between the state as the centre of the political investigation and issues of global justice. Therefore, the debate on migration has been mostly focused on discussing *who decides what* about the right to enter and stay. Is freedom of movement an international issue and is there a need for global governance of movement and mobility? Or is it the nation-state that decides, and does it have discretionary control of borders? Do individuals decide their own freedom of movement? On what grounds do states have the right to exclude immigrants? Is there a human right to freedom of movement? It very much depends on how questions around immigration and freedom of movement are framed. Asking whether there is an international human right to freedom of movement or whether the state has the discretionary control of borders sets up a radically different theoretical frame for the investigation of migration (e.g. starting from international human rights or starting from the nation-state), despite the fact that both perspectives aim to clarify who has the right to decide about free movement and admission.

Philosophies that justify limitations in international freedom of movement consider the state to be the normative starting point of their investigation. Therefore, they argue for the state “right to exclude”, for the state right to “control over its borders” or the

“discretionary right of the state to admit immigrants”. This approach considers starting from realism and non-ideal theory as starting from the (nation) state and the (mostly) unilateral control over its borders. Typical arguments for state border control are based on considering the political association as a distinctive cultural community: a “community of character”, the social and cultural integrity of which is endangered by immigration (Walzer).¹¹⁰ Similar arguments also appeal to the value of national-culture (considered mostly homogenous) and the moral bounds of shared right and duties that keep the citizenry together (Miller);¹¹¹ and to the right to self-determination and freedom of association among individuals considered at the origin of the political association (Wellman).¹¹² Finally, some arguments are also based on considering migration disadvantageous for countries of origin. An example is the discussion of the so-called brain-drain (Brock and Blake).¹¹³

Examining some of those arguments more in detail, Michael Walzer’s book *Spheres of Justice* is often referred to when talking about the value of a shared culture within the political association. In this case the idea of a group with a shared culture overlaps with the political association, becoming one thing. Starting with bounded communities, Walzer appeals to the idea of membership as a good to distribute according to the purposes of a community. Therefore, the members of settled and stable communities are those who decide how to distribute membership according to what they think is good for their community. This approach allows the justification of quite extensive power of the state in choosing the criteria for selecting prospective members and it also shows how migration is considered a phenomenon at the periphery of membership that is instrumental for the needs of a settled and established society.

David Miller also focuses on the nation state as the centre of his analysis in migration and argues that there are strong justifications for the fact that democratic states set up policies selecting some (voluntary) migrants while excluding others. He appeals to ideas of territorial jurisdiction linked to self-determination. He claims that states’ rights of jurisdiction

¹¹⁰ Walzer, *Spheres of Justice*.

¹¹¹ Miller, *Strangers in Our Midst*.

¹¹² Wellman and Cole, *Debating the Ethics of Immigration*.

¹¹³ Brock, Gillian and Michael Blake. 2015. *Debating Brain Drain: May Governments Restrict Emigration?* Oxford: OUP.

over a territory include their right to control people's movement "in and out of that territory".¹¹⁴ Miller claims that the acquired territorial jurisdiction includes the right to control and make use of the resources of such a territory and the right to control the movement of people and goods.¹¹⁵ According to Miller, territorial jurisdiction is the premise for self-determination that justifies border control.

There are several approaches to self-determination. Some appeal to the idea of "people", others to the idea of the "state" or the "self". Miller appeals to this last, claiming that the self is a "group sufficiently cohesive that one can attribute to it a range of aims and values that the members recognize as part of their collective identity, even though no individual member is likely to subscribe to all of them".¹¹⁶ Therefore, he argues that self-determination implies the existence of a group that shares some sort of identity and that makes choices about itself. Self-determination implies "the right of a democratic public to make a wide range of policy choices within the limits set by human rights".¹¹⁷ These choices include the welfare system and public spending. Miller argues that, therefore, control of immigration is necessary in order for the demos to organize and control such costs, in the interests of the wellbeing of both the population and the immigrants that the state decides to admit. Miller's justification of immigration control rests on the idea that the exercise of self-determination requires a cohesive cultural group that shares, to a certain degree, values and a collective identity and that is able to decide policies and expenditure according to the needs of the group and this group somehow coincides with the nation-state. Therefore, the control of internal costs and policies are strictly linked to the control of who can or cannot enter the state. More precisely, according to Miller's definition of self-determination, a state, in order to exercise full internal self-determination over the social and political content of the polity, must also control external self-determination. The latter means that the state in order to be independent must be in control of its international relationship and, as a consequence, in control of its borders. Within this perspective, uncontrolled immigration is seen as an external threat to the stability and choices of a state. Despite the fact that Miller's approach recognises some limitations on the legitimate power of the state against non-citizens (for

¹¹⁴ Miller, *Strangers in Our Midst*, p.58.

¹¹⁵ Miller, *Strangers in Our Midst*, pp.60-61.

¹¹⁶ Miller, *Strangers in Our Midst*, p.69.

¹¹⁷ Miller, *Strangers in Our Midst*, p.62.

instance, the moral duty to help refugees), the state remains the basic structure of the political analysis.

On the other hand, there are theories that advocate open borders and freedom of movement and thus challenge the traditional understanding of political theory centred on the state as the main actor of the political and ethical debate. Indeed, the focus on universal liberal principles such as equality and freedom, the role of global justice and the theorization of the global governance of migration in a world dominated by structural injustice disputes the nation-state as the main actor in starting the philosophical analysis from realism.¹¹⁸ More precisely, classic arguments for open borders and the right to freedom of movement across borders are based on the principle of the moral equality of individuals and their freedoms, which are not limited to (nor originated by) the state domestic jurisdiction. In this case, liberal egalitarian values such as equality of opportunity and the moral equality of human beings justify an international right to freedom of movement and highlights the role of the nation-state in limiting the achievement of global justice and in enhancing freedom and equality. In this case principles of distributive justice play a role in the debate, particularly if we start from an examination of the unequal global distribution of resources that affects individuals through no fault of their own.

Joseph Carens perhaps offers the most well-known arguments for a philosophy of open borders. Indeed, even though Walzer's 1983 *Spheres of Justice* is often referred to as the first work when discussing self-determination and immigration control, the contemporary philosophical debate on migration effectively begins with Joseph Carens's 1987 article 'Aliens and Citizens'. Here, he argues that well-known theories of political philosophy such as Rawlsian liberalism, Nozickian libertarianism and Utilitarianism do not justify limitations on freedom of movement when they are closely analysed. Carens compares citizenship in Western countries to a feudal privilege granted through inheritance to a restricted group of people and he discusses critically the justice of such restrictions.¹¹⁹

¹¹⁸ Miller, *Strangers in Our Midst*, pp.16-18, 157 and 208.

¹¹⁹ Carens, Joseph H. 1987. "Aliens and Citizens: The Case for Open Borders." *The Review of Politics* 49(2):251–73, 252.

These arguments are further developed in his book *The Ethics of Immigration* in which he introduces a theory of social membership that defends the idea that non-citizens who have lived in a country for a sufficient time and are involved in a social network have a moral claim to citizenship.¹²⁰ He also argues for a human right to immigrate. Indeed, Carens thinks that there is no conflict between freedom of movement and global justice, but rather that open borders are part of the requirements of global justice;¹²¹ therefore, restricting the right to enter is an impediment to equal opportunities for persons willing to move.¹²² The other reason for open borders, according to Carens, is freedom: he states that “it is an important restriction on human freedom to require people to get permission to enter a territory and reside there, especially when political authorities are almost entirely free to deny that permission”.¹²³ There are reasons for thinking that “the ability to move freely across borders might be the sort of vital interest that could deserve protection as a human right”.¹²⁴ Within this framework, the idea of freedom of movement as a human right is investigated as the “logical extension of the well-established democratic practice of treating freedom of movement within state borders as a human right” and he argues that this is connected with the democratic understanding of human freedom.¹²⁵

The coherence of liberal and democratic values and the restriction of freedom of movement across countries are also questioned by Phillip Cole.¹²⁶ In addition, there are also arguments based on reparative justice, such as the global harm principle (Wilcox),¹²⁷ which does not defend freedom of movement *tout court*, but appeals to international freedom of movement as instrumental in the politics of reparative justice in specific historical cases. On the same lines, there are arguments based on the idea that those who have been victims of historical injustice should have priority in terms of membership in wealthy countries. Alongside these arguments for freedom of movement across borders, there are also

¹²⁰ Carens, *The ethics of Immigration*.

¹²¹ Carens, *The ethics of Immigration*, p.234.

¹²² Carens, *The ethics of Immigration*, p.236

¹²³ Carens, *The ethics of Immigration*, p.236

¹²⁴ Carens, *The ethics of Immigration*, p.237.

¹²⁵ Carens, *The ethics of Immigration*, p.237.

¹²⁶ Cole, *Philosophies of Exclusion*; Wellman and Cole, *Debating the Ethics of Immigration*.

¹²⁷ Wilcox, Shelley. 2007. “Immigrant Admissions and Global Relations of Harm.” *Journal of Social Philosophy* 38(2): 274–91.

arguments for “more open borders” (Abizadeh, Benhabib, and others)¹²⁸ that share similar principles of justice of theorists for full freedom of movement but aim at an improvement and advancement of justice in migration rather than fully open borders.

There are, finally, some arguments that challenge methodological nationalism in the analysis of freedom of movement through the conceptualization of freedom of movement as a human right. By “human rights-based approaches to freedom of movement” I refer to those group of theories (including mine) that consider freedom of movement and the right to immigrate a moral human right. Human rights-based approaches to freedom of movement have been developed by Carens, Cole and Oberman.¹²⁹ These approaches tend to start from the position that human rights are already morally accepted and then generalise those justification to a human right to freedom of movement across borders. In this case, human rights-based approaches to freedom of movement start from the reasons that underlie a human right to emigrate and a human right to freedom of movement within a country, and then extend such principles to a human right to immigrate (Cole, Carens).¹³⁰ A similar way to appeal to a human right to freedom of movement is through the foundationalist approach to human rights, in which human rights are justified as a means to fulfil basic human needs and interests (Oberman).¹³¹

I think that the examination of some elements of the debate on migration and freedom of movement has shown that the political theory of migration is anchored to methodological nationalism while also challenging such an approach. Specifically, I argue that arguments for open borders and freedom of movement fundamentally challenge such biases because, methodologically, they assume that the nation-state is only one actor among other international and transnational actors and therefore arguments for freedom of movement reposition the debate under new categories of analysis based on global justice and show how traditional state-based categories of analysis are inadequate to the time we live in. To

¹²⁸ See Fine, Sarah, and Lea Ypi (eds). 2016. *Migration in Political Theory: The Ethics of Movement and Membership*. Oxford: OUP; Benhabib, *The Rights of Others*; Abizadeh, Arash. 2008. “Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders.” *Political Theory* 36(1): 37–65.

¹²⁹ Cole, *Debating the Ethics of Immigration*; Carens, *The Ethics of Immigration*; Oberman, Kieran. 2016. “Immigration as a Human Right” in Fine and Ypi, *Migration in Political Theory*.

¹³⁰ Cole, *Debating the Ethics of Immigration*; Carens, *The Ethics of Immigration*.

¹³¹ Oberman, *Immigration as a Human Right*, p.35.

conclude, even though the debate on migration is influenced by biases of methodological nationalism, nevertheless it is also the most prominent debate in political theory (with the possible exception of climate change) in which such biases are under scrutiny.

2.6 Situating the thesis in the debate

The previous section has roughly divided the debate on migration theory into two groups of scholars: one arguing for the right to exclude and the other for freedom of movement and open borders. In this approximative division my thesis is situated within the arguments for freedom of movement. In particular, I defend a human rights-based approach to freedom of movement and I argue for the greatest possible freedom in open borders. My thesis is situated, therefore, within the human rights-based approach to international freedom of movement.

In the following sections, I explain more in detail three different approaches to a moral human right to immigrate or freedom of movement. The first is Phillip Cole's symmetric argument, which considers the right to immigrate morally symmetrical to the right to emigrate. The second theory I consider is Joseph Carens's cantilever argument, which is based on the idea that the reasons that justify freedom of movement within a state are the same reasons that support freedom of movement across borders. The third approach I examine is Kieran Oberman's account of a moral human right to immigrate, which conceives this right as necessary to uphold basic human interests. Due to the limited scope of this thesis, I do not aim to offer a complete account of their arguments, but rather to grasp the fundamental elements of their arguments to highlight, in a comparative framework, how my argument about gender discrimination and racialization at the border might contribute to justifying a human right to freedom of movement.

2.6.1 Cole and the symmetry argument

In this section I explain Phillip Cole's symmetrical argument for freedom of movement, focused on aspects of his theory that are relevant for the comparison between a universal right to emigrate, the right to immigrate and their relation to human rights. Cole's argument

is spelt out in his books *Philosophies of Exclusion* and *Debating the Ethics of Immigration*. His theory of freedom of movement starts from liberal principles and discusses the contradictions of the control of membership within such ideals. Therefore, the liberal principle of moral equality of human beings becomes one of the benchmarks of his analysis and his argument suggests that liberal theories cannot be coherent with the liberal value of human equality while also justifying restrictions in immigration.¹³²

Cole discusses in particular the asymmetric moral value given to the right to immigrate and to emigrate. Indeed, schools for the discretionary control of the state over borders justify a moral asymmetry between the right to enter and the right to exit. Michael Walzer spelt out the asymmetry argument in order to justify the divergent parameters applied to immigration and emigration.¹³³ Starting from view that membership is a good distributed by the political community, Walzer argues that a community has the right to choose the criteria of admittance for outsiders, whereas it does not have the right to forbid its members to leave. Therefore, he argues that there is a moral asymmetry between the right to enter and the right to exit.

Cole discusses Walzer's asymmetry argument in *Philosophies of Exclusion*. He argues that the asymmetric perspective works in two ways. Firstly, states guarantee freedom to enter and exit to their own citizens; and, in this case, the relation of both rights is morally symmetrical. Secondly, non-citizens have the right of exit but not of entry;¹³⁴ and in this case the relationship between the two rights is morally asymmetrical. He says that this asymmetry could also be explained in these terms: *there is freedom of movement except for non-citizens*. According to Cole, the asymmetric view is deeply problematic for liberal theory because the latter is based on the idea of the moral equality of human beings and therefore, it is hard to find a consistent argument able to justify the different weight given to the moral right to emigrate and to immigrate and, at the same time, maintain liberal values. Cole examines several liberal arguments that have tried to justify such asymmetry and argues that they fail. For instance, he argues that arguments based on consequences and costs are one-dimensional: they usually focus on the costs of immigration for the receiving state, but there is also a cost of emigration that it is not taken into account. He argues that if such cost was

¹³² Cole, *Philosophies of Exclusion*, p.202.

¹³³ Walzer, *Spheres of Justice*, p.39.

¹³⁴ Cole, *Philosophies of Exclusion*, p.45.

taken into account, this would lead to the absurd idea that the state should control both emigration and immigration. This is what Cole calls the illiberal symmetry: if the state has the moral right to control immigration, it also has the moral right to control emigration. However, the idea that the state must have the right to control emigration is not acceptable for a liberal thinker.

In summary, Cole believes that there are not plausible arguments for the asymmetrical position; rather, that within liberal theory, it cannot be consistently argued that there is a human right to emigrate but not to immigrate; and, if the state has the right to control immigration, it has also the right to control emigration.¹³⁵ Cole points out that the right to immigrate should be symmetrical to the right to emigrate and both rights are not absolute. State can limit emigration but only under stringent constraints. Similarly, rules should apply to immigration in order to justify border control that should be the exception and not the norm.

Several scholars, both defenders of the state's discretionary control of immigration and those who argue for a right to freedom of movement, have highlighted the absence of a right to immigrate in the UDHR.¹³⁶ Miller considers that persons do not need freedom of movement across countries to fulfil their basic rights and interests. Therefore, according to Miller's interpretation of basic rights, the range of options that a person needs in order to have her human rights protected must be "adequate" and he considers that freedom to move across countries is adequate for what human rights require if people have a suitable range of opportunities. If not, they could have the right to move to *some* countries.¹³⁷ By contrast, Cole defines the absence of a right to immigrate in the practice of human rights as liberal asymmetry. In this case, he believes that the ethical consistency of such divergence of rights must be demonstrated while the principle of moral equality that underpin liberal theory requires symmetry between similar cases.¹³⁸

¹³⁵ Cole, *Philosophies of Exclusion*, p.46.

¹³⁶ See UDHR, Article 13: "Everyone has the right to freedom of movement and residence within the borders of each state" and "Everyone has the right to leave any country, including his own, and to return to his country". Article 14 reads, "Everyone has the right to seek and to enjoy in other countries asylum from persecution" and that "This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations".

¹³⁷ Miller, "Is There a Human Right to Immigrate?", p.22.

¹³⁸ Cole, *Debating the Ethics of Immigration*, pp.192-194.

Cole argues that the asymmetric view of entry and exit is questioned by the possibility that the absence of a right to enter might affect the exercise of the right to exit. In addition to Cole, the inconsistency of a right to emigrate without a right to immigrate has been raised by a number of scholars (e.g. Ann Dummett, Antoine Pecoud and Paul de Guchteneire)¹³⁹ who have pointed out the problematic status of the right to exit if no country allows a right to enter. Cole considers that persons can “achieve their own humanity” through the conditions created by the framework of human rights.¹⁴⁰ Therefore, as he points out, his consideration of human rights is more substantive than the idea of minimum and separate basic rights.¹⁴¹ Cole suggests that for human agency to be empowered and for a dignified life, human rights cannot be taken in isolation: they must be taken as linked and interconnected to each other. Therefore, a human right to mobility is linked to other human rights and it is a fundamental part of people’s ability to participate as equal and free individuals in their communities at any level, global and local. Cole¹⁴² argues that human agency cannot be constrained by the restrictions imposed on freedom of movement because human interests cannot be protected only at a national level, but also at an international level. This is especially important for those who find themselves at the bottom of the economic and social life and therefore a human right to mobility is linked both to freedom and to equality.

2.6.2 Carens and the cantilever argument

The strategy Carens chooses in order to argue for a possible human right to freedom of movement is the cantilever analogy. This is a way to argue for a new human right by demonstrating how this is analogous to a human right that already exists.¹⁴³ The cantilever strategy does not examine the foundations of the argument that is at the origin of the analogy, because it is based on the idea that, in order to establish an analogy, is not necessary

¹³⁹ Dummett, Ann. 1992. “The Transnational Migration of People Seen from Within a Natural Law Position” in Barry, Brian, and Robert E. Goodin (eds). *Free Movement: Ethical Issues in the Transnational Migration of People and of Money*. New York: Harvester Wheatsheaf, p.173; Pécoud, Antoine and Paul de Guchteneire. 2005. *Global Migration Perspectives 27. Migration Without Borders: An Investigation into the Free Movement of People*. Geneva: Global Commission on International Migration, p.22.

¹⁴⁰ Cole, *Debating the Ethics of Immigration*, p.296.

¹⁴¹ Cole, *Debating the Ethics of Immigration*, pp.295-296.

¹⁴² Cole, *Debating the Ethics of Immigration*, p.300.

¹⁴³ Carens, *The Ethics of Immigration*, p.238.

to appeal to the foundational reasons of the argument.¹⁴⁴ Carens starts from article 13 of the UDHR, which recognises that everyone has the right to freedom of movement within the borders of each state. From there, Carens argues that freedom of movement is the “logical extension of the right of free movement within states”.¹⁴⁵ In this case the foundation of a right to move freely among states is not investigated in itself and the fact that it is recognised by international documents agreed by democratic states is assumed to be a sufficient condition for founding the extension of the right of freedom of movement across countries.¹⁴⁶

Therefore, a cantilever argument for a human right to freedom of movement does not have the burden of proof for any of the rationales that could justify freedom of movement; indeed, whatever the reasons for endorsing freedom of movement within a state, the same reasons apply to justify freedom of movement across states.¹⁴⁷ The argument refers to the UDHR and it does not need to demonstrate the foundation of the human right as stated in article 13 of the UDHR, nor it does need to demonstrate any foundation at all. It assumes the validity of the foundation given to the right to freedom of movement within a country of the UDHR. Therefore, the foundation is grounded in the justification of the UDHR for freedom of movement and, in general, on the same reasons that justify international legal rights.

Carens’s cantilever argument as well as Cole’s symmetry argument show how freedom of movement has been broken down into parts and freedom to move freely across countries is the logical extension of freedom of movement within a country. Carens shows a contradiction inherent to the UDHR and the practice of human rights, in which freedom of movement is only partially recognised.

2.6.3 Oberman’s interests-based argument

Oberman argues for a moral human right to immigrate. He begins by describing the *status quo*: there are states that have borders, there is the UDHR that establishes some basic freedoms rights, and, within this framework, the moral freedom to immigrate is one of those

¹⁴⁴ Carens, *The Ethics of Immigration*, p.334.

¹⁴⁵ Carens, *The Ethics of Immigration*, p.238.

¹⁴⁶ Carens, *The Ethics of Immigration*, p.239.

¹⁴⁷ Carens, *The Ethics of Immigration*, p.239.

essential rights for pursuing personal and political interests. Challenging the state discretionary control of borders passes through international human rights and the possibility of a moral human right to immigrate.

Specifically, Oberman claims that a moral human right to immigrate follows from the right of freedom of movement within a country.¹⁴⁸ The latter is based upon two interests: a political interest related to the freedom of political activity and free association; and a personal interest related to the interest people have in accessing a full range of life options that give life meaning and purpose. Oberman argues that these essential interests also support a right to move within countries. This is an account of human rights that claims that human rights are grounded in universal interests that people have. From this, it follows that people must have a significant interest in freedom of immigration in order for the right to immigrate to be considered a human right. Such interests are the same as those already recognised as “rights to basic freedoms that are found on international human rights documents”.¹⁴⁹ Indeed, Oberman argues that a human right to immigrate is rooted on the same interests that protect other freedoms already recognised as human rights, such as freedom of expression, freedom of association, freedom of religion and particularly internal freedom of movement, which allows a person to access meaningful life options. However, he argues that this right is incomplete as it does not allow the person to access meaningful life options beyond the borders of the state. In this case, Oberman’s argument is instrumental: the right to immigrate acquires its status as human right because it is a necessary tool with which to achieve other basic rights; specifically, it is an instrument to achieve specific political and personal interests that human beings have.

I consider my approach to a moral human right to immigrate to be complementary to Cole’s, Carens’s and Oberman’s approaches to freedom of movement. However, while Cole and Carens infer a right to immigrate from a pre-existing human right to freedom of movement, and Oberman argues that such a right is based on the same foundations as other human rights, my theoretical strategy is based on the idea that a human right to immigrate is needed so as not to violate other human rights, such as the right to non-discrimination, as

¹⁴⁸ Oberman, "Immigration as a Human Right".

¹⁴⁹ Oberman, "Immigration as a Human Right", p.35.

suggested in Chapters Four, Five and Six. In the next chapters I shall focus on wrongful discrimination and argue that wrongful discrimination is an intrinsic part of the process of selecting immigrants at the borders of a nation-state. Therefore, I shall argue that a human right to international freedom of movement and the greatest possible freedom of movement across countries is needed to discourage discrimination.

2.7 Conclusion

This chapter has examined the relationship between migration and political theory, highlighting the challenges of mobility across borders for the conception of the political association as a complete and sufficient unit of analysis. It has argued that while theories for state unilateral control over the border tend to maintain the status quo and consider starting from realism and non-ideal theory as starting from the nation state, theories for the right to freedom of movement across borders challenge such assumptions and show how starting from realism means starting from the global issue of mobility and the possibility of the global governance of migration. Finally, the chapter has situated the thesis among human rights-based approaches to international freedom of movement. It has offered an overview of the theories of Cole, Carens and Oberman, and it has explained that my thesis is complementary to these approaches but offers a different theorization of a human right to freedom of movement, justified by the principle of non-discrimination.

A non-ideal analysis of discrimination and migration is the starting point of my thesis: beginning from the idea that discrimination is overlooked in the political theory of migration, I examine a definition of wrongful discrimination in migration (Chapter Three) and issues of membership, racialization and gender wrongful discrimination in migration (Chapters Four and Five) in order to argue for a right to freedom of movement across borders (Chapter Six) and the application of the greatest possible freedom in open borders (Chapter Seven).

CHAPTER THREE: WHAT IS MORALLY WRONG WITH WRONGFUL DISCRIMINATION?

3.1 Introduction

In this thesis I argue that an international human right to freedom of movement serves to reduce wrongful discrimination at the borders of membership and territory. To back up this argument, I shall examine what wrongful discrimination is in the context of migration and justify why it is morally wrong.

I believe that a non-ideal approach to the philosophy of migration requires a contextualized definition of wrongful discrimination that takes into account historical and systematic processes of injustice and domination. Therefore, according to this non-ideal methodology, the goal of this chapter is not that of defining wrongful discrimination in an abstract way but to examine the most appropriate definition of wrongful discrimination that fits the contemporary context of migration, mobility, borders and nation states.

In the next two chapters I argue that borders *intrinsically* wrongfully discriminate against migrants through precarious membership statuses and through racial and gender categories. This will allow me to argue for a human right to freedom of movement across state borders grounded on the right of non-discrimination.

In section 3.2 I examine wrongful discrimination and human rights, focusing on different definitions of discrimination and to the development of such definitions in specific areas of interest. Section 3.3 examines scholarly definitions of discrimination within political theory in which wrongful discrimination is considered disadvantageous differential treatment. Section 3.4 narrows the analysis to the definitions of direct and indirect wrongful discrimination at the borders of territory and membership. Finally, section 3.5 analyses why wrongful discrimination is morally wrong. The chapter considers arguments based on moral equality and on the consensus against wrongful discrimination in the human rights practice, ruling out reasons based on *relevance*.

3.2 Wrongful discrimination and human rights

Approaching wrongful discrimination as a reason for justifying the urgency of a moral human right to freedom of movement across borders requires us to define what discrimination is and why it is wrong. This section explores how discrimination has been defined in the practice of human rights and the next section analyses definitions of discrimination in the philosophical debate.

In some books¹⁵⁰ about law and human rights the notion of non-discrimination is analysed alongside equality. Perhaps this is because, in human rights practice, equality and non-discrimination are considered concepts that uphold all other rights and are fundamental to the enjoyment of all other rights. For instance, being discriminated against because of sex, race, religion etc. does not allow the equal enjoyment of human rights. This makes up the first account of non-discrimination in the Article 2 of the Universal Declaration of Human Rights:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

This first definition of non-discrimination refers specifically to the fact that individuals cannot be discriminated against in terms of being deprived of their entitlement to all the rights of the Declaration, nor for reasons linked to their own individuality (race, sex and so forth), nor for reasons related to the status of their country of belonging.

The right to non-discrimination is restated in Article 26 of the International Covenant on Civil and Political Rights (1966) extending its meaning to “equality before the law” and forbidding discrimination in general (not only against the Convention, as in the UDHR):

¹⁵⁰ See Rehman, Javid. 2010. *International Human Rights Law*. 2nd ed. Harlow, England: Longman Pearson; Clapham, Andrew. 2015. *Human Rights: A Very Short Introduction*. 2nd ed. Oxford: OUP, pp.115-158; Vierdag, Egbert W. 1973. *The Concept of Discrimination in International Law: With Special Reference to Human Rights*. The Hague: Nijhoff.

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Moreover, the generalisation of the right to non-discrimination has led to the implementation of field-focused treaties and Conventions: for instance, the Convention on the Elimination of all forms of Racial Discrimination of 1966 and the Convention on Elimination of all forms of Discrimination against Women. Moreover, the right to non-discrimination was also defined again in the International Covenant on Economic, Social and Cultural Rights (also 1966).¹⁵¹

There are specific Conventions for the protection of migrants and refugees such as the Geneva Convention for the protection of refugees of 1951, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 and the Global Compact on Migration of 2018. In addition, the most important aspect of the global governance of migration is the endorsement by the UN of a human rights-based approach to migration.¹⁵² The UN (OHCHR) considers migrants' human rights to require special attention because migrants are particularly vulnerable.

The international governance of migration is a process that links legal norms, practices and complex organizations that regulate state actions towards international migration, directing rights, responsibilities and endorsing worldwide cooperation.¹⁵³

These field-specifications of the right of non-discrimination show how the human rights law and practice consists of *rights in the making*. Therefore, human rights practice is a process of challenges, adjustments, improvements that leads to new understandings of

¹⁵¹ For a more accurate description of international law against discrimination see Rehman, *International Human Rights Law*, pp.401-431.

¹⁵² See the report of the Office of the High Commissioner for Human Rights. 2012. *Migration and human rights. Improving Human Rights-Based Governance of International Migration*. Available at: https://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf; Office of the United Nations High Commissioner for Human Rights. 2019. *Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations*. Available at: <https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>.

¹⁵³ Office of the High Commissioner for Human Rights, *Migration and Human Rights*, p.9.

rights. However, the weaknesses of human rights law and practice is related to its non-compelling status and, therefore, despite the fact that it has set up a standard to which states are expected to conform, they are not obliged to do so. The success of human rights practice depends on processes of negotiation and moral recognition at local, national and international levels.

Within the political theory of migration, there is widespread agreement among philosophers that is morally wrong (and unlawful) to discriminate against anyone because of sex, gender, religion, race, and other traits attributed to people who are discriminated against. However, as Fine¹⁵⁴ outlines, often the examination of non-discrimination ends there and issues of wrongful discrimination in migration outside such clear and explicit legal framework tend to be unexplored.

Within this framework, I shall argue that, despite the fact that theories for the state right to exclude prospective migrants overrule explicit wrongful discrimination,¹⁵⁵ such theories do not explore possible issues raised by historical processes of wrongful discrimination that go beyond the traditional way of understanding wrongful discrimination as legal, overt policy-based discrimination. By 'legal wrongful discrimination', I mean the wrongful differentiation (that creates a disadvantage to certain groups or individuals) that has often been institutionalised in national, foreign or local policies against certain groups or individuals.

3.3 Definitions of discrimination in political philosophy

This section explores possible definitions of discrimination in the literature of political theory in order to clarify a possible meaning of discrimination useful for this thesis.

It is worth noting, as Benjamin Eidelson and Andrea Sangiovanni have said, that definitions of discrimination have received little attention in the philosophical literature. However, unpacking the notion of discrimination shows that this concept is not straightforward.

¹⁵⁴ Fine, Sarah. 2016. "Immigration and Discrimination" in Fine and Ypi, *Migration in Political Theory*.

¹⁵⁵ An extensive examination of the meaning of wrongful discrimination is below.

To break down the meaning of discrimination, some terminological clarifications are necessary. Firstly, Jan Narveson¹⁵⁶ reminds us that discrimination involves at least three persons: the discriminator (the person that does the act of discriminating), the discriminatee (who is discriminated against) and those who are favoured in comparison with the persons who are discriminated (the beneficiaries). According to Narveson, an important part of the discriminatory process is the fact that the discriminatee possesses some characteristic or trait linked to differential (worse) treatment. Narveson calls such a trait the *discriminandum*. He uses the term to “possess” some characteristic, whereas Kasper Lippert-Rasmussen¹⁵⁷ distinguishes between *having* a trait or *believing* that someone has a trait. Eidelson¹⁵⁸ uses the term “perceived trait”, separating the *perception* that someone has a certain trait from the fact of having a certain trait.

I believe that discrimination makes something otherwise neutral a *trait* and this is particularly relevant for the case of discrimination in migration. For instance, the fact that female immigrants are disproportionately pushed toward the care sector in the job market compared to male migrant workers is based on the socially perceived trait that women are “natural carers”, but this perception has nothing to do with women *having* such a trait.¹⁵⁹ The stereotype that women are “natural carers” is *made* or *becomes* a trait through the constructions of gender stereotypes and gender roles. As Desiree Lim outlines, “the admission of women specifically to perform care work might reproduce the social belief, in receiving states, that caregiving is essentially ‘women’s work’, and not something that can be performed by both genders”.¹⁶⁰ This gender injustice includes not only how many women are admitted compared to men, but also *how* they are admitted and what their type of admission says about how women are culturally perceived. According to Lim, this pattern of admission worsens gender injustice in immigration policies, and worsens stereotypes against women in the receiving state.¹⁶¹

¹⁵⁶ Narveson, Jan. 2002. *Respecting Persons in Theory and Practice: Essays on Moral and Political Philosophy*. Lanham MD: Rowman & Littlefield, p.203.

¹⁵⁷ Sangiovanni, *Humanity Without Dignity*.

¹⁵⁸ Eidelson, *Discrimination and Disrespect*.

¹⁵⁹ See Chapter Five.

¹⁶⁰ Lim, Desiree. 2019. “The Indirect Gender Discrimination of Skill-Selective Immigration Policies.” *Critical review of international social and political philosophy* 22(7): 906–928, 921.

¹⁶¹ Lim, “The Indirect Gender Discrimination of Skill-Selective Immigration Policies”, p.922.

Such discrimination goes beyond explicitly discriminatory state policies. Therefore, when in this thesis I argue that in migration borders *intrinsically* discriminate through the categories of racialization and gender, I am not referring to the well-known explicit discrimination of historical legislation against, for instance, a certain gender, ethnicities or religions; rather, I am referring to the systematic, implicit and consistent stereotyping of immigrants through racialized and gendered categories by political institutions like the nation state. This stereotyping affects the life choices of the discriminatee. For instance, immigrant female workers pushed into the care sector have to adapt to biased gender roles and to balance their agency with such expectations in order to join the labour market at all.¹⁶²

The philosophical literature on discrimination distinguishes between *discrimination* and *wrongful discrimination*. In particular, philosophers like Lippert-Rasmussen, Eidelson and Sangiovanni¹⁶³ have distinguished between moral/non-moral definitions of discrimination. A moralized definition of discrimination considers discrimination morally problematic without any further distinction. On the other hand, a non-moralized¹⁶⁴ account of discrimination considers a generic definition of discrimination (without any specification) morally neutral; but it further differentiates between negative or wrongful discrimination and reverse or positive discrimination. The latter might refer, for instance, to actions in favour of certain groups in terms of reparative justice or might aim at favouring disadvantaged groups, like promoting gender quotas in work-related fields in which women have traditionally been excluded because of gender biases. In this investigation I leave aside issues of positive discrimination in order to focus on wrongful discrimination.

Negative discrimination disadvantages certain groups/individuals or worsens their condition, which is usually defined in the philosophical literature as *wrongful* discrimination. Within this distinction, moral issues about discrimination generally concern wrongful discrimination that produces disadvantage against certain individuals or groups.

¹⁶² See Chapter Five.

¹⁶³ See for instance Lippert-Rasmussen, Kasper. 2006. "The Badness of Discrimination." *Ethical Theory and Moral Practice* 9(2): 167–85. See also Sangiovanni, *Humanity Without Dignity*.

¹⁶⁴ Lippert-Rasmussen, Sangiovanni and Eidelson argue for a non-moralized account of discrimination.

An example of generic and non-moralized definition of discrimination is offered by Kasper Lippert-Rasmussen,¹⁶⁵ in which individuals, groups or organizations (e.g. governments or companies) discriminate against (or in favour of) other individuals, groups or organizations in some dimension if and only if the discriminator treats the discriminatee differently from how they treat or would treat other individuals, groups or organizations. This is or is believed to be (by the discriminator) disadvantageous or advantageous to the discriminatee; and such differential treatment is explained by the fact that (or the belief of the discriminator that) the individuals or groups discriminated against (or in favour of) and those who are not belong to “different, socially salient groups”.

Lippert-Rasmussen defines a socially salient group as a group whose perceived membership “is important to the structure of social interactions across a wide range of social contexts”.¹⁶⁶ The concept of socially salient groups shifts Lippert-Rasmussen’s definition of discrimination from *generic* to *specific* and he argues that “almost all groups on whose behalf the charge of being discriminated against is voiced are socially salient groups. Women, elderly people, disabled people, gays and lesbians, and ethnic and racial minorities are all socially salient groups in this sense”. Lippert-Rasmussen, focusing on discrimination *against*, argues that “to discriminate against someone is to treat her disadvantageously relative to others because she has or is believed to have some particular feature that those others do not have. In short, discrimination against someone simply is *disadvantageous differential treatment*”.¹⁶⁷

A generic definition of discrimination might be the starting point for building my specific (non-ideal) definition of wrongful discrimination in migration. A possible definition might be that “to wrongfully discriminate against immigrants is to treat them disadvantageously compared to other social groups because they are perceived as having

¹⁶⁵ Lippert-Rasmussen offers a generic definition of discrimination: “An agent, X, discriminates against someone, Y, in relation to another, Z, by Φ -ing (e.g., hiring Z rather than Y) if, and only if: (i) There is a property, P, such that Y has P or X believes that Y has P, and Z does not have P or X believes that Z does not have P, (ii) X treats Y worse than he treats or would treat Z by Φ -ing, and (iii) It is because (X believes that) Y has P and (X believes that) Z does not have P that X treats Y worse than Z by Φ -ing.” This is a generic definition to discrimination and to make it specific. Rasmussen adds: (iv”) P is the property of being a member of a certain socially salient group (to which Z does not belong). In Lippert-Rasmussen, Kasper. 2014. *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination*. New York: OUP, p.15.

¹⁶⁶ Lippert-Rasmussen, *Born Free and Equal?*, p.30.

¹⁶⁷ Lippert-Rasmussen, *Born Free and Equal?*, p.15.

certain characteristics. These characteristics are defined by (but not only) the intersection of migration, gender and race".¹⁶⁸ The characteristics included in this definition of wrongful discrimination in immigration can be extended. For example, Jose Jorge Mendoza¹⁶⁹ considers discriminatory those immigration policies that exclude people who belong to protected classes defined by sex, sexual orientation, disability, religion and national origin. Furthermore, Desiree Lim¹⁷⁰ adds that wrongful discrimination includes also the selection of immigrants based on talent. Lim argues that, whereas the selection of migrants directly and explicitly based on gender and racialization is recognised as wrongful discrimination, talent-based selection is not recognised as expressing "disrespect in the same way that sexist or racist selection criteria does".¹⁷¹ States preferring highly-skilled immigrants represents a form of wrongful discrimination because it reproduces demeaning stereotypes that can be used against low-skilled migrants. In fact, preferences for the talented and highly-skilled are linked to the spread of negative stereotypes about low-skilled immigrants. The idealization of highly talented immigrants as the 'good' minority serves to suggest to the low-skilled that they are responsible for their own failure.¹⁷²

I agree with Mendoza and Lim that a definition of discrimination in migration cannot be limited to race and gender; moreover I believe that wrongful discrimination in migration worsens when one or more factors (religion, nationality, sex, sexual orientation or disability) overlap. However, for the purposes of this thesis I limit my philosophical analysis to race and gender wrongful discrimination in an attempt to spell out why, to avoid such discrimination, a human right to freedom of movement is needed. Indeed, I believe that being non-citizens, migrants are submitted to a process of selection that is inevitably linked to racialization and gender stereotyping, and migrants receive disadvantageous, differential treatment. In the following section, I further specify the definition of discrimination in migration as *intrinsically wrongful direct and indirect discrimination*. I need therefore to specify the meaning of direct

¹⁶⁸ I believe that class is another intersectional factor in discrimination in migration along gender and racialization; however, it is not examined in this thesis.

¹⁶⁹ Mendoza, Jose J. 2017. "Discrimination and Immigration" in Lippert-Rasmussen, Kasper. *The Routledge Handbook of the Ethics of Discrimination*. London: Taylor & Francis, p.255.

¹⁷⁰ Lim, Desiree. 2017. "Selecting Immigrants by Skill: A Case of Wrongful Discrimination?" *Social Theory and Practice* 43(2): 369–96.

¹⁷¹ Lim, "Selecting Immigrants by Skill: A Case of Wrongful Discrimination?", p.369.

¹⁷² Lim, "Selecting Immigrants by Skill: A Case of Wrongful Discrimination?", pp.384-5.

and indirect discrimination, the intrinsic status of discrimination in migration and the moral wrongness of wrongful discrimination.

3.4 Direct and indirect discrimination in migration

A specification is needed about direct and indirect discrimination in migration. Firstly, this section will introduce both a general and a philosophical definition of direct and indirect discrimination; secondly, it will examine Mendoza's and Lim's definitions of discrimination in immigration; and finally, it will focus on Young's idea of structural injustice as a useful non-ideal framework to explain discrimination in immigration.

A general definition of direct discrimination is that it is overt differentiation made explicit through, for instance, laws and policies. Direct discrimination can be positive, in terms of promoting explicit legislation in order to pursue reparative justice in favour of groups that have been historical victims of structural injustice. This thesis does not focus on this aspect of direct discrimination, but rather on direct (and indirect) wrongful discrimination practices. A well-known example of direct *wrongful* discrimination practices in migration are, for instance, the US laws in nineteenth and twentieth century against Chinese migrants. Another example (linked to the investigation in this thesis) is the direct wrongful discrimination in emigration against women; indeed, in several countries women are prevented from freely and fully exercising the right to exit their own country, making them second-class citizens.¹⁷³ The normativity of *indirect* discrimination refers to laws and policies that implicitly exclude (or favour) some groups over others even though this does not seem to be the goal. In the philosophical debate on discrimination, indirect discrimination often focuses on concepts such as unconscious/conscious bias, intentionality, and voluntary/involuntary discrimination.

Moreover, Altman and Lippert-Rasmussen suggest that, among other characteristics, direct discrimination occurs when acts or policies are aimed at certain groups "explicitly or *surreptitiously*".¹⁷⁴ The latter refers to a policy or a law that might seem neutral, but that covertly aims to discriminate against certain groups. Lippert-Rasmussen notes that, in both cases, the policy is *intended* to exclude certain groups. Similarly, Sangiovanni¹⁷⁵ argues that

¹⁷³ See Chapter Five for a detailed analysis of this example.

¹⁷⁴ Lippert-Rasmussen, *Born Free and Equal?*, pp. 56 and 59.

¹⁷⁵ Sangiovanni, *Humanity Without Dignity*, p.120.

covert intentional discrimination does not count as indirect, but direct. In this way, the philosophical debate considers as *direct* discrimination what in law is considered *indirect* discrimination. Moreover, Sangiovanni¹⁷⁶ includes unconscious bias in direct discrimination, while indirect discrimination is genuinely unintentional and unconscious.

I argue that taking into account philosophical definitions of direct and indirect discrimination, wrongful discrimination in migration ends up including these factors: explicit legislation against migrants (or groups of migrants); concealed discriminatory migration policies that seem neutrally formulated but are motivated by conscious and unconscious biases; state migration controls rooted in socially, culturally, historically and politically biased patterns; and social and political hostility towards migrants at the border and within society.¹⁷⁷

Therefore, in philosophical conceptualizations of direct and indirect discrimination the distinction between the two relies on whether an action is intended or not. Intentions have a key role in direct and indirect discrimination. Scholars such as Altman, Sangiovanni and Lippert-Rasmussen agree that intentional discrimination is direct and unintentional discrimination is indirect.¹⁷⁸ Altman considers that “without the intent to disadvantage persons based on their race, sex, religion, and so on, there is no direct discrimination; with such an intent to disadvantage, there is direct discrimination”.¹⁷⁹ Moreover, within the philosophical discussion, intentional discrimination is both overt discrimination as well as implicit or unconscious intention to disadvantage someone. Sangiovanni argues that only unbiased and unconscious discrimination is truly unintentional (and therefore indirect).¹⁸⁰ However, as Lippert-Rasmussen outlines, in the case of indirect discrimination, we can have painful outcomes.¹⁸¹ Consequently, in the philosophical debate, intentionality is an important concept with which to distinguish between direct and indirect discrimination, but in both cases we are referring to wrongful discrimination.

¹⁷⁶ Sangiovanni, *Humanity Without Dignity*, p.120.

¹⁷⁷ On discrimination and oppression see Young, Iris M. 2011. *Responsibility for Justice*. Oxford: OUP. See also Sangiovanni on Young, *Humanity Without Dignity*, p.164.

¹⁷⁸ Altman, Andrew. 2011. “Discrimination” in Zalta Edward N. (ed.). *The Stanford Encyclopedia of Philosophy*. Stanford CA: The Metaphysics Research Lab; Sangiovanni, *Humanity Without Dignity*; Lippert-Rasmussen, *Born Free and Equal?*.

¹⁷⁹ Altman, “Discrimination”.

¹⁸⁰ Sangiovanni, *Humanity Without Dignity*, p.120.

¹⁸¹ Lippert-Rasmussen, *Born Free and Equal?* p.55.

However, I think that philosophical theorizations on discrimination are mostly aimed at discussing individual or group cases of wrongful discrimination in which explicit intentionality is particularly relevant. Looking at the specificity of migration, direct responsibility is evident only in explicit wrongful discriminatory policies in which it is clear who is responsible for the legislation (for instance, a government policy). Does this mean that there is no social and political responsibility if the intentionality of an action cannot be ascribed to an individual or a group? Two scholars who have examined the question of direct and indirect discrimination in immigration and have highlighted issues of social and political responsibility within indirect discrimination in immigration are Jorge Mendoza and Desiree Lim.¹⁸²

Mendoza highlights how immigration policies target certain groups in a discriminatory way to exclude these groups from membership. Mendoza defines direct discrimination in immigration as “any explicit (i.e., in the letter of the law) favoring or excluding of potential immigrants based on their membership in a particular group or class”.¹⁸³ He describes wrongful discrimination as invidious, and claims that direct discrimination can be invidious in two ways. First, policies that exclude whoever belongs to protected classes (race, religion, national origin, sex, sexual orientation, and disability) because they belong to those groups are invidiously discriminatory. Secondly, he claims that immigration policies can be invidiously discriminatory when they explicitly favour historically advantaged groups. For example Article 25 of Argentina’s Constitution states that entry for Europeans (an historically advantaged group) into Argentina is not restricted, but entry is restricted for other nationalities.

Further, Mendoza¹⁸⁴ argues that there are two kinds of indirect discriminatory policies. First, there are policies that select potential migrants with the conscious intention to indirectly discriminate, in order to obtain some outcome that cannot be obtained through explicit discrimination. He argues that most countries adopt some superficially neutral criterion in their policies, for instance the principle of protecting the welfare system with the hidden goal of targeting a certain group or to benefit an historically advantaged group.

¹⁸² Mendoza, “Discrimination and Immigration”; Lim, “Selecting Immigrants by Skill: A Case of Wrongful Discrimination?”.

¹⁸³ Mendoza, “Discrimination and Immigration”, p.255.

¹⁸⁴ Mendoza, “Discrimination and Immigration”, p.258.

Second, direct discrimination includes those policies that have an unintentional discriminatory outcome. Mendoza's example is the US Immigration and Nationality Act (1965), which aimed at granting equal quotas of immigrants to foreign countries but ended up extending the number of immigrants from small, advantaged countries like Denmark or Finland and instead limited the numbers of non-white immigrants, especially Mexicans, who were then pushed towards illegal migration.

On the other hand, Lim¹⁸⁵ defines policies that "single out members of a particular group for (wrongful) differential treatment" as direct discrimination, whereas indirect discrimination is wrongful differential treatment that affects "members of a particular group without explicitly singling them out" in a disproportionate way. Lim argues that talent-based selection of immigrants is indirect discrimination against women. Indeed, she claims that even though the selection of high-skilled immigrants seems only to discriminate against low-skilled workers, it actually affects women. She argues that women are much less likely to be able to meet such high-skilled criteria and therefore end up being admitted in higher numbers as dependents. According to Lim, the consequence of talent-based selection for women immigrants "is wrongful because it reflects negligence on the part of immigration policy makers" who have a duty of care to avoid worsening norms and beliefs against groups that are culturally disvalued and therefore subordinated.¹⁸⁶ She argues that "talent-based selection worsens existing beliefs about the inferiority of female workers' contributions, as well as women's status as passive or helpless".¹⁸⁷ Looking specifically at migration, although the responsibility for wrongdoing seems clear in wrongfully discriminatory policies in which responsibility is evident (for instance, the US government in the case of the Chinese exclusion Act), Mendoza and Lim have shown that the absence of explicit and direct discriminatory policies does not guarantee the application of fair criteria in the selection of immigrants and, in recent years, wrongful discrimination has spread in indirect and implicit ways.

A further possible approach to analyse indirect discrimination is applying the idea of structural injustice (from Iris Marion Young) in migration, as Owen does. Starting from

¹⁸⁵ Lim, "The Indirect Gender Discrimination of Skill-Selective Immigration Policies", p.906.

¹⁸⁶ Lim, "The Indirect Gender Discrimination of Skill-Selective Immigration Policies", p.907.

¹⁸⁷ Lim, "The Indirect Gender Discrimination of Skill-Selective Immigration Policies", p.907.

Young's framework of structural injustice,¹⁸⁸ which "exists when social processes put large groups of persons under systematic threat of domination or deprivation" Owen argues,

under contemporary circumstances, the norm of state unilateral control over 'voluntary' migration is pivotal to the social reproduction of racialized transnational patterns of 'exclusion, domination, subordination, exploitation, and marginalization' between the citizens of advantaged states and those of disadvantaged states that are rooted in a history of formal and informal imperialism, on the one hand, and of racialized migration controls, on the other hand.¹⁸⁹

Young's idea of processes of structural injustice questions the intentionality objection, because,

structural injustice is a kind of moral wrong distinct from the wrongful action of an individual agent or the repressive policies of a state. Structural injustice occurs as a consequence of many individuals and institutions acting to pursue their particular goals and interests, for the most part within the limits of accepted rules and norms.¹⁹⁰

In this case, structural wrongful discrimination in migration would be distinct from an individual's or a single state's wrongful action of discrimination. Structural wrongful discrimination in migration is the process in which institutions and states, acting within the norms, continue historical patterns of domination as well as creating new patterns of exclusion. As Owen says, in this case border control is pivotal. The process of structural discrimination in migration shows that issues of intentionality work differently in macro-processes than in individual cases. In any case, if intentionality was the crucial element to discuss for structural wrongful discrimination in migration, then states and institutions might have rectified the wrongdoing once they became aware of it. Instead, implicit wrongful discrimination in migration has been *consistent across time and countries* in such a pervasive way that its unintentionality can either be ruled out or ignored. For these reasons, I shall

¹⁸⁸ Young, *Responsibility for Justice*, p.52.

¹⁸⁹ Owen, David. 2019 (online). "Migration, Structural Injustice and Domination on 'Race', Mobility and Transnational Positional Difference." *Journal of Ethnic and Migration Studies*, 46(12): 2585-2601, 2591-2592.

¹⁹⁰ Young, *Responsibility for Justice*, p.79.

argue that, within migration control, the *consistency through time and space* of wrongful direct and indirect discrimination is such that its results cannot be considered unintended.

This consistency is evident in the analysis of indirect discrimination in immigration undertaken by Mendoza and Lim, and also in the social sciences. Antje Ellerman¹⁹¹ suggests that there has been a certain optimism among the scholarly about the improvement of the rights of migrants following the cancellation of racially-based migration policies in North America and Australia and the achievement of residence and family rights within European guest workers in the 1970s and '80s. She notes that many scholars believed that, with the end of explicit discriminatory policies, selection in immigration was going to be based on criteria akin to the universal values of liberalism. However, such scholars were soon disappointed. As Ellerman argues,

feminist, critical race, and critical legal scholarship that has emerged since the 2000s has made it clear that we have good reason to doubt that we live in an era of non-discriminatory immigration, integration, and citizenship policy. In a similar vein, the growing literature on precariousness draws attention to the increasing legal stratification of immigration status.¹⁹²

This is particularly relevant in a non-ideal approach to the political philosophy of migration, because the philosophical debate has often considered the absence of *legal* wrongful discrimination and the widespread agreement around the moral significance of the Universal Declaration of Human Rights and other international documents as sufficient to rule out wrongful discrimination from the political discourse about migration. However, I think this is not the case. Such arguments are based on separating processes of historical and structural injustice from abstracts and theoretical definitions of discrimination. The result is to split an abstract approach to discrimination from historical processes of overt and non-overt discrimination. By contrast, I argue that wrongful discrimination is intrinsic to border control, demonstrated by the continuation of wrongful discrimination in migration despite the end of the most *explicit* discriminatory legislation; I think this shows that the latter (rather

¹⁹¹ Ellermann, Antje. 2019 (online). "Discrimination in Migration and Citizenship." *Journal of Ethnic and Migration Studies*, 46(12): 2463-2479.

¹⁹² Ellermann, "Discrimination in Migration and Citizenship", p.2464.

than being the cause of discrimination in migration) was only one possible example of an ongoing process of racial and gender discrimination against migrants. Indeed, the legal aspect of wrongful discrimination is the expression and symptom (a very powerful one) of a widespread culture of wrongful discrimination in migration that is much more socially and politically extensive than particular laws.

I believe that such patterns of discrimination are not easily eradicated because they are social, cultural and historical processes that reshape themselves with new patterns of discrimination (such as Islamophobia). The intrinsically wrongful discrimination at the borders of territory and membership is therefore embedded within cultural, social and historical processes of injustice that inevitably frame mobility across countries.

3.5 Why is wrongful discrimination morally wrong?

The former section explored some definitions of discrimination within political theory. In this case, what is morally relevant in the discussion about migration is wrongful direct and indirect discrimination. The section has also shown that wrongful discrimination in migration is consistent through time in such a way that can be considered structural. More clearly, it is consistent regarding specific groups of migrants selected through racialized and gendered discriminatory patterns. However, to define discrimination as wrongful does not explain (in philosophy) why it is morally wrong. The question that is left to explore then is, in general, what makes wrongful discrimination morally wrong? And, more precisely about migration: what does make direct and indirect wrongful discrimination in migration morally wrong?

I explore two possible arguments on the moral wrongness of discrimination. The first is based on the idea of equality and the second on the specificity of migration. First, I rule out the objection against wrongful discrimination based on *relevance*.

3.5.1 Philosophical arguments against discrimination: irrelevancy

Exploring philosophical principles for the justification of non-discrimination, I exclude explanations based on *relevance*. Peter Singer¹⁹³ calls this the standard objection against

¹⁹³ Singer, Peter. 1978. "Is Racial Discrimination Arbitrary?" *Philosophia* 8: 185-203, 186.

racist discrimination. According to Singer, this objection against the arbitrariness of racial discrimination is as follows: take the case of the right to vote. A rational choice between electoral candidates or policies must be related to the relevant characteristic of such choices, and race does not seem relevant. Therefore, it is arbitrary discrimination to single out race (an irrelevant characteristic) for making the choice; moreover, this action shows a bias or a prejudice against such characteristics.¹⁹⁴

The standard objection has been a popular way to explain the wrongness of discrimination in migration, in particular among scholars who argue for the state's right to unilateral control borders. Therefore, I examine some examples in the literature on migration about the standard objection and highlight some of its problematic consequences. To explain my argument, I explore the work of David Miller, Sarah Song and Michael Walzer on discrimination, migration and the role of *relevance* in such approaches.

David Miller and Sarah Song seem to agree that appealing to a human right against discrimination is not sufficient in philosophical terms to explain the wrongness of wrongful discrimination.¹⁹⁵ They examine discrimination in migration starting from the International Covenant on Civil and Political Rights and the widespread agreement among scholars and institutions on its value. However, they suggest that the wrongness of discrimination needs to be philosophically justified.

To give philosophical foundation to the prohibition of discrimination in migration, Miller argues that such a right can be interpreted as prohibiting discrimination "on grounds that are *irrelevant* to the right or benefit being allocated".¹⁹⁶ Therefore, selecting migrants must be based on reasons justifiable to both parties and migration might be based on conditions of mutual advantage. The goals of state policies (e.g. economic growth) define its approach to migration control but "selection by race or national background is unjustifiable, since these attributes cannot be linked to any goal that a democratic state might legitimately wish to pursue".¹⁹⁷

¹⁹⁴ Singer, "Is Racial Discrimination Arbitrary?", p.186.

¹⁹⁵ Song, Sarah. 2018. *Immigration and Democracy*. New York: OUP, p.159; Miller, *Strangers in Our Midst*, pp.103-104.

¹⁹⁶ Miller, *Strangers in Our Midst*, pp.103-104.

¹⁹⁷ Miller, *Strangers in Our Midst*, p.106.

Similarly, Song interprets the right of non-discrimination as “a right against being treated on the basis of grounds that are *irrelevant* to the benefit or opportunity in question”.¹⁹⁸ Song criticizes in particular US legislation and the public debate in which discrimination has been legitimized on grounds of national security (against citizens of Muslim countries) and on grounds of public health (against the poor, minorities and LGBT persons). Therefore, according to Miller and Song, wrongful discrimination is excluded on the grounds of being *irrelevant* for the purposes of selection. The criterion of relevance does not demonstrate that discrimination in migration is wrong, but that is wrong for what is at stake (e.g. the goal of a state to improve its economy).

Appealing to *relevance* to exclude wrongful discrimination is highly problematic for the political theory of migration. Indeed, the principle of relevance does not rule out wrongful discrimination as such, but it does rule out discrimination when the criterion of relevance is not satisfied and this can lead to unfair results. For instance, Singer believes that the standard objection is not adequate to rule out racial discrimination in general because there could be cases in which the purpose of a policy might be exactly about race (e.g. racial segregation in the US) and therefore, race would be in this case a *relevant* factor. Therefore, the argument based on irrelevance is not able to explain the wrongness of racist discrimination. In migration this aspect is particularly important because race has indeed been a very relevant factor in terms of excluding some and accepting others, not only in terms of explicitly racist legislation but also, for instance, through the principle of cultural affinity.

An example that shows this problematic aspect of the standard objection to racist discrimination is the role given to ethnicity by Walzer. He argues that a fundamental reason to maintain border control is that communities have distinctive cultures that are put at risk by uncontrolled immigration. This approach presumes several other things: that communities are internally culturally homogenous in a way that makes them sufficiently distinct from those who live outside such a community; and that the of lack of border control in immigration would endanger the cultural distinctiveness of this community. This idea of cultural distinctiveness is one of the reasons why Walzer argues that states find it advantageous to

¹⁹⁸ Song, *Immigration and Democracy*, p.159.

choose migrants according to the principle of cultural affinity. However, the way Walzer sets up the value of the community as antithetical to outsiders, his dystopic approach to the role of newcomers in the political community, and the extensive discretion that the state has in establishing principles for selecting new members, leave the door open to the possibility of discriminatory policies against foreigners. Walzer considers ethnicity relevant to keeping society homogeneous and argues that the state might prefer to select outsiders who are ethnic 'relatives'. In this case ethnicity and race play a crucial role to grant access to some groups of immigrants while excluding others, as in the case of the White Australia policy that has been the instrument (for a group defined through its racialization as white) to maintain dominance.

Miller also emphasises the preservation of national culture (and therefore assumes that a nation-state has one) and argues that the state is based on self-determination, which includes the right to control membership. Despite the fact that such control over newcomers exerts explicit wrongful discrimination, Miller¹⁹⁹ argues that democratic self-determination is affected by immigration because immigrants change the demos, the *self*, and its decisions, and this may in turn reduce personal and political trust that leads groups to endorse self-interested policies. He believes that this is also related to the risk that immigrants could form self-contained groups. Therefore, he argues that cultural and religious diversity reduces trust in the societies and even though contemporary societies are multicultural, some degree of convergence in political values, languages etc. is needed, which can be achieved only if migration is slow and steady.²⁰⁰

The focus on "affinity" on the one hand, and wrongful discrimination narrowed to explicit wrongful discrimination on the other, shows the double standard in establishing when discrimination is relevant and when it is not.

Miller and Song link wrongful discrimination to legislation about discrimination on the grounds of sex, race, gender, religion and so forth but not to historical patterns of exclusion and disadvantage (linked to sex, race, religion and other traits) created through economic,

¹⁹⁹ Miller, *Strangers in Our Midst*, p.64.

²⁰⁰ Miller, David. 2016. "Is There a Human Right to Immigrate?" in Fine and Ypi, *Migration in Political Theory*, p.27.

social and cultural processes that influence (explicitly and implicitly) the politics of border control. The limited focus on explicit legislation regarding wrongful discrimination excludes from the analysis those factors that aim to favour certain groups over others in a non-overt legal way. Therefore, scholars who argue for limited freedom of movement across borders tend to separate issues of historical injustice from issues of discrimination understood narrowly. In this way, wrongful discrimination as a structural social process is overlooked.

Kukathas argues that, with the goal of protecting the social order, “the state will end up choosing immigrants by excluding on the grounds of culture, ethnicity or race – albeit by finding official proxies that do not show the discrimination directly.” According to Kukathas, this choice will affect not only immigrants but also citizens, because those with “favoured ethnicities will find it easier to bring in relatives or to hire from abroad, while those from minority communities will face greater difficulty”.²⁰¹

The examination of Song, Miller and Walzer has shown that the standard objection against discrimination based on *relevance* cannot rule out discrimination but rather allows a state to apply discrimination when is considered a relevant factor in migration policies (e.g. protecting the dominant culture of a community), considering it irrelevant when the goals of a state focus on other factors. The analysis has also shown the double standard of considering discrimination only in terms of explicit legislation, while leaving to states the possibility of justifying their policies on criteria like affinity will result in ethnic exclusion from the borders of membership through the application of more subtle criteria.

As Fine, Hayter and Kukathas say, the history of immigration control is a history of ethnic and racial exclusion.²⁰² From the US Chinese exclusion act of 1882 and the exclusion of southern Europeans in the early twentieth century to the most recent White Australia policy, the goal is to control the ethnicity of the population: that is, as Kukathas says, “to maintain the whiteness of the population”.²⁰³ Moreover, studies in the social sciences have shown that there are reasons to question the idea that the end of most of that legislation in Western countries represents the achievement of a non-discriminatory migration process. Rather,

²⁰¹ Kukathas, Chandran. 2017. “On David Miller on Immigration Control.” *Critical Review of International Social and Political Philosophy* 20(6): 712-718, 716.

²⁰² Fine, “Immigration and Discrimination”, pp. 132-133; Hayter, Teresa. 2004. *Open Borders: The Case against Immigration Controls*. 2nd ed. London: Pluto Press, p.21; Kukathas, “On David Miller”, p.716.

²⁰³ Kukathas, “On David Miller”, p.716.

wrongful discrimination in migration is represented through political and bureaucratic patterns (for instance, the hostile environment), precarious membership and less obvious patterns of exclusion.

3.5.2 Moral equality

This section examines explanations for the wrongness of discrimination within political theory. It focuses in particular on arguments based on the idea of moral equality in the philosophical discussion on discrimination and their application to migration theory.

At the beginning of this chapter I outlined how, within the literature and practice about human rights and discrimination, the latter is analysed in relation to the principle of equality. Arguments on equality to justify non-discrimination are shared both by philosophers who work on discrimination and those who work on migration theory. Explanations about moral equality can be grounded on the same human rights practices, in which the principle of non-discrimination is pivotal to maintaining equality among individuals (equality in enjoying other human rights); on the tradition of political theory; or on the same theories on migration.

An important step in the definition of moral equality has been Dworkin's distinction between equal treatment and treatment as an equal.²⁰⁴ Dworkin defines equal treatment as "the right to an equal distribution to some opportunity or resource or burden", and the right to be treated as an equal as "to be treated with the same respect and concern as anyone else".²⁰⁵ The first definition is related to issues of distributive justice about some good but it does not discuss the moral status of individuals as such; the second definition reflects the equal moral worth of individuals and relies on ideas of dignity, respect or concern. In this case, some kind of impartiality in moral reasoning is required and moral equality in terms of being treated as an equal requires a relational and comparative framework.²⁰⁶ The idea of human beings worthy of being treated as equals reflects a basic commitment of political theory, and underpins many different areas of investigation, including migration theory. At minimum, the

²⁰⁴ Dworkin, Ronald. 2013. *Taking Rights Seriously*. London: Bloomsbury Publishing, p.273.

²⁰⁵ Dworkin, *Taking Rights Seriously*, p.273.

²⁰⁶ Nagel, Thomas. 1991. *Equality and Partiality*. New York: OUP.

principle requires that the reasons for differentiation must be recognised as fair by everyone involved; within migration theory, the principle of equal moral worth of individuals is not questioned and what is at stake in the debate instead are fair justifications for the right to select some and not others. Within this framework, equality plays a key role in defining wrongful discrimination, although based on sometimes antithetic concepts.

Singer bases his examination of the arbitrariness of racism in the principle of equal consideration of interests. He thinks that the wrongness of racism can be shown through this basic moral principle. The principle requires that equal weight is given by “our moral deliberations to the like interests of all those affected by our actions”.²⁰⁷ Therefore, in Singer’s view our moral reasoning in making a choice must equally consider the interests of the people affected by our decision.

On the other hand, Deborah Hellman²⁰⁸ whose research investigates the analysis of philosophical concepts that ground discrimination law, puts the focus of her analysis on equality and on the concept of “demeaning”. Hellman starts her analysis of wrongful discrimination by distinguishing between descriptive and moralized accounts of discrimination.²⁰⁹

According to Hellman, descriptive discrimination is merely a distinction that is based on some trait (for instance, the US law that a person must be 16 years old to hold a driving license). On the other hand, moralized discrimination implies differentiating between people according to a trait in such a way that it demeans those involved. Hellman defines this type of discrimination as wrongful and morally impermissible.²¹⁰

Wrongful discrimination within a law or a policy is a violation of persons’ equal moral worth, and this happens when a person is demeaned in comparison with others. It is wrongful because “people are entitled to be treated in a way that expresses their equal moral worth”: therefore, no person matters morally more than another. If so, then to say “I am your better” is to say, in a comparative way, I am a person who matters more than you. If that is demeaning, then to demean is also inherently comparative. Hellman grounds her argument

²⁰⁷ Singer, “Is Racial Discrimination Arbitrary?”, p.197.

²⁰⁸ Hellman, *When is Discrimination Wrong?*.

²⁰⁹ Hellman, *When is Discrimination Wrong?*, p.13.

²¹⁰ Hellman, *When is Discrimination Wrong?*, p.3.

against wrongful discrimination on the equal moral worth of all persons as “a bedrock moral principle”.²¹¹ According to this principle, persons have an inherent dignity that does not change according to other traits people possess.

The concept of demeaning is pivotal to Hellman’s definition of wrongful discrimination. She outlines that demeaning is not defined by its consequences nor the wrongness of discrimination. Therefore, wrongful discrimination is not based on accounts of intentionality or harm. Rather, for Hellman wrongful discrimination is defined by what the meaning of drawing a distinction in a certain context is.²¹² Context and culture play an important role in wrongful discrimination because a distinction is demeaning when is based on “a trait that defines a group with either a history of mistreatment or a lower social status currently”.²¹³ Within this approach, traits like race and gender acquire social meaning. For instance, separating by race has a charged meaning in our culture due to a long history of racism and oppression against non-white groups.

Hellman considers that to demean implies, on the one hand, expressing denigration, and on the other hand, the power to act demeaningly. Expressing denigration means “to treat another as lesser” and therefore to disrespect the equal humanity of others.²¹⁴ Secondly, demeaning requires a certain degree of authority such that the discriminator must have enough power to lessen the social position of the people affected. Hellman argues that “institutions with more social power have more opportunity to wrongful discriminate”.²¹⁵ In this way, demeaning becomes a moral concept that allows one to draw a distinction between permissible and impermissible differentiation.²¹⁶

Lim has focused on Hellman’s concept of demeaning applied to immigration.²¹⁷ In her analysis of states’ talent-based selection of immigrants, Lim highlights how the predominant preference for highly-skilled workers creates a demeaning expressive effect attached to the

²¹¹ Hellman, *When is Discrimination Wrong?*, p.10.

²¹² Hellman, *When is Discrimination Wrong?*, pp.7 and 29.

²¹³ Hellman, *When is Discrimination Wrong?*, p.21.

²¹⁴ Hellman, *When is Discrimination Wrong?*, p.38.

²¹⁵ Hellman, Deborah. 2017. “Discrimination and Social Meaning” in Lippert-Rasmussen, *The Routledge Handbook of the Ethics of Discrimination*, p.103.

²¹⁶ Hellman, *When is Discrimination Wrong?*, p.32.

²¹⁷ Lim, “Selecting Immigrants by Skill: A Case of Wrongful Discrimination?”, pp. 378-384.

status of low-skilled immigrants, who “are only allowed to exist as unflattering caricatures, hungry for jobs and benefits”.²¹⁸

I agree with Lim’s analysis, but in this thesis, I consider a more extensive approach to wrongful discrimination and migration. I believe that Hellman’s argument can be applied to migration control and that direct and indirect wrongful discrimination against migrants have the result of being demeaning and therefore morally wrong. I argue that migration policies wrongfully discriminate against groups with a specific social identity defined by traits like race and gender. Drawing on Hellman’s account of demeaning as linked to context and culture, I argue that, within a context of historical racism, colonialism, domination and gender inequality, groups that have been subordinated are affected more than others by selective migration control. The history of mistreatment (racism, injustice and the consequently lesser social status of the people affected, for instance women, people of colour, Muslims etc.) makes selective differentiation in immigration demeaning, and this undermines the principle of the equal moral worth of each person; in fact, immigration policies (often with a superficial neutral approach) disadvantage groups with specific ethnicities or gender because these groups have these specific traits. This is demonstrated by the fact that migration control does not affect each group or person in the same way. For instance, approaches to immigration in western wealthy countries favour white immigrants over non-white immigrants. This is a way to express denigration and to undermine persons’ equal moral worth because of the meaning these specific traits have historically acquired, as a tool to withhold basic rights and entitlements.

To sum up, the specificity of wrongful discrimination in migration is that migration control maintains and reinforces demeaning aspects of membership that are embedded within historical and ongoing processes of oppression, exclusion and domination. Starting from the bedrock moral principle of equal worth of human beings, a perspective on migration control that is historically and socially contextualized shows how the selection of immigrants is part of processes of injustice entrenched in issues of gender, racism and racialization.

²¹⁸ Lim, “Selecting Immigrants by Skill: A Case of Wrongful Discrimination?”, pp. 382-383.

3.5.3 Non-discrimination and the cantilever strategy

Another strategy to explain the wrongness of discrimination is, rather than beginning from justifying a universal moral principle like equality, to narrow the focus of the analysis and to start from the overlapping consensus about the human rights practice of non-discrimination. In this case, it is the task of those who argue against an approach to freedom of movement justified against wrongful discrimination to demonstrate that this shared consensus does not offer a sufficient ground from which to justify non-discrimination. Starting from things as they are, the widespread consensus in human rights practice as well as in political theory and in the literature on migration about the wrongness of discrimination suffices for me to argue that discrimination is wrong.

Nevertheless, such a consensus needs to be spelled out. First, the recognition of the moral value of non-discrimination can be understood as a fundamental concept for the acknowledgment of historical and structural injustices. Therefore, rather than a principle that needs to be demonstrated within a theoretical framework based on unhistorical conceptualizations, the principle of non-discrimination can be considered the benchmark for the recognition of historical processes of injustice such as slavery, historical patterns of exclusion and subordination of women, colonialism, gender discrimination and racism.

In this case the focus on non-discrimination within the Universal Declaration of Human Rights as well as subsequent international documents such as the International Covenant on Civil and Political Rights, the European Convention of Human Rights, the American Convention of Human Rights, the African Charter of Human and Peoples' Rights, the UN Convention on the Elimination of all Forms of Racial Discrimination and the UN Convention on the Elimination of all Forms of Discrimination Against Women, show that within human rights practice, the focus on the principle of non-discrimination is fundamental: it is a principle necessary for the enjoyment of other rights because if an individual is wrongfully discriminated against, for whatever reason (sex, colour etc.), she is excluded from the enjoyment of other rights on the basis of this first exclusion; for instance, historical discrimination against women led to their exclusion from political participation and from the right to vote. Moreover, through this lens of analysis, it seems that within the human rights practice the right of non-discrimination is a way to apply the principle of equality. Therefore, regardless of the foundation given to human rights (in terms of moral equality of human

beings, human dignity, or the same practice of human rights, or human capabilities) the right to non-discrimination remains fundamental for the enjoyment of other rights.

Starting from these considerations, in order to ground philosophically the right of non-discrimination, I might paraphrase some aspects of Carens's cantilever argument.²¹⁹ The cantilever strategy is centred on the idea that a new human right can be justified by demonstrating that is analogous to another recognised human right that is widely accepted by those who are committed to liberal and democratic principles. I focus on this latter aspect and I consider that there is a widespread consensus within liberal and democratic principles and human rights practice on a human right against discrimination, therefore since the right of non-discrimination is a recognized right, I consider a task of who disagrees with such a right to demonstrate the validity of wrongful discrimination.

3.6 Conclusion

This chapter has focused on the examination of wrongful discrimination. First, the chapter has looked at definitions of wrongful discrimination, both in human rights practice and political theory. Secondly, I argued that a definition of wrongful discrimination in migration cannot be limited to the critique of overt policies that apply wrongful discrimination in migration, but such a definition must take into account structural widespread social and cultural processes of wrongful discrimination based on stereotypes and biases. Finally, the chapter has explored some possible explanations for the wrongness of wrongful discrimination. Ruling out the standard account against discrimination, the chapter has instead focused on the concept of equal moral worth of individuals and a consensus view based on the cantilever strategy.

While political philosophers seem to agree about the unfairness of applying wrongfully discriminatory processes in selecting migrants, I think that this does not fully define wrongful discrimination in migration. I argue that part of the issue at stake is related to what is included in wrongful discrimination in migration: philosophers in favour of the right to exclude tend to narrow wrongful discrimination in migration to explicit governmental

²¹⁹ See Carens, *The Ethics of Immigration*, pp.237-245.

policies, whereas I consider historical processes of injustice, exclusion and social stereotyping as processes of wrongful discrimination that must be included in the analysis.

Given that the investigation in this thesis is solely about wrongful discrimination, in the next chapters I use discrimination and wrongful discrimination interchangeably.

CHAPTER FOUR: MEMBERSHIP, EXCLUSION AND FREEDOM OF MOVEMENT

4.1 Introduction

In this thesis I argue for a human right to freedom of movement in order to make wrongful discrimination against migrants less likely or to reduce it. In particular, this chapter (which focuses on precarious membership) and the next (which examines migrant racialization and gender wrongful discrimination at the borders of political societies as a systemic process) aim to justify why the recognition of a human right to freedom of movement is urgent on grounds of non-discrimination.

The literature in the political philosophy of migration has analysed several aspects of membership acquisition and deprivation within political associations, but they are often analysed as aspects of different issues. By contrast, I consider that the unfairness of membership selection and procedures within the border (this chapter) and at the external border of the political association (next chapter) are two aspects of the same process, characterized by exclusion through the violation of basic rights, and this exclusionary practice morally justifies a human right to freedom of movement.

Membership indeed needs to be valuable enough to be considered a moral good; however, with an increase in global mobility, wealthy liberal democracies are restricting the possibility to acquire membership statuses with a strong bundle of rights, making citizenship and other membership statuses more precarious and therefore less valuable.

This chapter examines the acquisition and loss of different membership statuses within political associations. More precisely, the chapter analyses the changes applied by liberal democracies to naturalization laws, to birth-right citizenship laws and to the practices of denationalization.

This chapter is divided as follow: section 4.2 explores the concepts of borders; section 4.3 offers an overview of the stratification of memberships in liberal democracies. Section 4.4 examines the hardening of procedures of naturalization and the role of the genuine link to the state. Section 4.5 investigates changes (especially in the EU) to the application of unconditional jus soli for more conditional criteria to grant membership to those born on the territory of a state. Section 4.6 examines issues of citizenship deprivation in liberal

democracies referring particularly to the UK. Finally, section 4.7 explores some possible challenges to democratic membership and its fragmentation of rights. The chapter concludes that the state has failed in addressing issues of membership and moral equality.

4.2 Borders

Investigating processes of acquisition and loss of membership implies focusing on the borders of the political association. The attempt to find a single definition of the border could seem overwhelming: borders are historical and geographical, practical and contextualized, but they are also metaphorical and abstract. As Balibar²²⁰ said, the practical definition of what is a border requires at least a “reduction of complexity”. Thus, I do not look for a comprehensive definition of borders in their complexity and heterogeneity, but rather will examine the concept of a border only for what is relevant to the field of migration and freedom of movement within political philosophy. Therefore, in this chapter the word *border* has a specific and field-focused meaning, while other possible meanings of borders, even though correct and suggestive, are not introduced or analysed. Within a perspective on migration, borders are not an end in themselves but a means to some other end. Thus, the border is instrumental. The point in this case is to understand what the functions of the borders in political societies are, why they are in place and for whom. The scope and function of the borders change accordingly to the aims of particular political societies. The border therefore acquires a normative value according to specific criteria defined by who put them in place.

Mostly, the tradition of political theory did not consider investigation of the border as a primary concern of the political association; rather, the interpretation of the bounded polity and the borders of citizenship were considered normatively and morally neutral, invisible, or even beneficial for maintaining the community’s cultural singularity (for instance, by Miller and Walzer). Within the liberal tradition, the moral neutrality of the border is taken as a given. According to this approach, borders do not exclude or include members via some preferential criterion, but are considered morally neutral because they have the sole purpose of marking the frontier of citizenship and territory. In this case, somehow, the delimitation of both the

²²⁰ Balibar, Étienne. 2002. *Politics and the Other Scene*. London: Verso, p.76.

borders of territory and citizenship is considered as given and non-problematic. This abstract conception of the society makes the border invisible.

However, the border is not invisible to everybody. The border is invisible for those who can enter freely, but highly visible for those who have to deal with the present or future possibility of exclusion. Indeed, the territorial border is a threshold that defines who can and cannot enter, and who can and cannot leave. This is expressed through the system of control that states place at their frontiers, but also through the erection of walls that make the border real and concrete beyond the imaginary line of the frontier. Specifically, while defining the perimeter of the state, the border has also the function of separating the state territory from other territories. There are therefore at least two types of relevant border: a physical perimeter around the territory and a demarcation of membership.²²¹ In this case, while circumscribing the citizenry, the border of membership defines also the non-citizens and those who holds a weaker or precarious membership status. As Balibar²²² says, the meaning of borders is polysemic: borders do not have the same meaning for everyone because they do not work in the same way for people of distinct social groups.²²³ Indeed, the right to enter and cross the territory of a state does not imply the right to stay for everyone; the right to stay does not imply the right to permanent membership or citizenship for everyone; and some citizenship statuses are less stable than others.

Within this framework, the following sections will analyse how the border works for different categories of members. In particular, they will outline how several categories of membership have been restricted or made more precarious. The aim is to show how the unilateral control of the borders of territory and membership by the state leads to discriminatory situations that are not morally justified. Such analysis contributes to my argument that borders are intrinsically discriminatory and that the consequent violation of basic rights of such structural condition of the borders requires a human right to freedom of

²²¹ Bertram, Christopher. 2014. "Competing methods of territorial control, migration and justice." *Critical Review of International Social and Political Philosophy* 17(1): 129-43.

²²² Balibar, *Politics and the Other Scene*, p.81.

²²³ Balibar, *Politics and the Other Scene*, p.79.

movement, in terms of a human right to enter and stay, independent of holding any specific membership status.

4.3 Encasing mobility

International migration is encased within national membership statuses mostly structured according to the needs of the nation states. These statuses can be more or less temporary and include, among others, migrant workers, but also refugee and asylum seekers, members with dependant and family visas, naturalized and dual citizens.

These memberships do not give equal rights and, closely analysed, they show a hierarchical stratification of membership rights in tension with the democratic principles of moral equality of individuals.

Recently some scholars such as Bosniak, Cohen and Benton have outlined the contradictions inherent in the dichotomy of citizen/non-citizen, and provided a normative structure for the concept of non-citizen through their respective definition of alien, semi-citizen or denizen;²²⁴ while other authors have focused on the state's admission policies as a selective pattern towards determining citizenship.²²⁵

Discussing citizenship and alienage, Linda Bosniak gives a normative framework to non-citizen members; stating, along with Elizabeth Cohen,²²⁶ that citizenship is not a monolithic whole, but is a concept divided normatively and conceptually.²²⁷ Bosniak offers an

²²⁴ I refer to Cohen, Elizabeth F. 2010. *Semi-Citizenship in Democratic Politics*. Cambridge: CUP; Bosniak, Linda. 2006. *The Citizen and the Alien: Dilemmas of Contemporary Membership*. Princeton University Press; Benton, Meghan. 2014. "The Problem of Denizenship: A Non-Domination Framework." *Critical Review of International Social and Political Philosophy* 17(1): 49-69.

²²⁵ In this case, the gaze moves from closed/open borders to members' selection. For instance, Sachar and Hirschl examine Olympic citizenship, defined as a membership determined by investment and merit, admission granted to wealthy or talented people that challenge the ideal of citizenship as equality. They argue that "in today's stratified international mobility market, the focus is not on closing the gates of admission, but on opening them *selectively*." Shachar, Ayelet and Ran Hirschl. 2014. "On Citizenship, States, and Markets." *Journal of Political Philosophy* 22 (2): 231-57, 233.

²²⁶ Cohen, *Semi-Citizenship in Democratic Politics*, pp.3-4.

²²⁷ Bosniak, *The Citizen and the Alien*, p.13. A similar approach is presented by Ottonelli and Torresi. They argue that temporary migratory projects make "a life effectively split between two polities, create a dislocation of social and political spaces, and consequently of the social bases of self-respect, making it impossible and rational for a person to trade her status as an equal member of the receiving polity for a chance to advance her aims in

overview of the contradictions of a formal inclusionary model in which non-citizens have entered the space of national and normative boundaries of belonging.²²⁸ Bosniak defines this model as hard-outside soft-inside citizenship and she argues that despite liberal nationalists differing about what the inside should look like, they share the idea of a territorial inside and the bounded territorial threshold.²²⁹

While Bosniak distinguishes between citizenship and alienage, Elizabeth Cohen discusses the unitary definition of citizenship and the coexistence of different forms of citizenship in liberal democracies. She highlights the contradiction between the single meaning given to citizenship (equality of its members) and the existence of various degrees of citizenship. According to this, semi-citizenships are secondary statuses in between citizens and non-citizens.²³⁰ Cohen describes the contemporary *status quo* of liberal democracies as a differentiated landscape of citizens and semi-citizens.

Both philosophers, Cohen and Bosniak, outline the weak social position of immigrant members. Cohen identifies irregular migrants, who belong to the category of semi-citizenship, as the ones with weak relative rights and weak autonomous rights.²³¹

Bosniak refers to alienage as a pattern of disadvantage showing the inadequacy of national and territorial premises. Similarly, Benton examines non-citizenship as a peculiar condition of disadvantage related to non-domination. Benton defines members without citizenship as *denizens* and demonstrates the connection between denizen status and the risk of domination.²³²

All these thinkers shift the normative focus from that of the citizen perceived as the subject morally entitled to membership of the polity, to one focusing on the exclusionary and precarious ground of alienage. Discussing such a framework, these authors bring excluded members into the normative ground of liberal democratic theory.

At the bottom of the hierarchy of memberships, there is the membership of undocumented immigrants (those who have entered without documents, and those who

the pursuit of happiness. [...] temporary migration gives rise to a dilemmatic choice between these two fundamental dimensions of liberal egalitarian justice". Ottonelli, Valeria and Tiziana Torresi. 2010. "Inclusivist Egalitarian Liberalism and Temporary Migration: A Dilemma." *Journal of Political Philosophy* 20: 202-24, 202.

²²⁸ Ottonelli and Torresi, "Inclusivist Egalitarian Liberalism and Temporary Migration", p.206.

²²⁹ Bosniak, *The Citizen and the Alien*, pp.125-126.

²³⁰ Cohen, *Semi-citizenship in Democratic Politics*, p.2.

²³¹ Relative rights link to the context while autonomous rights focus on personhood.

²³² See Benton, "The Problem of Denizenship", p.50.

have overstayed).²³³ Undocumented and temporary members with a precarious status are also those employed in the so-called 3D jobs (dirty, dangerous and demanding) and they are the target of politicians and populist movements at times of economic or political instability.²³⁴ Unauthorised migrants have only human rights, and their ability to enjoy such rights is highly limited. Due to the informality of their membership, they are subordinate and vulnerable.²³⁵ If an undocumented migrant is lucky enough, she might acquire membership through, for instance, a pricey amnesty.²³⁶ If not, she is destined to deportation or years of irregularity.

On the other hand, at the top of the social hierarchy of membership applicants, there are those who can acquire membership through capital. Some states sell their membership, and some can sell it at a higher price than others because their membership is more influential and powerful. As Shachar outlines,

the investor categories ... crudely permit the actual 'purchase' of an entry visa for a hefty price (US \$1 million for a conditional green card in America, €1 million in Germany, and in the UK, a minimum investment of GBP £750,000 in British stocks and the holding of additional funds of GBP £250,000). Recent years have also seen the introduction of unfettered cash-for-passport programs, where citizenship is literally offered "for sale" to the world's moneyed elite, creating dangerous liaisons between wealth and access to political membership.²³⁷

²³³ Düvell, Franck. 2011. "Paths into Irregularity: The Legal and Political Construction of Irregular Migration." *European Journal of Migration and Law* 13 (3): 275-295.

²³⁴ Marfleet, Philip and David L. Blustein. 2011. "Needed Not Wanted: An Interdisciplinary Examination of the Work-Related Challenges Faced by Irregular Migrants." *Journal of Vocational Behavior* 78(3): 381–89, 384.

²³⁵ They are vulnerable and subordinated not only in the labour market but also in their relationship with the state. For instance, in the Netherlands "the national government decided in 2004 to evict 26,000 rejected asylum seekers, who have often been tolerated for years". Van der Leun, Joanne. 2007. "The Dutch 'Discouragement Policy' towards Undocumented Immigrants: Implementation and Outcomes" in Berggren, Erik, Branka Likic-Brbroic, Gülay Toksöz and Nicos Trimikliniotis (eds). 2007. *Irregular Migration, Informal Labour and Community: A Challenge for Europe*. Maastricht: Shaker, p.410. On the other hand, even if some immigrants are better off than others (and are required in the labour market), all immigrants have to deal with the possibility of being excluded by the host state at some point.

²³⁶ Even in case of amnesty, there is a monetary selection: the Italian amnesty of 2012 cost around €1500-2000 for live-in care workers and €4000-6000 for workers in other sectors. These included the payment of the tax avoided during irregular work and a €1000 non-refundable fee for making the application.

²³⁷ Shachar and Hirschl, *On Citizenship, States, and Markets*, p.245.

Within this framework, it might be argued that the birthright lottery²³⁸ affects not only citizenship but also the chances of being considered a more or less desirable immigrant or a new citizen in the host country. Ayelet Shachar defines citizenship as equivalent to inherited property.²³⁹ She argues that *jus sanguinis* and *jus soli* are both forms of inheritance, which confer a more or less strong bundle of rights and opportunities to a citizen. A person born in an affluent country receives a strong bundle of rights, while one born in a poor country does not. It is a matter of luck. Shachar challenges the traditional approach to citizenship as an agreement between equals: instead of being a matter of agreement, citizenship ends up being a matter of luck equivalent to inherited property. She argues that while some are lucky enough to be born in a wealthy country and to inherit by birthright (by blood or soil) the privilege of membership in an affluent society, others are less fortunate and their membership gives them few opportunities of living a comfortable life or having basic needs met. In the vein of Shachar's approach to membership, I shift the focus to migrant membership. I argue that, within the category of the unluckily born, some are unluckier than others. This is not only because there are degrees of poverty and destitution, but also because certain nationalities, culture, or educational levels are considered less desirable than others when it comes to migration. Therefore, some have a better chance of being accepted as immigrants than others without merit or fault of their own.

Within this stratification of memberships, mono-citizens by ancestry hold the more stable bundle of rights. By mono-citizenship by ancestry, I mean the status of a citizen who holds (and is entitled to) a single citizenship status and holds this status by virtue of her parentage. This entitlement to a single endless membership status is the most secure membership status because the singularity of membership acquired by descent protects the person against the power of the state to revoke membership. Indeed, refugee statuses, immigrant temporary membership, naturalization and denationalization are all characterized by the same instability, created by possible frameworks of exclusion. However, as Shachar and Carens have highlighted, citizenship is valuable if it is held in the "right" state and citizenship in a wealthy country has quite a different value to the citizenship status of a poor

²³⁸ Shachar, Ayelet. 2009. *The Birthright Lottery: Citizenship and Global Inequality*. Cambridge MA: Harvard University Press.

²³⁹ Shachar, Ayelet and Ran Hirschl. 2007. "Citizenship as Inherited Property." *Political Theory* 35(3): 253–87.

country that offers few opportunities in terms of both prosperity and fulfilling basic human needs.

The stratification of memberships is not a fixed process but it is characterized by a trend of restricting the criteria for the acquisition of membership statuses (refugee status, immigrant status, citizenship) while expanding the criteria for the loss of membership of those who are not mono-citizens. Indeed, the trend in liberal democracies seems to be not only to maintain the stratification of non-citizen memberships but also to make citizenship acquired by newcomers or by descendants of those who have once been “newcomers” more precarious and temporary. The changes in legislations about denationalization and naturalization are aspects of this process.

4.4 Naturalization

I start by exploring some problematic aspects of naturalization within contemporary liberal democracies. Naturalization refers to the process of foreigners acquiring legal citizenship. Within contemporary liberal democracies, naturalization procedures are characterized by the presence of a series of requirements.²⁴⁰ Indeed, time and residence alone are no longer considered sufficient criteria for the acquisition of citizenship through naturalization. Additional criteria might include language tests; historical, cultural and political knowledge of the country; economic self-sufficiency; permanent residence; good character (as shown by a clean criminal record, for example); and the ability to pay a fee for consideration of the application. Some countries have also health requirements. As Orgad summarizes, in 2002, 4 out of 14 European states had a compulsory language requirement for the acquisition of citizenship, but in 2010 their number raised to 17 out of 23 European states. In addition, in 1999, only 4 European states had a formal citizenship test while their number rose to 12 in

²⁴⁰The process of naturalization has been integrated with tests aimed at proving the affinity and connection of the applicant with the host country. These tests have become part of the procedure for the acquisition of citizenship in several liberal democracies. See Goodman, Sara W. 2010. *Naturalisation Policies in Europe: Exploring Patterns of Inclusion and Exclusion*. Florence: RSCAS, p.17.

2010.²⁴¹ These data show an increasing trend in the implementation of the criteria that a person must fulfil in order to acquire citizenship.²⁴²

Language tests can be more or less strict. Jensen et al. argue that in Denmark very strict language requirements exclude large groups of immigrants and refugees from acquiring citizenship even though they speak the language sufficiently well to participate in Danish society.²⁴³ Next to language requirements, often, there is a facilitated procedure of naturalization for those with special merit or skills. Some scholars, including Bauböck and Joppke, believe that tests are needed to qualify people and they think that the issue is how to establish what kind of tests as legitimate and what their possible limits are.

Within this framework, the idea of an effective and genuine link with the country of citizenship acquires a normative value in the philosophical debate and becomes a principle that justifies and explains how citizenship ought to be distributed. The root of this principle is usually found in the Nottebohm judgement of 1955 and in the definition of an effective link given by the International Court of Justice, which considers nationality as a legal bond based on “a social fact of attachment”²⁴⁴ and a “genuine connection of existence”. The person receiving such a nationality is connected to the state conferring that nationality more than to any other state.²⁴⁵ Bauböck and Vesco Paskalev, among others, state that the “genuine link” is the preferred normative principle for establishing citizenship status and membership: Bauböck believes that states should avoid under-inclusion as well as over-inclusion, and that

²⁴¹ Orgad Liav. 2017. “Naturalization” in Shachar, Ayelet, Rainer Bauböck, Irene Bloemraad and Marteen Vink, (eds). *The Oxford Handbook of Citizenship*. Oxford: OUP, pp.351-352.

²⁴² See also Stadlmair, Jeremias. 2018. “Earning Citizenship. Economic Criteria for Naturalisation in Nine EU Countries.” *Journal of Contemporary European Studies* 26(1): 42-63; Sredanovic, Djordje. 2018. “(Un)Preferential Treatment: ‘Special’ and Particularistic Citizenship Norms in the EU28, 1992-2015.” *Journal of Contemporary European Studies* 26(1): 12–27; Sredanovic, Djordje and Jeremias Stadlmair. 2018. “Introduction: Trends Towards Particularism in European Citizenship Policies.” *Journal of Contemporary European Studies* 26(1): 1–11.

²⁴³ Jensen, Kristian Kriegbaum, Per Mouritsen, Emily Cochran Bech and Tore Vincents Olsen. 2019. “Roadblocks to Citizenship: Selection Effects of Restrictive Naturalisation Rules.” *Journal of Ethnic and Migration Studies*: 1-19, 17.

²⁴⁴ The Nottebohm Case (Liechtenstein v. Guatemala) International Court of Justice April 6, 1955, ICJ 4.

²⁴⁵ However, other scholars have highlighted the fact that such a judgement has been contradicted by the European Court in the Rottman case, ruling that in case of disputed nationalities, European citizenship should be protected. In this case, the idea of maintaining the bundle of rights that people have thanks to their European citizenship (regardless of which EU nationality they hold) prevails over the principle of the genuine link. See Nalin, Egeria. 2011. “Riforma della Legge Italiana sulla Cittadinanza e Diritto dell’Unione Europea” in Triggiani, Ennio (ed). *Le Nuove Frontiere della Cittadinanza Europea*. Bari: Cacucci editore, p.167. I think that within the political theory of migration the criterion of the genuine link cannot be fully justified by appealing to a legal judgement. This is because it could be modified or even contradicted by other succeeding judgements and it is open to interpretation; in this case, some philosophical foundation is needed.

to avoid over-inclusion, the genuine link is the right normative instrument, preventing persons without an adequate claim to citizenship from applying.²⁴⁶

A further argument for establishing strict criteria for acquiring citizenship is that some criteria might be needed to foster political participation. This might be justified by the fact that citizenship is not only social and civil membership, but also political one. While other types of membership, such as permanent residence or guest worker status, might be social or civil, citizenship is intrinsically political and, given the constitutively political nature of legal citizenship, some requirements could be justified in terms of fostering political participation. In this way, the criteria might not aim at selecting would-be citizens in an unfair way, but rather encourage the acquisition of the skills needed for fostering political participation, such as language skills and knowledge of the country's political system.

However, even though some skills are required for political participation and the latter is a constitutive characteristic of the meaning of citizenship, criteria for sorting membership out in an indirect way are not neutral. Therefore, in the case of both the genuine link and political participation, the criteria for naturalization tend to advantage certain type of applicants.

First, the idea of a genuine or effective link with a country assumes the existence of a dominant culture within multicultural societies and it is to *that* dominant culture that the immigrant is required to demonstrate her allegiance. This is demonstrated, for instance, by the *uniformity* of criteria for selecting citizens, distinguishing prima facie between 'stronger' and 'weaker' applicants. Indeed, first such criteria advantage those applicants who have some kind of former cultural similarity with the country in terms of the dominant narrative about linguistic, political and historical knowledge; secondly, they advantage highly-skilled applicants. These groups constitute the category of the stronger applicants. Weaker applicants are those who do not fit such criteria, such as applicants that do not come from countries with some kind of cultural affinity (according to what is considered the "right" cultural affinity), low-skilled workers or people who are not involved in the job market. The deliberate choice of states to apply a standardized selection based on the *uniformity* of the

²⁴⁶ Bauböck, Rainer and Vesco Paskalev. 2015. "Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation." *Georgetown Immigration Law Journal* 30(1): 47–104.

criteria ends up favouring some over others. For instance, in the UK, citizens that are English native speakers like those of (mostly) white countries of the commonwealth are relatively advantaged in terms of cultural affinity with the dominant narrative about “British values”. On the other hand, in the EU freedom of movement (and stay) for EU citizens reduces their need to apply for naturalization in other EU countries; therefore, hardening the criteria for naturalization affects third-country nationals (non-EU citizens) almost exclusively. In both cases, restricted criteria for naturalization are indirectly racialized. Moreover, the more citizenship becomes a requirement before one can access vital goods and rights, the weaker the condition of the individual who does not hold citizenship status in the state she lives in. If states are left to decide about the rights of non-citizens (with little or no international constraint), this creates a risky situation for individuals who do not hold a legal citizenship status in the country in which they live. Indeed, states can weaken or strengthen the stability of the status of non-citizens and they can apply indirect discriminatory strategies.

A way to offer a fair share of membership to weaker applicant would be, for instance, to provide additional opportunities for the acquisition of language skills or cutting the costs of the fee for the application, especially for applicants that are not involved in the job market and for those in low-skilled jobs. Instead, the criteria for naturalization advantages those who have a stronger involvement in the job market in a situation in which naturalization has been increasingly linked to substantial financial criteria. This makes the application more difficult for those who have less chance to be active members of the society. Indeed, requirements such as “good character” and financial security tend to advantage people who fit the model of the “hard-working immigrants”.

On the other hand, Joseph Carens argues that if we examine the acquisition of citizenship from a liberal perspective, the only acceptable test is none. Similarly, I start from the point of view that a person that is applying for citizenship is also thereby agreeing to the normative and political framework of that society, therefore no test is needed. Indeed, the choice of applying already represents an act of recognition of the legal and political system that is at the origin of the same application which implicitly recognizes a system of laws and social and political structures. The request for participation by new members implies the acceptance of the polity’s rules. If I ask to become a member of a democratic state I am

accepting the formal existence of democracy. This fact does not mean that I have to believe in democracy as a just or as the best form of government, but it implies that I have to formally recognize its legitimacy and respect its rules. Once I am a member of the state then I am free to move into the democratic rules in order to agree with other citizens to appeal for a change of the state rules. When I accept becoming a new member of a state I am at the same time expressing my agreement with the social contract and the laws of that particular state (new members are, paradoxically, the only members that actually have the chance to express their consent to the state). Therefore, in this perspective, no test is needed.

4.5 Unconditional *jus soli*

This section focuses on the implications of modifying the legislation for the acquisition of citizenship through unconditional (or pure) *jus soli*. This is a citizenship status acquired by birth through the right of the soil (right acquired by place of birth) without any additional criterion to fulfil (such as parental citizenship). Modifying conditions to *jus soli* are usually linked to the citizenship status of the parents of the newborn and their length of residence in the country to which they are applying for citizenship. Some countries grant *jus soli* citizenship if one of the parents was born in the country (double *jus soli*) or if one of the parents was born in the country and also resided there for a certain period of time (conditional double *jus soli*). Some other countries require parents who are foreign citizens to have been resident in the country for some time but do not require that they have acquired citizenship (conditional *jus soli*). In this section I focus on *jus soli* rather than *jus sanguinis* (citizenship by blood) because changes in *jus soli* have restricted the chances of getting citizenship for the children of immigrants, while such changes do not affect other members of the political community who get membership by descent.

There has been a trend in many countries towards the end of unconditional *jus soli*, in favour of more conditional ways of acquiring citizenship. In recent decades, states of the EU have seen the end of unconditional *jus soli* policies for would-be citizens and many states

have changed their legislation. Consequently, in the EU and the UK,²⁴⁷ the procedure for acquiring citizenship through unconditional *jus soli* has been revoked by all member states, replacing it with a mixed regime of *jus sanguinis* and conditional *jus soli*. Countries such as France, Australia, New Zealand and others, which had a strong tradition of pure *jus soli*, have revoked the laws about unconditional *jus soli* while they have reinforced forms of conditional territorial birthright.²⁴⁸ The UK changed its legislation in 1981: unconditional *jus soli* was abolished for children of temporary or irregular migrants by the British Nationality Act. Those born after that time must prove their parents' immigration status at the time of birth in order to obtain or renew a passport. The last state to abolish unconditional *jus soli* in the EU was Ireland in 2004. The US retains, for now, unconditional *jus soli*; however, the exacerbation of the debate in the public sphere around children born to undocumented mothers defined with the cynical 'anchor babies'²⁴⁹ shows how unpopular the practice of unconditional *jus soli* has become.

Scholars have considered pure *jus soli* over-inclusive and *jus sanguinis* under-inclusive. For instance, Joppke argues that European democracies have shifted toward a mixed regime that includes elements of both blood and soil in order to avoid under-inclusion or over-inclusion.²⁵⁰ Honohan argues that *jus sanguinis* and *jus soli* can be over-inclusive; and, for this reason states tend to converge towards a mixed regime of both criteria (blood and soil).²⁵¹ She argues that states previously based exclusively on *jus sanguinis* have introduced patterns

²⁴⁷ Unconditional *jus soli* was abolished for children of temporary or irregular migrants by the British Nationality Act (1981). Those born later must prove their parents' immigration status at the time of birth in order to obtain or renew a passport. The British nationality act states that a person born in the UK acquires British citizenship if at the time of birth their father or mother is a British citizen or if their parents are permanent residents in the UK under EU legislation or they have indefinite leave to remain. The US has maintained the pure *jus soli* tradition; however, in case of illegal immigrants, citizenship given to children does not grant residence status to their parents. See Sawyer, Caroline and Helena Wray. 2014. *Country Report: United Kingdom*. EUDO Citizenship Observatory Country Reports. Available at: <http://hdl.handle.net/1814/33839>

²⁴⁸ Honohan, Iseult. 2011. *Ius Soli Citizenship*. EUDO Citizenship, Policy Briefs. Available at: <http://hdl.handle.net/1814/51624>; Honohan, Iseult. 2010. *The Theory and Politics of Ius Soli*. EUDO Citizenship Observatory Comparative Reports. Available at: <http://hdl.handle.net/1814/19574>; Vink, Maarten P. and Gerard-René De Groot. 2010. *Birthright Citizenship: Trends and Regulations in Europe*. EUDO Citizenship Observatory Comparative Report. Available at: <https://ssrn.com/abstract=1714975>; Bauböck, Rainer, Ersbøll, Eva, Groenendijk, Kees and Harald Waldrauch (eds). 2006. *Acquisition and Loss of Nationality: Policies and Trends in 15 European States. Volume 1, Comparative Analyses*. Amsterdam: Amsterdam University Press.

²⁴⁹ Chavez, Leo R. 2017. *Anchor Babies and the Challenge of Birthright Citizenship*. Stanford CA: Stanford University Press.

²⁵⁰ Joppke, Christian. 2010. *Citizenship and Immigration*. Cambridge: Polity Press.

²⁵¹ Honohan, *Ius Soli Citizenship*, pp.3 and 5.

of *jus soli*; on the other hand, countries based on pure *jus soli* have introduced restrictions under pressure of immigration. Honohan argues that the inclusiveness of territorial birthright depends on which form it assumes; on its discretionary application, often related to the presence of a centre or left-wing government; and other additional criteria imposed on conditional *jus soli*.²⁵²

Within this framework, the criterion of the genuine link, assumed to be the normative ground for citizenship, can be highly exclusionary though delegitimizing practices that do not fit with such a criterion, such as unconditional *jus soli* which becomes, therefore, an over-inclusive membership status. The exclusion of unconditional *jus soli* contributes to maintaining citizenship by descent as the privileged way to acquire citizenship. In this case it is worth outlining that unconditional *jus soli* is independent of any preference about identity, religion, cultural background and language: it guarantees citizenship to whomever happens to be born in the country without any additional criteria, even to a child of illegal immigrants. Unconditional *jus soli* does not allow the state to select members according to their cultural and linguistic background and it forces states to accept as a citizen whomever is born within its territory. In such a case, the restrictions imposed on unconditional *jus soli* guarantee not only the restriction of the number of members included but also the chance to choose the “right” migrants. Far from being a criterion of justice, the genuine link is a criterion of selection that restricts the chance of gaining membership for the most disadvantaged, the uneducated, the poorest and the undocumented.

4.6 Denationalization

Within liberal democracies, the recent increase of migration and mobility has been accompanied by the tightening of criteria to acquire membership and an increase in the practice of citizenship deprivation.²⁵³ On the grounds of protecting the state from terrorism,

²⁵² Honohan, *Ius Soli Citizenship*, pp.17 and 23.

²⁵³ Several articles have been published on citizenship revocation, offering an overview of normative approaches to citizenship and denationalization, and showing how political theory develops different perspectives of the political community and how this influences their approach to citizenship deprivation. See Gibney, Matthew J. 2019 (online). “Denationalisation and Discrimination.” *Journal of Ethnic and Migration Studies* 46(12): 2551-68; Gibney, Matthew J. 2013. “‘A Very Transcendental Power’: Denaturalisation and the Liberalisation of Citizenship

in recent decades several Western liberal democracies have implemented laws for the revocation of citizenship.²⁵⁴ For instance, countries such as Australia, France, and Britain have introduced policies to revoke citizenship for naturalized citizens, native-born dual citizens, and would-be dual nationals, if they act against the public good or the state. The Australian Citizenship Act 2007 considers the revocation of citizenship to be applicable if an individual is “convicted of a serious criminal offence at any time before becoming a citizen involving a sentence of death or 12 months or more”. Similarly, Britain allows for anyone who, in the judgement of the British government, acts against the public good and is *entitled* to another citizenship, to be deprived of their citizenship.

These norms for deprivation often refer to dual citizens. Indeed, in the international framework, the legislation against statelessness normatively creates a limit to state power over membership revocation and weakens the idea that the state is the only holder of membership distribution and revocation.²⁵⁵ In such a case, the international community could be considered an actor that breaks the dichotomy citizen/state typical of the liberal model.²⁵⁶ As Sandra Mantu claims, statelessness is the “outer limit to states executive power on denationalization”.²⁵⁷ However, the normative focus on statelessness as a parameter for citizenship revocation leaves the door open to denationalization for whoever does not end up being recognized as stateless. Indeed, the legislation on statelessness does not forbid

in the United Kingdom.” *Political Studies* 61(3): 637–55; Gibney, Matthew J. 2013. “Should Citizenship Be Conditional? The Ethics of Denationalization.” *The Journal of Politics* 75(3): 646–58; Bauböck, Rainer and Vesco Paskalev. 2015. “Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation.” *Georgetown Immigration Law Journal* 30(1): 47–104; Barry, Christian and Luara Ferracioli. 2016. “Can Withdrawing Citizenship Be Justified?” *Political Studies* 64(4): 1055–70; Mantu, Sandra. 2014. “Citizenship Deprivation in the United Kingdom: Statelessness and Terrorism.” *Tilburg Law Review* 19(1-2): 163–70; Mantu, Sandra. 2015. *Contingent citizenship: the Law and Practice of Citizenship Deprivation in International, European and National Perspectives*. Leiden, Boston: Brill Nijhoff.

²⁵⁴ Membership withdrawal relates to a state’s right to apply deportation. Indeed, the withdrawal of residence status might be considered a tool with which a state may enforce and facilitate deportation, rather than an end in itself.

²⁵⁵ There are three pieces of international regulation on statelessness: the Universal Declaration of Human Rights (1948), of which article 15 says that ‘Everyone has the right to a nationality’ and ‘No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality’; the Convention Relating to the Status of Stateless Persons of the United Nations (1954); and the Convention of Reduction of Statelessness of the United Nations (1961). In addition, see: UN High Commissioner for Refugees (UNHCR). 2010. *UNHCR and De Facto Statelessness*. Available at: <https://www.refworld.org/docid/4bbf387d2.html>, p.26.

²⁵⁶ For instance, the Convention of 1961 rejects any law or procedure that allows arbitrary deprivation of nationality; but, in recent years the interpretation of such arbitrariness has become more extensive. In the UK, policies about deprivation of citizenship are applied not only to persons already in possession of another citizenship but also to persons only potentially able to get another citizenship in the future.

²⁵⁷ Mantu, “Citizenship Deprivation in the United Kingdom”, p.163.

denationalization: it forbids statelessness. The question is that the condition of lacking a nationality and the condition of being recognized as lacking a nationality are two different things: the fact of being recognized as *de jure* or *de facto*²⁵⁸ stateless according to international Conventions differs from the fact of actually lacking a nationality and not being able to claim stateless status or not be treated as a stateless person. Moreover, often the burden to prove statelessness is on the individual. In this way, the Convention of Reduction of Statelessness of the United Nations ends up protecting only mono citizens and *de jure* stateless persons, but does not protect dual citizens or potential dual citizens from denationalization.

Deprivation of citizenship and the prohibition of *de jure* statelessness are in a kind of dyadic relationship: on the one hand, the norms against statelessness represent the moral boundary against revocation of citizenship; on the other hand, denationalization laws for dual citizenship arise in the space left undetermined (a regulatory gap) between international norms against statelessness and the national norms for citizenship; which means that denationalization is not regulated by international norms with the exception of statelessness and with all other cases left in the hands of national states. This regulatory gap in international legislation gives great freedom to states in the application of denationalization laws and this happens both through national legislation and the controversial use of bureaucratic procedures. In this situation, the norm against statelessness could end up being a very weak constraint against the power of the state to deprive people of citizenship.

Given the boundary of statelessness, then, denationalization is applied to dual citizens.²⁵⁹ Gibney argues that, from a liberal perspective, the application of denationalization laws to naturalized and dual citizenship raises concerns about fairness and equality between fellow citizens and creates a group of second-class citizens.²⁶⁰ However, Gibney also

²⁵⁸ The Convention Relating to the Status of Stateless Persons of 1954 states that “the term ‘stateless person’ means a person who is not considered as a national by any state”. The UNHCR has also given a traditional definition of *de facto* statelessness: individuals who lack the protection of their own state because they are outside its boundaries. The UNHCR has also stated that *de facto* and *de jure* statelessness must be treated in the same way. According to such definitions, *de jure* statelessness has been forbidden by international conventions and the end of *de facto* statelessness is considered a matter of global justice.

²⁵⁹ Almost all EU states have some provision on denationalization, either for disloyalty or fraudulent acquisition. For a full database on the loss of citizenship see Luk, Ngo Chun and Maarten Peter Vink. 2014. *Statistical Database on Loss of Citizenship*. EUI Research Data, Robert Schuman Centre for Advanced Studies. Available at: <http://hdl.handle.net/1814/64602>.

²⁶⁰ Gibney, “Should Citizenship Be Conditional?”, p.13.

distinguishes between the law and its enforcement and he highlights the role of discrimination in the application of denationalization. He argues that the great emphasis put on Islamist terrorism as the biggest threat to liberal democracies “might itself be grounded in a prejudice against Muslims”. He also argues that the power of denationalization has been applied to cases of severe crime committed by Asian men in the UK. The grounds for denationalization in such cases were considered to be the lack of adherence to the public good and to British values. Within his analysis, Gibney aims to demonstrate that denationalization is de facto implemented in a discriminatory way against naturalized citizens from Muslim countries.

This example shows that in the UK there has been an important shift within the application of denationalization law from political crime (terrorism) to general crime. Traditionally, denationalization fits with the old concept of political treason, in which denationalization is considered an appropriate punishment for a crime that is fundamentally political (even though it might also need to be justified as to why another state should take the burden of such denationalization).²⁶¹ By contrast, non-political crime (a crime that does not have political goals) has traditionally been considered a crime that starts and ends *within* the territory of the state, without questioning or investigating the membership of the convicted person to such a state; therefore, general crime is not linked with the citizenship status of the convicted person within the polity, indeed, criminal law is usually linked to territory, not to nationality. Also, foreign wrongdoers are subject to the law of the state in which they committed the crime, regardless of the citizenship they hold. The decision of the UK government to extend the type of penalty applied for a political crime as a punishment to be applied to general crime raises many questions about the extension of the power of the state over its citizens and the proportionality of the punishment. It has the effect of selecting the group of dual citizens as the recipients of such a norm; it makes every dual citizen a potential denationalized person. This does not fit with the basic democratic understanding of citizenship and the polity. In this case, the argument that the exceptions are mono-citizens because they cannot be made stateless works only if we consider the democratic state a Leviathan that, at its own discretion, can decide that all of its citizens who commit any crime

²⁶¹ Voltaire argues that banishment is “like throwing into a neighbour’s field the stones that incommode us in our own”. He underlines the fact that the state has the duty to take charge of its own citizen who have committed crimes and it cannot give such a responsibility to a neighbouring country.

can be deprived of their status. If not, as Gibney outlines, these laws single out the group of dual nationals. The discretionary understanding of what it means to act “against the *public good*” has led to a trend in which denationalization, and consequent deportation, have normatively established the precariousness of dual citizenship and foreign ancestry.

Finally, it would be worth investigating if the use of discretion in the application of denationalization for political and general crime that is focused on citizens of Asian origin is part of an extensive approach to racialization of the citizenry that includes other groups. For instance, a further extension of the process of removal has been the deportation of people not only for crimes but also for petty bureaucratic reasons for which the state is mainly responsible, as in the case of the Windrush generation, where people of Caribbean origin have been deported to the Caribbean after spending most of their lives in the UK. There is, therefore, more to investigate about the role of racialization in the hardening of the criteria for accessing membership and in the degeneration in the practices of removal and deportation of internal members.

4.7 Challenges

The chapter has explored how membership within liberal democracies has been characterized on the one hand by (mono) citizenship and on the other by a number of other types of membership (guest worker, permanent resident, spouse visa, naturalization, dual citizenship) that are far less consistent than mono-citizenship in protecting rights and that show a very sophisticated hierarchy of statuses within the polity. I believe that different degrees of membership with different degrees of rights create a constant state of tension between individual agency, freedom of choice, and the membership held by an individual. Indeed, the possibility to move from one membership status to another does not depend on individual agency but on governmental policies. Moreover, different memberships in liberal democracies are in constant tension between each other because they are not equally valuable and some of them have power over the others.

At the root of the hierarchy of precarious memberships is a discriminatory bias about the possibility of becoming one of *us* and this trend has increased in recent years. In particular,

within contemporary Western liberal democracies, the desire to exclude the poor, culturally or religious minorities (especially Muslims) and the low-skilled is evident in changes applied to policies for the acquisition of citizenship. With the rise of nationalism in the public debate and in the political sphere the additional criteria imposed onto the process of naturalization come as no surprise, as well as the end in many countries of birthright citizenship through unconditional *jus soli* for the children of foreigners and the implementation of citizenship revocation for dual citizens.

These aspects of citizenship are usually analysed separately, but I argue that they are aspects of the same process in which access to membership (naturalization), the reproductive sphere (*jus soli*) and the chances of losing membership (denationalization) affect all aspects of the life of the would-be citizen, which means it predictably affects citizens also identified as of non-white descent in most liberal democracies that have applied such legislation. The existence of such a hierarchy of membership in which people must fit into one category or another according to the choice of the state is due to state unilateral control of membership and the absence of a human right to freedom of movement (freedom of immigration). Such absence gives the state the discretion to put some people at the top of the hierarchy of membership and others at the bottom, without having to morally respond to the inequality of rights that results.

Such unilateral control of immigration is highly problematic because of its arbitrary distribution of degrees of rights among people of different nationalities. Indeed, the prohibition of legal wrongful discrimination does not prevent the application of other forms of wrongful discrimination.²⁶²

This fragmentation of membership is ethically and normatively problematic. The thesis argues that freedom of movement is needed to guarantee basic rights for whomever does not hold a strong membership status. As the chapter has showed, the differentiation of membership statuses and the risk of statelessness are reinforced by the border system creating precarious statuses and conditions of membership. By contrast, freedom of movement would improve justice for all these categories of precarious members within states. It limits the coercive power of the state against the individual in terms of membership

²⁶² Issues of wrongful discrimination are examined in Chapter Five.

and it limits the coercive power of the state in case of citizenship deprivation, family reunification, and the racialization and gender discrimination at borders. This is because, as in the EU, the freedom to enter and stay would nullify the need to apply for any precarious membership statuses and reinforce the real meaning of citizenship that is essentially a political membership.

Several scholars argue for more open borders in an attempt to reconcile the right of the state to distribute membership with a person's basic rights. Seyla Benhabib tries to reconcile the contradiction between democratic membership and human rights by arguing for *porous borders*.²⁶³ In an attempt to balance human rights and self-determination, a theory of porous borders aims to give "first-admittance rights for refugees and asylum seekers" while keeping the right of democracies to govern the process of membership. Benhabib is concerned that a fully open border policy would nullify the role of democratic institutions and at the same time aims to address issues of human rights that are at stake with national sovereignty. The question is whether open borders (i.e. unregulated or minimally regulated freedom of movement) would challenge democratic institutions. While Benhabib counterpoises empires and democracies as characterized by size and distinguishes between the frontiers of the empire and the borders of democracy, she seems to be arguing that democracy needs a limited size and defined borders to maintain itself.²⁶⁴

Sarah Song believes that democratic self-determination (in which members have an equal say in decisions that affect their lives) requires a stable infrastructure and a relation of trust among people who share a common identity. Song argues that immigration is a challenge to this trust and shared identity.²⁶⁵ However, Song does not consider the notion that a fundamental characteristic of democratic self-determination is to be open to new participants and new values and countries are not culturally and socially defined once and for all.

On the other hand, perhaps the solution could be found through aggregation into larger institutions, for instance by empowering transnational structures that take control of the shared borders, as in the EU and as may be happening in the African Union. However, the

²⁶³ Benhabib, *The Rights of Others*, p.220.

²⁶⁴ Benhabib, *The Rights of Others*, p.220.

²⁶⁵ Song, *Immigration and Democracy*, pp.67-69.

point is not about transferring control of the border from one institution to another, but whether freedom of movement challenges democratic institutions or if freedom of movement as a human right overrides the borders of nation states. From this point, the thesis argues that a human right to freedom of movement is needed because liberal democracies and other states have failed to address the fairness and justice of membership: a human right to freedom of movement is therefore needed in order to balance the power of the state in granting and revoking membership.

4.8 Conclusion

In conclusion, this chapter has argued that restrictions on citizenship acquisition, the fragmentation of membership, and the implementation of citizenship deprivation are all aspects of the same process of making membership more precarious and temporary according to the needs of the nation state.

In particular this chapter has argued that membership in liberal democracies is stratified in order to favour the skilled, cultural similarity, the person able to invest in the economy. At the bottom of this stratification there are those who are undocumented, asylum seekers at risk of deportation and those employed in low-skilled jobs with precarious memberships. Moreover, there is also a stratification of citizenship in which the mono-citizen by ancestry find herself in a better position than dual-citizens or naturalized citizens. Indeed, three processes have been examined: first, the hardening of the criteria to acquire citizenship through naturalization, especially based on the applicant's ability to demonstrate her genuine link with the country according to standardised criteria; second, the end of the practice of unconditional *jus soli* in all European countries that would have given citizenship to the children of immigrants and its substitution with a variety of mixed criteria related to the immigrant or citizenship statuses of the parents; third, the practice of denationalization of dual citizens which, for instance in the UK, has passed from being applied as punishment for political treason to be applied as additional punishment in more general terms (as for acting against the public good), finally, denationalisation is applied for bureaucratic reasons against the "Windrush generation". These three processes show that the state has decided to extend its powers in the civil and political birth (acquisition of citizenship) and death (loss of citizenship) of its citizens.

This puts persons' basic rights at risk of being fragmented and temporalized in the same way as their membership. A human right to immigrate would remove the unfairness of precarious membership. My argument is that the selection of would-be members at the border of political societies and within them are inherently discriminatory and therefore also normatively discriminatory.

This justifies the need for a human right to freedom of movement. In order to develop this argument, in this chapter I have examined the practice of the acquisition and deprivation of membership within liberal democracies. In the next chapter I will examine the practice of membership selection at the borders of liberal democracies, focusing on racialization and gender issues at the border.

CHAPTER FIVE. FOR A HUMAN RIGHT TO FREEDOM OF MOVEMENT: RACIALIZATION AND GENDER

5.1 Introduction

This chapter investigates the border of the polity as discriminatory, both in terms of gender and racialization, and argues that these factors make a human right to immigrate urgently needed. The previous chapter has examined the “*border within*” and highlighted the constitutive unfairness and inequality of membership within liberal democracies, given that inequality of membership statuses is a structural aspect of any system formed by citizens and non-citizens. The previous chapter considered this an argument in favour of a human right to freedom of movement. By contrast, this chapter examines the racialization and gender discrimination of the external border and argues that a human right to freedom of movement is needed because selection at the border is not neutral, and the border is structurally discriminatory.

The non-ideal methodology of this chapter is unfolded through the critique of ideal theory as raceless on the one hand (the abstract individual of liberal theory) and the fact that such philosophical theorization actually presupposes the white male as the centre of the political society on the other. The chapter focuses especially on Mills’s critique of ideal theory as a framework for racial domination and it applies such a critique to the philosophy of migration. The goal is to show how the non-ideal racial discourse that Mills develops in its analysis of the social contract can also be applied to the analysis of discrimination in migration. Moreover, this chapter focuses on wrongful gender discrimination in migration. The chapter’s non-ideal focus is about challenging the idealized assumptions within political theory that emigration is allowed and immigration is not, as this changes according to gender.

This chapter is divided into two parts. The first examines the racialization of the border and begins by offering a definition of racialization (section 5.2). Subsequently, inspired by Charles Mills’s definition of the racial contract, this chapter will argue against “raceless” philosophical analysis of the borders within migration theory in which processes of borders’ racialization and racism are overlooked (section 5.3). In section 5.4 I shall argue that borders

are both a tool for maintaining historical racialization patterns and simultaneously intrinsically racialized. Therefore (section 5.5) I argue that some have a de facto right to immigrate while others are excluded.

The second part of this chapter (section 5.6) explores the border as instrumental to maintaining stereotypical gender constructions that channel migrant agency into assigned gender roles and reproduce patterns of inequality and subordination, in particular for female migrants. Section 5.7 examines emigration and admission, focusing on gender in non-ideal theory, and finally argues that unilateral state control of borders reinforces stereotypical gender roles rather than recognising gender identity.

5.2 A definition of racialization

I explore a possible philosophical thread of analysis about racialization and migration: starting from Charles Mills's theory of the racial contract, I explore whether the border of the political association is intrinsically racialized, and therefore intrinsically discriminatory, and I argue that, if so, this necessitates a human right to freedom of movement.²⁶⁶ Within the political philosophy of migration, there are few philosophical works that focus on the links between racialization and migration.²⁶⁷ In particular, overlooking the issue of racialization within the political philosophy of migration has been highlighted by Sarah Fine, who argues that, within philosophical work on migration and membership, racial and ethnic discrimination are usually briefly mentioned with the aim of excluding them from the main arguments under consideration.²⁶⁸ Fine explains that racism, as well as racial and ethnic discrimination, historically played a crucial role in the determination of immigration policies and this discrimination is embedded in the history of migration.

Despite this, racism and ethnic discrimination are not at the forefront of the philosophical analysis in migration. Fine argues that philosophers who claim the right of the state to unilateral control the border cannot distance themselves from the history of discrimination in migration through quickly ruling out discrimination from their arguments on

²⁶⁶ Mills, *The Racial Contract*.

²⁶⁷ On this topic see Fine, "Immigration and Discrimination"; Owen, "Migration, Structural Injustice and Domination"; Gibney, "Denationalisation and Discrimination".

²⁶⁸ Fine, "Immigration and Discrimination", p.126.

border control.²⁶⁹ The role of racialization has also been explored by David Owen,²⁷⁰ who argues that the "dispersed" global governance of migration is based on the pivotal role of states in border control and this reproduces structural injustice in migration. A further example of such discriminatory policies is analysed by Matthew Gibney²⁷¹ who discusses denaturalization and denationalization policies that implement racialized bias, for instance, against persons of Muslim background. Taking account of these works, this chapter contributes to the literature on migration and racialization within the political philosophy of migration.

Before discussing racialization and migration, a definition of the term racialization is needed. This section does not aim to offer a complete account of racialization, with its ambivalences and complexity; instead, it aims to highlight some elements of the development of the concept of racialization that might support a definition that is useful for the purpose of this chapter. The concept of racialization is used across disciplines such as political theory, social sciences and cultural studies.²⁷² The link between racialization, wrongful discrimination and migration is well-known in social sciences, where several scholars have shown how the influence of racialization and discrimination have shaped (and continue to shape) migration practices. Scholars usually trace the first definition of racialization back to Frantz Fanon²⁷³ and his analysis of the "racialization of thought". Fanon argues that colonialism (he is referring to the African continent specifically) is not satisfied by imposing its own rule, but "it turns to the past of the oppressed people, and distorts, disfigures, and destroys it. This work of devaluing pre-colonial history takes on a dialectical significance" in which colonialism comes to "lighten their darkness" and establishes the belief that without colonialism, darkness will come back.²⁷⁴ Fanon argues that through the process of racialization of thought, the native past is

²⁶⁹ Fine, "Immigration and Discrimination", p.136.

²⁷⁰ Owen, "Migration, Structural Injustice and Domination".

²⁷¹ Gibney, "Denationalization and Discrimination".

²⁷² On racialization in the field of the social sciences see Miles, Robert. 1993. *Racism After 'Race Relations'*. London: Routledge; Σολωμός, Ιωάννης, John Solomos and John Wrench. 1993. *Racism and Migration in Western Europe*. Oxford: Berg; Small, Stephen. 1994. *Racialized Barriers: The Black Experience in the United States and England in the 1980s*. London: Routledge; Murji, Karim and John Solomos (eds). 2005. *Racialization: Studies in Theory and Practice*. Oxford: OUP; Shantz, Jeff. 2010. *Racism and Borders: Representation, Repression, Resistance*. New York: Algora Publishing; Grosfoguel Ramon, Oso Laura and Anastasia Christou. 2015. "Racism', Intersectionality and Migration Studies: Framing some Theoretical Reflections." *Identities* 22(6): 635-652.

²⁷³ Fanon, Frantz. 2004 [1961]. *The Wretched of the Earth*. New York: Grove Press.

²⁷⁴ Fanon, *The Wretched*, p.211.

eroded until its inexistence is established; and then it is replaced by colonial ideology. As a consequence, Fanon argues that “the native intellectual” has the task of responding to such erosion of culture. In this case, intellectuals cannot focus on national cultures, but need to answer within the unchosen and imposed colonial paradigm of Africa as a whole because, Fanon argues, native intellectuals must first demonstrate that any African culture existed in the first place. The dialectical aspect of the definition of racialization of thought about defining the self through the other passed on to the social sciences; for instance, Stephen Small²⁷⁵ considers racialization as an historical process of attribution, while Robert Miles defines racialization “a dialectical process of signification” in which the fact of “ascribing real or imagined biological characteristics” that aim to define the other, unavoidably also define the self.²⁷⁶

Disciplines in the social sciences tend to distinguish between racialization and ethnicization and to separate biological attribution and cultural, linguistic, religious factors of wrongful discrimination. In philosophy, Charles Mills defines *cultural racism* as the condition of granting some sort of epistemic membership “based on the extent to which non-whites show themselves capable of mastering white Western culture”.²⁷⁷ Taking into account these interdisciplinary definitions of racialization, I refer to the racialization of the borders in migration as a process related both to racism and cultural racism. The concept of racialization refers to the *act* of racializing and thus highlights dialectical *processes* of racial construction. Such dialectical processes of racialization imply that while some are excluded on racist or cultural racist grounds, others are included on the same grounds.

To sum up, the racialization of the borders in migration implies a dialectical process of inclusion and exclusion based on racism and cultural racism. In the following sections I shall examine philosophical approaches to the historical and contemporary condition of processes of racialization within the state unilateral control of borders. I shall argue that processes of racialization are intrinsic to the same institution of border control. Therefore, I disagree with the hypothesis that racialization and racism at the border are a dysfunction of a border system

²⁷⁵ Small, *Racialized Barriers*; Small, Stephen. 2001. “Racisms and Racialized Hostility at the Start of the New Millenium” in Solomos, John and David Theo Goldberg (eds), *Companion to Racial and Ethnic Studies*. Williston: Blackwell; Murji and Solomos, *Racialization: Studies in Theory and Practice*.

²⁷⁶ Miles, Robert, and Malcolm Brown. 2003 [1989]. *Racism*. London: Taylor & Francis, p.101.

²⁷⁷ Mills, *The Racial Contract*, p.61.

that would otherwise work, and I argue that state unilateral control of borders is intrinsically racialized and therefore a human right to freedom of movement is necessary.

5.3 A theorization of the intrinsic racialization of the border

My argument about the intrinsic racialization of the border is in debt to Charles Mills's theorization of the racial contract.²⁷⁸ Mills examines the racial contract within the polity. Starting from his categories of political analysis, I shall shift the focus to the analysis of racialization at the borders of the political association within migration political theory.

Mills's idea of the racial contract is inspired by the theory of the sexual contract developed by Carol Pateman.²⁷⁹ Discussing the tradition of the social contract theories of Locke, Rousseau and Kant, among others, Pateman argues that, according to social contract theory, rationality is recognized as a masculine capacity, which also defines the group of equal individuals who freely make the original contract; a group from which women were excluded given that they were also excluded from the capacity of being equal individuals. Pateman argues that the exclusion of women from the group of equals is based on the fact that prior to the social contract there is a sexual contract that is based on the subordination of women to men and the construction of patriarchy. She considers that this tradition has left "a legacy of problems about the incorporation" of women into society that are not yet resolved.²⁸⁰

In line with both Pateman's analysis of the sexual contract and feminist theory, Mills examines how the social contract, from Locke to Kant, has been set up to maintain racial oppression for the advantage of white men.²⁸¹ Mills discusses the modern tradition of the social contract theory as a normative and non-ideal framework for racial domination and his analysis focuses on the racial criteria for including/excluding members at the point of origin of the political community.

Within a framework of non-ideal theory, Mills discusses how the theory of the social contract supposes a raceless and abstract individual for the setting up of the political association.²⁸² He argues that the "theoretical disappearance of the body" presupposes that

²⁷⁸ Mills, *The Racial Contract*.

²⁷⁹ Pateman, Carol. 1988. *The Sexual Contract*. Cambridge: Polity Press.

²⁸⁰ Pateman, *The Sexual Contract*, p. x.

²⁸¹ Mills, *The Racial Contract*, pp.51-54.

²⁸² Mills, *The Racial Contract*, pp.51-54.

the body is the white male body;²⁸³ and, while the traditional narrative of the social contract supposes that all the pre-political *men* are involved in making the pact, these pre-political individuals are actually white men, white settlers in particular. The aim of the social contract is, therefore, according to Mills, to distinguish the socio-political white men from the non-political condition of the non-white ones. This is because “being a person, being white, meant- definitionally-not being a subperson, not having the qualities that dragged one down to the next ontological level” and, as in the case of women, the categories of person and subperson define themselves through each other. Therefore, the racial contract is essential to create and maintain whiteness and to make the political man, *the* man. On the other hand, as Frantz Fanon writes, “for not only must the black man be black; he must be black in relation to the white man...his inferiority comes into being through the other”.²⁸⁴

Mills says “the Racial contract is continually being rewritten to create different forms of the racial polity”;²⁸⁵ therefore, an ongoing racial polity is the consequence of this first racialization. Starting from this idea of an ongoing racial contract, I consider the racialization of the border as a continuation and form of the racial polity.²⁸⁶ Therefore, I shall examine the racialization at the borders of the political association and the racialization of migration as intrinsic to the same existence of the border and therefore a further aspect of an ongoing racial contract. Therefore, in the same way that the exclusion of individuals racialized as blacks from the original agreement by the white settlers was not casual (but the social contract was meant to be a racial contract), I argue that the border of the political association is inherently racialized. Saying that the border is inherently racialized implies that it is structurally conceived so as to exclude some persons on ethnic, cultural, historical, social or religious grounds. Therefore, the racialization of the border is a fundamental instrument with which to maintain the politics of exclusion. I focus on the way the external border racializes persons in mobility who wish to enter countries they are not citizens of, and thus in this chapter the focus is not on the *exclusionary within* but on the exclusion at the borders of memberships and territory.

²⁸³ Mills, *The Racial Contract*, p.13.

²⁸⁴ Fanon, Frantz. 2008 [1952]. *Black Skin, White Masks*. London: Pluto, pp.82-83.

²⁸⁵ Mills, *The Racial Contract*, p.72.

²⁸⁶ Mills, *The Racial Contract*, p.66.

Like the social contract that was made “raceless”,²⁸⁷ the concept of “racelessness” dominates the philosophical discourse in migration and, consequently, processes of racialization and racial discrimination are neglected within philosophical analysis. It is worth outlining that there are clear differences between the explicit and direct racist exclusion of persons within the racial contract (linked to the history of slavery and colonialism), the direct wrongful discrimination against certain groups in migration (represented, for instance, by the colour bar) and the contemporary indirect wrongful discrimination at the borders of the polity hidden by formal bureaucratic neutrality.²⁸⁸ Nevertheless, these different processes are all direct and indirect ways of selecting members through the criterion of racialization. Within this framework, the choice within the political theory of migration to largely overlook the question of racialization and racism has implications for the way migration restrictions can be justified. In particular, the choice not to discuss the racialization of the borders within migration contributes to neglecting the acknowledgement of the indirect politics of racial exclusion and thereby sanitizes the narrative about migration and wrongful discrimination to justify “neutral” selection processes.

5.4 Old and new racializations

Within migration theory, Mills’s critique of the raceless social contract can be applied to the analysis of the border of the political association; indeed, the raceless border is a way to keep the history of exploitation and colonialism at the periphery of the philosophical discourse in order to make migration neutral and “meritocratic”, according to various policies based on selecting members on the basis of cultural affinity, wealth or skills. In this case, philosophical decontextualization is not a neutral choice because it implies levelling historical injustices, processes of racialization, racism and “clearing” historical consciousness. Such processes allow freedom from historical responsibility and therefore enable an abstract moral discourse about selecting migrants at the borders of the polity. For instance, the defence of an abstract right to freedom of association in order to justify the regulation of migration is based on historical and political de-contextualization about how states were formed and their historical responsibilities. In this case, the passage from ideal theory (freedom of association) to realism

²⁸⁷ Mills, *The Racial Contract*, p.121.

²⁸⁸ Dumbrava, Costica, *Nationality, Citizenship and Ethno-Cultural Belonging*.

(e.g. the violation of such principles through colonialism, its contemporary systemic consequences as well as the inherent racialization of colonialism) is often dismissed in terms of duties and responsibilities in migration theory.

Another way to explore the racialization of the borders is through the analysis of principles like kinship and cultural homogeneity, which are employed to justify migration control. Walzer²⁸⁹ claims that citizens, in order to keep society homogeneous, can feel compelled to choose among outsiders who they recognize as “ethnic” relatives. He calls this the kinship principle. There are several aspects that could be discussed here, such as whether citizens have such a right to choose among outsiders at all; whether homogeneity is a principle to take into account in immigration policies; and what the racialization and racism of such policies implies. I shall focus on the latter and explore the problematic of racialization and racism within the selection of members according to ethnicity. In order to make ethnicity a selecting principle for membership, issues about “race”, racism and related harm must be sanitized: for Walzer to justify a selection made, for instance on the base of “whiteness”, he needs to make “whiteness” an unhistorical category in which racialization is a neutral and harmless factor, rather than the continuation of a long and global history of harm within the category of “whiteness”. For instance, applying Walzer’s categories of analysis to the white Australia policy, it seems that such categories must ignore the deliberate policies of the Australian government against the autochthonous Aboriginal population. Indeed, what happened in this case is that a dominant racial group employed racist practices in order to remain the dominant racial group. It requires considerable effort in ideal theory to read this perpetration of harm according to the philosophical category of homogeneity and kinship. In this case, kinship and homogeneity are not neutral categories of abstract political theory, but can support a system of racialization aimed at maintaining whiteness as a category of domination against other minority groups.

The double standard of the kinship principle, which on the one hand is made abstract and therefore “raceless” within ideal theory, and, on the other hand is deeply racialized, in an analysis within non-ideal theory is evident in multicultural societies in which the

²⁸⁹ Walzer, *Spheres of Justice*, pp.29-63.

application of such principles in selecting members is not neutral, but for the benefit of the dominant racial group. For instance, British policies that have increased the criteria to be met for marrying citizens of overseas countries (like requiring applicants to take tests or to earn a certain income) amounts to an application of a “kinship principle”, affecting mainly Muslim British citizens (usually of Pakistani descent) because they tend to marry transnationally more often than other groups. On the other hand, the UK, through the Ancestry Visa policy, also promotes the kinship principle for citizens of the Commonwealth who are able to prove that one of their grandparents was born in the UK. This formally impartial requirement mainly restricts the category of people who can apply for this immigration route to those with a white ancestry living in one of the countries of the Commonwealth with a majority white population. If we compare these two cases, we can see that the racialization of the kinship principle works in two ways: on the one hand there is a selection between white and non-white Commonwealth citizens and the chance to apply for certain visas is offered mainly to white citizens of the Commonwealth. On the other, British citizens of Muslim background face barriers if they try to marry transnationally according to the kinship principle.

The point is that the absence of a human right to freedom of movement has created a situation in which states have adapted to power relations, historical injustices and structures of domination. These factors are deeply racialized and wealthy (mostly) white countries facilitate reciprocal membership while excluding non-white people who thereby pay the consequences of historical structural injustices. Owen argues that dispersed control of migration by nation-states favours racialized and discriminatory approaches to migration, while a global governance of migration would end such discrimination. He argues that state unilateral control of voluntary migration is crucial for reproducing “racialized transnational patterns of exclusion, domination, subordination, exploitation, and marginalization between the citizens of advantaged states and those of disadvantaged states” that are rooted in both direct and indirect imperialism and racialized migration.²⁹⁰

I argue that wrongful discrimination in migration is both historical and structural. There are structural wrongful discriminations linked to colonialism and exploitation in which

²⁹⁰ Owen, *Migration Structural Injustice and Domination*, p.7.

the racist approach to migration reproduces the racist patterns of colonialism. Further, racialization and racism within migration exists also among groups that have not been in a relation of domination but which “become” subject to one through the migration process of border control and through exclusion from membership and citizenship. Indeed, migration is racialized also among groups that do not necessarily share a history of colonial domination or exploitation. For instance, Robert Miles demonstrated how migrant racialization in early twentieth century against Jewish refugees is not linked to some colonial past among two nations.²⁹¹ The same can be said for the exclusionary policies against Chinese and Southern European migrants in the early twentieth-century in the US. Moreover, Theresa Hayter has shown how policies about immigration have always been racist and discriminatory and that the only change through time is the identity of the targeted groups (Jews, Irish, Asian, Afro-Caribbean).²⁹² Therefore, these scholars show that racialization and racism are present in contexts of border control that become contexts of domination.²⁹³

Governmental policies for immigration control cannot openly favour individuals with specific racial characteristics, religion or culture over others because of the public commitment of liberal democracies to abide by human rights practices. As a consequence, the racialization of membership has to take the form of making borders soft for some and hard for others. For instance, in the course of recent efforts to fight terrorism, EU member states have suspended the Schengen agreement that guarantees freedom of movement among EU states, and have reintroduced border controls.²⁹⁴ Despite the fact that, according to the EU law, internal border control is allowed for a maximum of two years, it has been

²⁹¹ Solomos, *Racism and Migration in Western Europe*, p.211.

²⁹² Hayter, *Open Borders: The Case against Immigration Controls*. Hayter claims that borders are inherently racist because borders discriminate between native inhabitants and foreigners. As a possible solution, Hayter suggests open borders in terms of the extension of the model of EU freedom of movement. My thesis differs from Hayter’s empirical approach because, rather than starting from a contextual-dependent description of migration in the UK, my thesis explores the possibility of spelling out the racialization of borders and migration in conceptual terms starting from Mills’s racial contract; in particular, the analysis of borders’ racialization through the lens of Mills’s theory, highlights not only the historical and contemporary racialization of membership and borders, but also how, within liberal political theory, the abstract theorization of the neutral other at the borders represents an attempt to dismiss an uncomfortable past.

²⁹³ The rise of islamophobia during the build-up to the Brexit referendum can be exemplified by the emphasis on non-white (mostly Muslim) asylum seekers entering the EU. Even the Prime Minister, when asked about the Calais crisis in July 2015, spoke of a “swarm” of people crossing the Mediterranean seeking a better life in Britain. The UN Special Representative for International Migration accused politicians of adopting a “xenophobic response” to the migrant crisis and said their language had been “grossly excessive”, pp.17 and 19.

²⁹⁴ See https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en.

extended on grounds of security and fight against terrorism. Suspending the Schengen agreement has not been an impartial process and the border policing disproportionately targets non-white citizens. The controls at the borders between European states work twofold, making non-white persons feel unwelcome, giving them the sense that they should not be present and that they are occupying a space that is not meant for them. Frontier control makes EU white citizens feel that they are on the “right” side of the border: they can cross the border freely because they “should” be on the inside. While the “soft inside-hard outside” borders might make asylum seekers, refugees and immigrants believe at first that once they are in an EU country they will have freedom of movement, they are quickly disillusioned. While the controls at the border of EU countries are justified by a narrative against terrorism and mass migration, discretionary control of the borders is effectively used to send asylum seekers and undocumented migrants from one European country to another.

5.5 De facto right to immigrate, but only for some

The consequence of the racialization of the border is that it creates a *de facto* (partial) racialized right to immigrate for some while excluding others according to criteria influenced by racialization. As a result, some passports have become more powerful than others, and the absence of a legal human right to immigrate creates a *de facto* situation where some can live “as if” they hold a full human right to freedom of movement (the right to immigrate) that allows them to enter many countries (perhaps not all countries, but maybe the wealthiest), whereas others do not hold the “right” passport may have the right to enter just a few countries.

The border is a means of maintaining such structures and excluding the racialized other. Therefore, I think it is possible to distinguish a *de facto* (although not complete) right to immigrate for those who hold the *right* passport and the *right* racialization from an absence of such right for those who are racialized according to ethnic, cultural, religious backgrounds that states have unilaterally decided to be less desirable. This situation raises moral issues of wrongful discrimination that involve the violation of persons’ human rights. My argument is therefore that it is the absence of a human right to immigrate that creates the conditions for the violation of other persons’ human rights. Without a legal human right to immigrate, the political conditions allow some to have a *de facto* right to immigrate and others to be trapped

in countries often impoverished by colonialism and by informal colonial practices after colonialism ended. Consequently, a full human right to freedom of movement is morally necessary because it would end the racialization of a *de facto* right to immigrate.

It could be objected that a theory that supports open borders, freedom of movement and the global governance of migration, does not necessarily need to be grounded on human rights; nevertheless, a human right to freedom of movement offers a very strong grounds from which to address states' policies. Indeed, the global governance of migration and mobility without a strong principle at its roots might end up being shaped by national and international policies that can easily be driven by particularistic interests. Therefore, I argue that the application of open borders should be grounded on a strong moral recognition of international freedom of movement as a fundamental liberty; and this must be considered the moral cornerstone for the particular policies applied by states and international agreements. The absence of a human right to freedom of movement creates a situation in which some fortunate persons can move freely among a certain number of states while others have very limited freedom of movement.

Some scholars have presented a priority-based argument within freedom of movement (e.g. Wilcox) in which the right to freedom of movement is a reparative tool for structural injustice in terms of distributive justice. However, I think that, given that the border is intrinsically racialized and racist, a human right to freedom of movement *tout court* is necessary. In this case I believe that it is important to distinguish between a framework that implies a human right to freedom of movement for everyone and the prioritization of groups who have been victim of structural injustice. I think that such groups should have priority in exercising their human right to freedom of movement if there is an exceptional need to limit freedom of movement according to particular and exceptional circumstances. However, I think that a human right to freedom of movement, given that the border is intrinsically racialized, must be the norm.

5.6 Borders and Gender

The thesis considers a cluster of reasons for the necessity of a human right to freedom of movement within non-ideal theory. So far, I have argued that the discriminatory approach of the nation-state to membership within the border and the intrinsic racialization of the external border are two reasons justifying a human right to freedom of movement. This section explores issues about gender and the border, and I argue that a human right to freedom of movement is necessary for the global improvement of gender equality. I argue that the absence of a human right to freedom of movement contributes to the violation of gender equality as a human right, given that state unilateral control of the border exacerbates the problems of gender discrimination. Therefore, I believe that a human right to freedom of movement is a basic freedom that protects and enhances other human rights like gender equality. This section contributes to filling a gap in the philosophical discourse about gender and migration. Indeed, the political theory of migration has overlooked gender in its theorization about border control, membership and migration, which has strong implications for shaping the philosophical debate on mobility both in ideal and non-ideal theory.

Before starting this analysis, it is worth giving some terminological clarification. Gender is an interdisciplinary, multifaceted and complex concept and it is not the aim of this chapter to analyse this concept in depth, but I will seek a definition that works for the discussion of gender discrimination within migration. Feminist scholarship has strongly contributed to the rise of the concept of gender and to its distinction from biological sex; Simone de Beauvoir in *The Second Sex* famously says that women are *made and not born*, and they are made as *the other*.²⁹⁵ There are two important elements in this definition of what women are that are basic for defining the concept of gender: first, its difference from sex (a woman is made and not born); and second, the construction of gender as a relation based not only on difference but on inequality and subordination. Several subsequent definitions of gender (e.g. in the field of the social sciences) include these aspects. In this section, I understand gender as a social construction that includes cultural and social characteristics

²⁹⁵ Beauvoir de, Simone. 1989 [1949]. *The Second Sex*. New York: Vintage, p.273.

assigned to biological sexual differences;²⁹⁶ gender is a relational concept because not only does it refer to the characteristics assigned to persons, but such characteristics also define relations among people. It therefore implies the creation of gender roles, of social expectations according to gender assignment and the burdens and costs that such assignments might lead to. In this case, I need to distinguish between gender and gender-identity, which refers instead to gender self-identification separate from biological sex. This chapter does not investigate gender identity fully in relation to migration (even though it would be worth doing) but instead investigates how policies for closed borders play a role in maintaining gender discrimination, starting from gender as a category ascribed to people according to their sexual differences. In this framework it examines the tension between gender-identity and gender role.

Within this framework, I argue that policies of closed borders exacerbate ascribed normative gender roles and thereby force persons in mobility to ascribe themselves to such normative gender roles in migration. The absence of a right to freedom of movement and the fragmented global governance of migration at an international level give a stronger role to states in deciding who has the right to enter and also in facilitating (in a direct or indirect way) who is able to leave. I argue that the system of border control is based on gender constructions and I shall explore how disaggregated data by sex on migration and mobility show how female migration is affected by gender norms and how restrictions in freedom of movement reinforce discriminatory gender bias when they are attached to the concept of womanhood assigned to the female sex. In philosophical terms, this is an analysis of the sexual contract beyond borders. Indeed, Pateman considers the sexual contract a way of reinforcing patriarchy and maintaining social subordinate relations. I examine how those patterns of subordination and inequality are translated into issues of migration, mobility and membership within a system of border control. I argue that patterns related to the state unilateral control of the border end up being strictly interrelated with discriminatory gender roles and this issue is overlooked in the philosophical debate on migration.

²⁹⁶ See Bruce, Steve and Steven Yearley. 2006. *The Sage Dictionary of Sociology*. London: Sage; Ridgeway, Cecelia L. and Lynn Smith-Lovin. 1999. "Theory and Methods – the Gender System and Interaction." *Annual Review of Sociology* 25: 191-216, 192; Wharton, Amy S. 2012. *The Sociology of Gender: An Introduction to Theory and Research* (2nd ed.). Chichester West Sussex: Wiley-Blackwell; see also the online UN Women Training Centre's Glossary.

5.7 Emigration and admission

First, I examine the right to emigrate from a perspective focused on gender. The gender lens of analysis shows that the traditional understanding of the right to emigrate as morally and socially recognized and guaranteed by the positivistic right of the UDHR is actually misleading. Philosophy considers the non-compelling right of the UDHR as “starting from realism” and part of a non-ideal theory approach to emigration. However, the gender analysis of the right to emigrate shows a more complex picture. Indeed, male and female migrants are not free to emigrate in the same way. Despite the recognition of the human right to emigrate in the UDHR and in spite of a human rights-based approach to migration endorsed by the UN, the right of exit is, in practice, dominated by gender inequalities. According to the report of the World Bank *Women, Business and the law 2018*, the limitation of women’s freedom of movement ranges from the freedom to leave home to the freedom to travel abroad and such limitations are much more substantial than the limitations that men have. Over a third of countries worldwide still restrict women’s right to emigrate²⁹⁷ and the legal border for women can start immediately outside the home. In particular, 37 states do not give the same rights to female and male citizens when applying for a passport and 31 countries do not give them the same rights about choosing where to live.²⁹⁸ Finally, 17 countries do not give the same freedom to travel outside home to both genders.²⁹⁹ This means that the right of exit is heavily influenced by gender bias both in legal and social terms.

Part of the philosophical literature on migration that has based its analysis on the distinction among the right to immigrate and the right to emigrate, has assumed a gender-blind approach towards migration and therefore, it has often considered the right to emigrate non-problematic when compared to the right to immigrate. However, a gender-blind approach is never neutral, and the non-problematization of the right to emigrate presumes the pattern of male migration as normative. Therefore, when scholars argue for the right of the state to control its borders in immigration but not in emigration and they refer to the UDHR in non-ideal discourse, they are talking about male migration. With the gender lens of

²⁹⁷ World Bank Group. 2018. *Women, Business and the Law 2018*. Washington DC. Available at: <http://pubdocs.worldbank.org/en/999211524236982958/WBL-Key-Findings-Web-FINAL-2.pdf>.

²⁹⁸ World Bank Group, *Women, Business and the Law*, p.11.

²⁹⁹ World Bank Group, *Women, Business and the Law*, p.11.

analysis, the absence of the recognized right to immigrate creates different obstacles to male and female migration. Indeed, the absence of a human right to immigrate facilitates state control over the right to emigrate for women, given the obstacles for entry admission in receiving countries. Freedom to immigrate might indeed constitute a pull factor for challenging gender norms about freedom to emigrate.

The focus on gender should lead us to advocate for justice in migration by focusing both on the right to emigrate and the right to immigrate. This is because gender inequality influences each aspect of migration and mobility; therefore, the lack of focus on gender can mislead us about what the issues raised by migration are and about the results of the philosophical analysis on migration. Examining migration through a gender-blind approach means that issues of justice are not highlighted fully and justice in migration ends up being reduced to, and being debated only as, the right to enter (justice in immigration), which is the most urgent issue for male migration. By contrast, issues of justice related to the state's unilateral border control that concerns female migration and include both state control in emigration and immigration are mostly overlooked.³⁰⁰

Second, I examine how, within the state's right to unilateral control of the border, the conditions of admission define the immigrant perspective, both within the job market and within membership acquisition in the receiving country, and I explore how this pattern is based on stereotypical assigned gender roles which contribute to maintain patterns of wrongful discrimination, subordination and inequality. Empirical research has demonstrated that the social construction of gender roles tends to segregate female migrants in certain sectors of the job market that are considered (through the same process of wrongful discrimination) both feminine and low-skilled. What the market consider skilled and unskilled is gendered: sectors like nursing and care work are considered low-skilled because they are perceived as based on feminine qualities that belong to women as such (women as "natural carers") rather than on skills.

³⁰⁰See UN Entity for Gender Equality and the Empowerment of Women (UNWOMEN). 2017. *Making gender-responsive migration laws*. Policy Brief No. 4. Available at: <https://www.refworld.org/docid/5a1bfd1b4.html>; UN Committee on the Elimination of Discrimination Against Women (CEDAW). 2008. *General recommendation No. 26 on women migrant workers*. Available at: <https://www.refworld.org/docid/4a54bc33d.html>.

I argue that state border control and entry admissions criteria in the migration south-north and south-south maintain and enhance such discriminatory processes. Gender norms entrenched with border control are particularly relevant in the phenomenon of south-south migration for domestic work; in this case, most female migration is directed towards the domestic sector (independent of the skills of the migrant worker) and this sector is based on the system of sponsorship, in which the domestic worker is dependent on her sponsor for her visa. In this case, the membership of the worker depends on the will of her sponsor and this creates not only a condition of subordination of one human being to another but also a very precarious membership status for the migrant worker. In this case, freedom of movement as a human right would allow these workers more agency in the job market and in their lives.

Sociological research has also shown that the entry category migrants fall into influences their long-term chances in the job market: those who enter through visas for marriage and family reunification have to deal with the fact that the job market perceives them as unqualified.³⁰¹ Moreover, in many countries women have second-class citizenship status (e.g. in some countries, women are prevented from passing their nationality to their children and, in some cases, this happens even if the child ends up being stateless) and this means that if they are prevented from acquiring full citizenship or a safe membership status in the host country they have to rely on their second-class citizenship status that does not guarantee equal rights.³⁰² So, women are at risk of being in a lose-lose position where they move from one second-class citizenship status to another. Therefore, despite the fact that migration empowers women's agency in broader terms, they are disadvantaged by having to conduct their agency within assigned gender roles, established through a system of visas based on a stereotypical approach to gender.

I argue that the absence of freedom of movement and therefore state unilateral border control in immigration limits the empowerment of female migrants and instead intensify processes of wrongful discrimination. Most of the precarious forms of membership (e.g. dependant visas, family visas) are held by women; the increased use of temporary

³⁰¹ International Organization for Migration (IOM). 2013. *Crushed Hopes: Underemployment and Deskilling among Skilled Migrant Women*, p.21. Available at: https://publications.iom.int/system/files/pdf/crushed_hopes_3jan2013.pdf.

³⁰² UN High Commissioner for Refugees (UNHCR). 2017. *Background Note on Gender Equality, Nationality Laws and Statelessness*. Available at: <https://www.refworld.org/docid/58aff4d94.html>.

membership for immigrant workers; the processes of marginalization and deskilling in the job market, the restrictions in accessing the welfare system; and the systematic harshening of the criteria for getting full citizenship in receiving countries all contribute to disempowering women and limiting their agency within migration and freedom of movement. I argue that freedom of movement would enhance gender equality; indeed, the right to freedom of movement removes the need for dependent visas (in which membership is in the hands of the sponsor), marriage visas (which are considered low-skilled by default by the job market) and other gendered memberships, because people do not need a specific visa status to stay or to work and this favours mobility in the job market for both skilled and unskilled female migrants.

Finally, the analysis based on disaggregated data by sex on migration and mobility has demonstrated how gender norms shape female migration and how immigration control reinforces discriminatory gender bias. The analysis has shown how border control, admission entry and controlled immigration patterns in general are based on maintaining gender roles assigned to sex. The analysis has therefore shown how policies for immigration control play an important role in gender wrongful discrimination, worsening patterns of inequality and subordination both in the job market and in the family sphere. Female migrants are therefore forced to deal with the tension between their migratory project, their agency and the ascription to gender roles of admission criteria in the receiving countries.

A system of border control both in emigration and immigration is not gender neutral and social and legal gender constructions and gender roles dominate patterns of inclusion and exclusion. Within this framework, there is little room for gender-identity (for all gender identities) and there is a constant tension between the self-understanding of one own gender-identity and the prescribed gender role that, in order to migrate, a person is expected to perform. Indeed, the system of border control assumes gender roles rather than gender identity. Therefore, those who claim their agency through their gender-identity are, instead, required by admission criteria to perform such identities according to what the host country considers appropriate for that gender construction.

5.8 Conclusion

In this chapter I examined whether processes of racialization and gender wrongful discrimination are intrinsic to the existence of the border. I argued that a human right to freedom of movement is needed.

In the first part of the chapter I argued against “raceless” interpretations of the borders within political theory, in which the denial/neglect of a process of borders’ racialization and racism allows the justification of principles for membership admission at the border as neutral. I focused in particular on the principle of kinship. I further argued that the racialization of the border is linked to structural historical injustices – like British and European colonialism – and the way migration is governed re-shapes (rather than repairing) past relations of domination. I also noted that the existence and purpose of the border is intrinsically based on processes of racialization. Indeed, racialization is an ongoing process, partly related to historical racialization processes that are now reproduced within migration, and partly linked to the process of migration control, in which the migratory dialectic of included/excluded creates also new processes of racialization. Raceless abstraction is also timeless, and this allows the overlooking of any ongoing, new and future form of racialization while arguing for the unilateral control of state borders. I think that both the historical racialization of the border as well as its inherent racial structure mandate the implementation of a human right to freedom of movement.

In the second part of the chapter I examined how state unilateral control of membership is shaped along discriminatory gender patterns. I focused in particular on the creation of gender roles in migration according to gender assignment and the costs in terms of gender wrongful discrimination at the borders of membership. I argued that policies for closed borders play a role in maintaining gender wrongful discrimination, starting from gender as a category ascribed to people according to their sexual differences and in this framework I examined the tension between ascribed gender roles and migration and gender-identity. I argued that the state unilateral control of borders reinforces discriminatory gender roles ascribed to sexual differences.

So far the thesis has done three things: it has offered an overview of the thesis and of its methodology, and it has offered a non-ideal approach to the analysis of migration through the lenses of racialization and gender in order to demonstrate why a human right to immigrate is needed. The next chapter explores a definition of a human right to immigrate in terms of non-violation of the right of non-discrimination and the following chapter will cover the maximization of open borders.

CHAPTER SIX: A HUMAN RIGHT TO FREEDOM OF MOVEMENT

6.1 Introduction

The goal of this chapter is to argue for an international moral human right to freedom of movement. The earlier chapters argued that state discretionary control over the borders is inherently wrongfully discriminatory. In this chapter, I argue that an international human right to freedom of movement is urgent, to discourage violation of the right not to be discriminated against. The next chapter examines issues of feasibility and human rights.

In this chapter, I start the analysis from the practice of human rights, and I examine how the decision not to include a human right to immigrate in the UDHR has been taken according to contemporary historical facts rather than ideals and values about the nation-state. I argue that in an historically significant time for migration, a human right to immigrate is needed. Therefore, I develop a derivative argument for justifying why a human right to freedom of movement across borders is urgent. I consider my approach complementary to the human rights-based approaches of Cole, Carens and Oberman, but I apply a different methodology for arguing for a human right to freedom of movement, applying a derivative approach inspired by Nickel and Shue. Within this approach, a second right may serve to reduce the possibility of the violation of a pre-existing human right, although the two rights belong to different areas. I argue that, given the structural and consistent pattern of wrongful discrimination across time and countries, a human right to freedom of movement across borders is not only *helpful* to reduce wrongful discrimination, but *essential*. I ground this idea on analysis of precarious membership, gender and racialized discrimination as structural and wrongful patterns in migration and border control, as examined in earlier chapters.

Section 6.2 defines the framework of the human rights practice and human rights-based approaches to freedom of movement and critically examines the process that led to the definition of a human right to freedom of movement in the UDHR. Section 6.3 defines my human rights-based approach to an international moral right to freedom of movement. I argue for a human right to freedom of movement across borders based on the principle of non-violation of human rights. In section 6.4 I define the state as the main duty-bearer of the

right of non-discrimination. Section 6.5 explains why a human right to freedom of movement across borders derives from the right of non-discrimination in an essential way, referring to precarious membership, racial and gender-based wrongful discrimination.

6.2 Human rights practice

Within the political theory of migration, human rights-based approaches to a moral human right to freedom of movement (such as Cole's symmetry argument, Carens's cantilever approach and Oberman's interest account of a human right to immigrate) assume human rights practice as part of their philosophical discourse, at least in terms of moral rights. Considering human rights practice in migration as part of the philosophical discourse implies methodological choices. Such choices include ways to understand the tradition of human rights and what role it plays in the philosophical context. There are, for instance, several schools that investigate the foundations of human rights: the dominant ones are the foundationalist or orthodox view and the political approach.

The foundationalist view is the traditional approach to human rights that considers human rights to be moral rights: entitlements that people hold only because they are human beings. In this case the foundation of human rights can be traced back to the equal moral worth of all human beings, in human dignity and autonomy, or the need to protect basic human needs and interests. Therefore, this approach looks for a moral principle that is external to the human rights practice in order to give a foundation to the idea of human rights. On the other hand, practical-political approaches consider the justification of the international practice of human rights sustained by its own practice and norms. Therefore, this approach does not endorse any particular moral foundation of human rights. Starting from the contemporary international practice of human rights, this approach considers human rights as limits to state sovereignty and the duty of protecting human rights is on the nation state (therefore state power against the individual is limited).³⁰³

³⁰³ Ernst, Gerhard, and Jan-Christoph Heilinger (eds). 2011. *The Philosophy of Human Rights: Contemporary Controversies*. Berlin and Boston MA: De Gruyter; Etnison, Adam (ed). 2018. *Human Rights: Moral or Political?* Oxford: OUP; Donnelly, Jack. *Universal Human Rights in Theory and Practice*. 2013. Ithaca NY: Cornell University Press; Beitz, Charles R. 2009. *The Idea of Human Rights*. Oxford: OUP; Lafont, Cristina. 2012. *Global Governance and Human Rights*. Amsterdam: Van Gorcum.

Human rights-based approaches to a moral right to freedom of movement do not need to endorse one of those schools, but they can share some aspects of theories for justifying human rights in order to investigate the possible justification of a moral human right to immigrate. For instance, two strategies for justifying a moral human right to immigrate include starting from a human right that is already recognised or starting from the philosophical reasons that ground other human rights.

Cole's symmetry argument and Carens's cantilever argument start from human rights practice: for instance, from the established recognition of a human right to emigrate or to move within a country. From this they demonstrate either a contradiction in human rights practice or the justification of a new human right based on an existing human right. It is worth defining at this point what starting from the human rights practice in migration includes. I think that human rights practice is not limited to international documents such as the UDHR (1948); the 1951 Convention relating to the Status of Refugees; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) or the discussions for the Global Compact on Migration (2018). Indeed, starting from human rights practices in migration includes also those processes of global governance of migration favoured by agencies like the UN, the UNHCR, the International Organization for Migration, the International Organization of Labour and the various NGOs that work with migrants and refugees. For instance, the UN (OHCHR) has endorsed a human-rights based approach to migration governance aimed at protecting migrants' human rights. This approach is centred on the idea that migrants' human rights need special attention because migrants are especially at risk of having their human rights violated; this approach is developed and endorsed by the UN and other international actors in migration global governance. It is important to say that human rights practice is not a clear and defined subset of rights, acts, facts and discourses, but an ongoing complex process made by tensions, adjustments and contradictions in which human rights are "rights in the making", open to new rights.

In terms of a human right to migrate, the focus in the political philosophy of migration is often on Articles 13 and 14 of the UDHR. Article 13 states that "Everyone has the right to freedom of movement and residence within the borders of each state" and "Everyone has the right to leave any country, including his own, and to return to his country". Article 14 states that "Everyone has the right to seek and to enjoy in other countries asylum from

persecution” and that “This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”. The result is that the articles of the UDHR break down liberty of movement into several parts: freedom is recognized as freedom of movement within a country; as a freedom to leave any country; but in terms of the freedom of entry, only the right to enter to one’s own country is recognised, unless the person is fleeing persecution.

The right to enter a country is not included in the UDHR. This freedom is not denied but rather absent. This absence means, in practical terms, that the nation-state has decided about immigration law. Moreover, the UDHR has set up a standard with which sovereign states are expected (but not compelled) to comply. Seyla Benhabib argues that the UDHR, and international law in general, delegitimize the Westphalian idea that states have “ultimate authority over all objects and subjects within their territory”.³⁰⁴ However, she argues that on the one hand international law is binding only for states’ signatories and sometimes not even for them;³⁰⁵ and, on the other that the UDHR does not address issues of the right to enter for immigrants, nor membership statuses for non-citizens. Therefore, the UDHR shows its own contradictions by maintaining states’ territorial sovereignty.

However, advocates³⁰⁶ for the state discretionary right to exclude need to explain state border control over immigration while also harmonising it with a broad international and national recognition of the rights to leave, and/or move freely within, any country. To overcome this contradiction, advocates of the unilateral control of state borders tend to establish a normative distinction between the right of entry and exit; they need to establish that the rights or freedoms of entry and exit are based on different principles. Indeed, for them the distinction between the right to immigrate and the right to emigrate must highlight the fact that these rights are not ruled by the same principles. The asymmetrical value given to the rights to immigrate and emigrate is defended by Michael Walzer.³⁰⁷ He argues that, while the right to emigrate is morally accepted, the right to immigrate would endanger the

³⁰⁴ Benhabib, *The Rights of Others*, p.12.

³⁰⁵ Benhabib, *The Rights of Others*, p.11.

³⁰⁶ For instance, Walzer, Miller and Wellman.

³⁰⁷ Walzer, *Spheres of Justice*, pp.39-40.

cohesion of the political community and its cultural distinctiveness. David Miller endorses this perspective, as for him the state is considered a bounded society and the philosophical discussion is about how to manage territorial and metaphorical boundaries.³⁰⁸

Looking at the process that led to these rights, it is worth outlining that in 1948 the drafting of Article 13 reflected a compromise between the requests of those who also wanted to limit freedom of movement within state's borders (e.g. the USSR) and those who wanted freedom of movement to mean freedom to enter any country (e.g. Lebanon).³⁰⁹ The final part of the Article we have now comes from the amendments proposed by Karim Azkoul, the Lebanese representative. Being unable to obtain freedom to enter any country, he obtained at least the minimum requirement for a person to have the freedom to enter their own country. Indeed, the drafts of the declaration and the records of the meetings between delegates show how the definition of the right to freedom of movement had to balance the factual and the ideal. Azkoul writes,

article 11 [13 in the final version] was intended to cover all movements inside and outside a given state [...] The ideal would be that any person should be able to enter any country he might choose, but account had to be taken of actual *facts*. The minimum requirement was that any person should be able to return to his own country.³¹⁰

The discourse about human rights and freedom of movement when the UDHR was written was not based on giving different *moral* value to the rights to immigrate and emigrate. The rationales for both a right to freedom of movement within a country and to leave a country, as well as the rationales for a right to enter a country, were included in draft discussions of the UDHR. Freedom to enter one's country was considered a minimum requirement to support one's freedoms. In other words, it was a compromise, and the decision was taken in

³⁰⁸ See Miller, David. 1995. *On Nationality*. Oxford: Clarendon Press; Miller, *Stranger in Our Midst*.

³⁰⁹ For the discussion of Article 11 among delegates see the "Summary Record of the Hundred and Twentieth Meeting [of the Third Committee] Held at the Palais de Chaillot, Paris, 2 November 1948 (A/C.3/SR.120)" in Schabas, William. 2013. *The Universal Declaration of Human Rights: the Travaux Préparatoires*. Cambridge: CUP, pp.2405-2418.

³¹⁰ "Summary Record of the Hundred and Twentieth Meeting" in Schabas, *The Universal Declaration of Human Rights: the Travaux Préparatoires*, pp.2406-2407.

the light of particular *facts*, rather than moral reasons or principles about identity, national culture or freedom of association.

Although it could be discussed how much the philosophical discourse should take into account substantive positions to validate or discuss conceptual frameworks, in a non-ideal analysis I think it is worth outlining that, in the hope of creating a final Declaration shared by the largest number of countries (including less democratic ones), human rights have been balanced out, including the needs of all participants. Therefore, the minimum result obtained regarding freedom of movement was a result of balancing the specific needs of states in the historical and political situation of 1948. In the context of the end of the Second World War (that included the genocide of Jewish people and other groups), the freedom to be protected was the freedom of the political dissenter or of the persecuted from her own state for political, ethnic or religious reasons (among others). In this case, a person must be protected from the abuse of political power that her own state might have exercised against her, trying to keep her in certain areas of her country, or not allowing her to leave or re-enter her country. This is also why, focusing on the dissenter in the Declaration, through the right to claim asylum, gives the latter also the right to enter *any* country. Therefore, the Declaration did not rule out international freedom of movement for moral reasons but because it had to balance, as Azkoul says, the *ideal* of human freedom with particular *facts*. The right of freedom of movement had to be balanced with the requests of those who hoped for freedom to enter and leave any country, and those states that disliked not being able to control internal freedom of movement of their own citizens.

The question for political philosophy is, then, if this framework is still sufficient to respond to the needs of a time in which migration is the subject of so much international focus. In this case, the debate about the right to immigrate is divided between those who wish to maintain the status quo and those who advocate a moral human right to immigrate and freedom of movement across countries. Within this framework, I believe that the justification of freedom of movement across countries (or the right to immigrate) is multidimensional and I think that distinct theoretical approaches highlight different but complementary reasons for endorsing a human right to freedom of movement. Freedom of movement includes the freedom to move within a country, the freedom to leave any country

as well as the freedom to enter one's own country of citizenship and the right to enter any country. Therefore, to say that freedom of movement is polyvalent means that it has different meanings and according to the starting point, a particular aspect of its possible meanings gets explained; for instance, I might focus on the limits imposed to the right to enter for economic migrants and, in this way, highlight issues of racism at the border, or I could examine the restrictions imposed on the right to leave any country and examine the case of asylum seekers who are blocked at the frontiers, as happens to asylum seekers who transit through Libya (to where they are often returned when they try to cross the Mediterranean). The multidimensional and polyvalent conceptualization of freedom of movement might imply the possibility of using divergent methods of analysis to argue for a moral human right to freedom of movement, and in the following sections I use a derivative approach to demonstrate that an international moral human right to freedom of movement is needed.

My methodological approach diverges from those employed by Cole, Carens and Oberman in their justifications of a moral human right to international freedom of movement described in Chapter Two. Indeed, although all these approaches (including mine) derive a human right to immigrate from other existent and accepted rights, Cole, Carens and Oberman derive their justification of freedom of movement across countries from the justification of other, similar rights (the right to move across countries is justified in the same way that the right to move freely within a country is, or the right to immigrate is symmetric to the right to emigrate) or because it enhances the fulfilment of basic human interests. My approach is derivative in terms of protecting from threats and in terms of non-violation of other rights (the right to non-discrimination).³¹¹

Despite the fact that these analyses and mine are, in this aspect, methodologically different, they are also complementary because they show different meanings of the multidimensional character of freedom of movement. Therefore, I argue that my non-discriminatory argument for freedom of movement is complementary to the approaches to a human right to immigrate undertaken by Cole, Carens and Oberman. This is because each of these perspectives upholds a relevant and substantive reason to justify why a human right to

³¹¹ Nickel, *Making Sense of Human Rights*, pp.87-91.

immigrate is needed and each represents one of the dimensions of the analysis of such a polyvalent and multidimensional right.

In the following sections I explain my approach to a human right to freedom of movement based on non-discrimination. I argue that a human right to international freedom of movement is needed to make wrongful discrimination less likely.

6.3 Non-violation approach

I develop my approach employing one of the methods for justifying human rights that James W. Nickel describes.³¹² According to Nickel, a specific (new) right is justified if there is the possibility of *deriving* it from a right that is already existing and justified. Such a derivative approach assumes that, first, a general right can entail a more specific right (Nickel describes the example of freedom of expression requiring the right to distribute materials freely). Second, it assumes that the implementation of the first right requires the implementation of the second right even though they do not seem correlated. In this case, Nickel describes the example of freedom of assembly requiring security against violence. This example is explained by Henry Shue.³¹³ He argues that a right might be necessary for another right in terms of “inherent necessity”. From his perspective,

part of the meaning of the enjoyment of a right of assembly is that one can assemble in physical security because if people do not have guarantees that they can assemble in security, they have not been provided with assembly as a right. They must assemble and merely hope for the best, because a standard threat to assembling securely has not been dealt with.³¹⁴

Shue argues that guaranteeing certain rights requires us also to establish the conditions for such rights to be enjoyed, one of which is to prevent the “thwarting of the enjoyment of the right by any “standard threat”. Shue distinguishes any possible threats from standard threats that include degrees of vulnerability in which people are left “at the mercy of others”.³¹⁵ Finally, the third derivative approach that Nickel describes is that “the second right may serve

³¹² Nickel, *Making Sense of Human Rights*, p.87.

³¹³ Shue, *Basic Rights*.

³¹⁴ Shue, *Basic Rights*, p.27.

³¹⁵ Shue, *Basic Rights*, p.30.

to make violations of the first right less likely, even though the two rights operates in different spheres".³¹⁶ Scholars who subscribe to this non-violation approach to human rights are usually focused on negative duties or on monitoring the implementation of human rights.³¹⁷

Within this framework of analysis, I include my approach within the latter strategy: a right to freedom of movement across countries serves to make violations of the right to non-discrimination less likely. Indeed, my argument says that a moral human right of freedom of movement across countries is needed in order *not to violate* the right of non-discrimination. This implies that the *absence* of a right to immigrate constitutes a threat to the right of non-discrimination because it makes people vulnerable through an inherent discriminatory pattern created by the discretionary power of state to control immigration. In this case, I consider the historical and persistent discrimination at the borders as Shue's "standard threat" that justifies a human right to immigrate. Therefore, starting from the right of non-discrimination as an internationally recognised human right³¹⁸ and given the structural and consistent (in time and countries) wrongful discrimination in migration caused by the state unilateral control of membership, I argue that an international human right to freedom of movement is necessary to non-violation of the right of non-discrimination.

To recap, state unilateral border control is structurally and inherently wrongfully discriminatory and it constitutes a "standard threat" to the human right of non-discrimination. Therefore, according to the derivative approach in which a new human right is needed to make the violation of another less likely, I argue that a human right to freedom of movement is needed in order to prevent violation of the right of not being wrongfully discriminated against. Within this claim, I need to explain at least two things: who is the duty-bearer of this right and the role played by the distinction between the duty to *protect* and *not to violate*; and the fact that the human right to immigrate is *essential* (not merely *helpful*) for the non-violation of the right not to be discriminated against.

³¹⁶ Nickel, *Making Sense of Human Rights*, p.87.

³¹⁷ Chapman, Audrey R. 1996. "A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights." *Human Rights Quarterly* 18(1): 23–66. On the comparison with social provision see Donnelly, Jack. 2008. "Human Rights and Social Provision." *Journal of Human Rights* 7(2): 123-138.

³¹⁸ On the right of non-discrimination (but not related to migration) see Donnelly, Jack. 2013. *Universal Human Rights in Theory and Practice*. Ithaca NY: Cornell University Press.

6.4 Duty-bearers and the distinction between protection and not-violation

In this section, I examine the question of who the duty-bearers are in relation to the right of not be wrongfully discriminated against in migration, and I analyse the distinction between accounts based on *non-violation* and accounts based on *protection* in issues of discrimination. Finally, I argue that states can be held responsible for structural wrongful discrimination in migration created by patterns of border control.

First, I need to distinguish between duty-bearers and right-holders. Right-holders are those who can make claims about rights. In human rights practice, in interpretations of human rights, and also according to the foundationalist view and the practical political approach to human rights, all human beings are right-holders, independent of gender, sex, ethnicity, religion, age and skills, and independent of the fact that individuals are migrants, refugees, statelessness persons and so forth. Defining duty-bearers is less straightforward. In general, duty-bearers are those actors that have the specific obligation not to violate, respect, protect and support the realization of human rights. In this case, the situation gets more problematic and blurred when trying to identify who those actors are.

The political approach to human rights considers the state the main duty-bearer in issues of human rights. However, the discussion has recently been opened to include other international actors such as international political organizations, NGOs, charities and similar institutions. On the other hand, for the foundationalist approach, human rights are considered to be rights against any other actor and the focus is not so strictly on political institutions like the nation-state. The question is therefore complex, and I think that one way to make it easier to identify duty-bearers is through looking at specific cases.

Given the dominant interpretations of the state as duty-bearer in philosophical studies on human rights (while the political approach considers the state as the relevant duty-bearer, other approaches, even though they do not focus primarily on the state, do not exclude the state from the group of the duty-bearers), I explore the case of the state as the duty-bearer in the case of migration and non-discrimination. The question this raises for wrongful discrimination in migration is: which nation state is responsible for the obligations against non-discrimination? Usually the country considered responsible for the protection of a person's human rights is the country of citizenship, or the country one is in. But in the case

of discrimination at the border of the nation state, who is responsible? I might argue that one of the duty-bearers is the nation-state that exercises discretionary control over the border, which often is the same state that is responsible of violating the right of non-discrimination. In this case, I argue that such a state has an obligation not to violate the right of non-discrimination.

I can also argue that both a foundationalist approach (that considers every possible actor a duty-bearer) as well as a political approach (that considers the state to be the relevant duty-bearer) in the specific case of migration, do not have reasons to contradict my understanding of the state that exercises border control as the *main* duty-bearer of the right to non-discrimination in migration. Even though other international organizations can be accountable for wrongful discrimination in migration, it is those that exercise the discretionary control of immigration that violate the duty of non-discrimination of migrants at the border of territory and membership.

In order to clarify my argument, I compare duties to *protect* and *not to violate* human rights and how they interact with the right to not be discriminated against. Duties to protect, to provide and not to violate require different obligations from the duty-bearer. The duty to protect against discrimination falls, generally, on a particular government such as that of the country of residence or citizenship. Duties not to violate the right to non-discrimination are against all persons and national and international actors. Therefore, the duty to protect is on a specific government, whereas the duty not to violate falls on everyone (every government, international agency and every individual).

Shifting the focus to wrongful discrimination in migration, governments have a duty to *protect* against discrimination, and countries are, at the same time, sending and receiving states in matters of migration. In both cases, they have obligations to protect their citizens and whoever is in their territory against discrimination. However, the situation does not seem settled in migration *across* national borders, because receiving, wealthy countries might make the (non-democratic) claim that the duty to protect from wrongful discrimination remains with sending countries. However, the fact that sending countries hold the duty to protect against discrimination does not mean that the receiving country is exempted from the duty not to violate the right of non-discrimination. Indeed, I have argued that the duty not to

violate the right of non-discrimination is not linked to a particular nation state, but is rather a duty that falls on everyone. The right of not being discriminated against is not, for instance, like the right to political participation, a right that must be protected and provided by the state of one's citizenship. The right of non-discrimination is a right that everyone, every state, organization and individual, has an obligation not to violate.

I argue that the duty not to violate the right of non-discrimination belongs to everyone. My position is different from that of Miller, who argues that there is a substantial difference between freedom of movement within a state and among states.³¹⁹ He claims that excluded groups (at the border) "are not made vulnerable in the way that targeted insiders are" because the responsibility for the protection of their human rights is in the state they are trying to leave and "in some cases the rights they already enjoy may be as valuable as the rights they would gain if they were permitted to enter".³²⁰ He states that the reason for guaranteeing freedom of movement within a state is that such restrictions would harm the essential interests of the persons who are targeted and discriminated against. Accordingly, he thinks that a human right to freedom of movement within a country is necessary to prevent the implementation of such discriminatory policies.

Miller offers a very idealistic perception of migration and human rights in which citizens need to be protected via internal freedom of movement against their own state, while migrants enjoy valuable rights in their own state and therefore have no right to enter other states. Moreover, Miller starts from the perspective that certain groups are at risk of being discriminated against by the state within the border but assumes that the same state is neutral in selecting immigrants from outside the border. He argues that "restrictions on international movement, unlike restrictions on domestic movement, are not targeted at specific groups with the aim of disadvantaging them in ways that put their human rights at risk" and when this is not true, as in the case of the white Australia policy he argues that "excluded groups are not made vulnerable in the way that targeted insiders are.

³¹⁹ Miller, *Is There a Human Right to Immigrate?*, pp.24-25.

³²⁰ Miller, *Is There a Human Right to Immigrate?*, p.25.

Responsibility for protecting their human rights rests primarily with the states that they are seeking to leave".³²¹

I think that one of the weaknesses of Miller's argument consists in the fact that he assumes that states have duties to *protect* the basic rights of their own citizens and to *prevent* discrimination against their own citizens. This might create a situation in which a state has the duty to *prevent* discrimination against their own citizens, but not against citizens of other countries. I think that Miller should, in this case, demonstrate on what grounds states have a duty to prevent discrimination towards their own citizens and not towards the persons that have arrived at the state's border. In this case, his argument about degrees of vulnerability (citizens would be more vulnerable to discrimination than non-citizens) perhaps misunderstands the specificity of human rights. The point is that, as human rights are rights that people hold in themselves only by dint of being humans and without any other reason, they are not defined by citizenship status. Therefore, states have a duty not to violate human rights in general, of everyone, rather than simply not to violate the human rights of their own citizens. In this case the distinction between the duty to *protect* and *not to violate* becomes important: if states might have for instance a positive duty to *protect* the right to freedom of expression *within* the state territory, they also have a negative duty *not to violate* the right to freedom of expression *in and outside* the state, of both of citizens and non-citizens, including those at the border. Otherwise, we might end up in the absurd situation in which states cannot violate the rights of people within the state, but can outside their territory.

Within the human rights context, it would be irrational to argue that a government must protect the right of non-discrimination of people on its territory, but free to violate the same principle for people at the borders of territory and membership. Therefore, states have the duty not to violate the right to non-discrimination of migrants and are held responsible for any wrongful discrimination that might occur during the process of migration. Migration control, being inherently discriminatory, does not guarantee that individuals would not be discriminated against at the border; therefore, the structural discrimination in border control

³²¹ Miller, *Is There a Human Right to Immigrate?*, p.25.

constitutes a “standard threat” making migrants vulnerable. I argue, therefore, for an international human right to freedom of movement.

6.5 Essential or helpful?

The derivative approach of a moral human right that I explore requires a strong connection between the moral right to freedom of movement and the right of non-discrimination. Nickel argues that in a derivative approach degrees of consistency create a stronger or weaker link between the two rights and argues that there is a difference of degree between whether the second right is *essential* to the implementation of the first or simply *helpful* to its implementation.³²² Therefore, it is not sufficient for me to say that freedom of movement in immigration is *helpful* not to violate the right to non-discrimination both in immigration and emigration. I need to argue that the first right is *essential* for the second.

Chapters Four and Five explored three reasons that I think justify an international moral right to immigrate and I argue that these reasons create an essential link between the need of a human right to freedom of movement across countries and the duty not to violate the right of non-discrimination. Indeed, I have clarified how wrongful discrimination in migration is a structural and consistent pattern through time and countries, and that thus an international human right to freedom of movement is essential to make wrongful discrimination less likely. In particular, through the lens of wrongful discrimination, I have examined the precariousness of membership and discriminatory patterns and I argue that these reasons are strong enough to demonstrate that to end the intrinsic wrongful discrimination in migration, a human right to freedom of movement is essential.

To recapitulate my position, firstly, I have argued that one of the reasons that justifies freedom of movement is related to the violation of basic rights due to the unfairness of precarious memberships within the border. I argued that, within liberal democracies, precarious and temporary membership statuses, the hardening of the requirements for obtaining membership and the sharp increase in the application of denationalization and

³²² Nickel, *Making Sense of Human Rights*, p.87.

deportation laws, have endangered persons' basic rights; indeed, the state, claiming the right to discretionary control of the borders in immigration (and therefore the membership of newcomers) also claims the freedom to set up precarious membership statuses for immigrants, and to decide their chance of acquiring citizenship. The state also claims the right to apply a policy of denationalization restrictively to specific groups of citizens who did not gain their membership by mono-citizenship ancestry. Although direct discrimination is usually not lawful in constitutional democracies, state unilateral control of the border is dominated by structural wrongful discriminatory patterns that favour some groups of citizens over others and some group of immigrants over others. This is an ongoing process of wrongful discrimination consistent through time and countries and can thus be considered inherent to the same process of selecting members by the nation-state. I argue that in this case, freedom of movement would guarantee to the migrant the right to enter and stay without the risk of being discriminated against through a selective application of precarious and temporary membership statuses, or through complex and costly procedures of citizenship acquisition that aim at selecting some over others.

Secondly, I argued that the borders of the polity are inherently racialized and that such racialization is, on the one hand, linked to structural historical injustices and on the other, inherent to the state discretionary power in immigration control. While the colonial past and exploitation is denied through the conceptualization of the ahistorical other at the borders (because the other is cut off from an historical context) who must demonstrate that they *deserve membership*, immigration control is a tool for the continuation of historical racial policies, for instance through the principle of kinship (that in Western wealthy countries combines with coming from a similar country of colonizers). Moreover, immigration control creates or supports new processes of racialization and exclusion (for instance, the hostility towards Muslim migrants is an expression of a more socially-extended process of Islamophobia). This produces a situation in which, according to the inherent criterion of racialization, some acquire a *de facto* right to immigrate while others are unjustly pushed towards the border of membership within a process of structural wrongful discrimination.

Thirdly, I argued that the border is a tool for maintaining patterns of gender discrimination. State unilateral control of the border is based on gender roles and this affects

both emigration and immigration. Indeed, in several countries the right to emigrate is gendered in a discriminatory way and immigration control reinforces stereotypical gender roles while undermining gender identity. In particular, I suggested that border control creates a tension between gender roles and gender identity as self-identification: the control of immigration is based on imposing gender roles according to the biases and the stereotypes of the receiving society and its labour market, and the migrant must balance out her *gender agency* (the choices about how to *act* her chosen gender) with the request of the receiving countries and its labour market to *play* a certain gender role in order to gain membership. Therefore, in order to gain membership in the receiving country migrants must deal with the tension between ascribed gender roles and self-constructed gender identities. Migration control is a structural gendered process of wrongful discrimination in which the biased patterns on gender of sending and receiving countries shape the migratory process undermining the free expression of the self.

Discussions about freedom of movement and gender discrimination highlight how the implementation of the right to emigrate requires the implementation of the right to immigrate; indeed, as Cole and others have argued, a right to exit is useless if people have nowhere to go. Philosophers who argue in favour of state border control think that the problem of the ineffectiveness of the right to exit (linked to the absence of the right to enter) might be solved if people always had the right to enter at least one other state (Bauböck, Miller).³²³ Within a non-ideal framework, I have examined the relationship between the right to enter and exit in the light of the dominant binary division between male and female genders. I argued that emigration and immigration are gendered and that constraints in immigration maintain structured gender roles that affects female migrants in a discriminatory way, both for the right to exit and for the right to enter. Moreover, in several societies, women are considered second-class citizens with fewer rights and some of these practices of wrongful discrimination include a gendered limitation in exercising the right to exit. The limitation imposed on the right to exit of female citizens is exacerbated by the absence of the right to enter. Indeed, the obstacles to immigration facilitate the applications of states' policies

³²³ Bauböck, Rainer. 2006. "Free movement and the asymmetry between exit and entry." *Éthique et économique/Ethics and Economics* 4(1):1-7, 1; Miller, *Is There a Human Right to Immigrate?*, p.22.

against emigration as well as creating a disincentive in the pursue of migration for the worst-off.

Within this framework, the argument that the right to emigrate would be effective if one had the right to enter at least one country does not solve issues of gender discrimination at the border. In particular, states might agree to open the border with another state that has similar gender discriminatory policies; or, the agreement between states that offer little social and economic opportunities might obstruct even more the ability of women to better themselves. Moreover, as argued in Chapter Five about the right to enter, when female migrants are admitted they tend to be categorized as holding typical “feminine” traits such as being “natural carers”. This means that they enter deskilling jobs easily, and if they enter with family visas they are considered under-qualified by the job market. A similar process can be argued for racialization at the border. Moreover, someone who wanted to move to any other country apart from the hypothetical bilateral agreement would still have to deal with the fact that their right to non-discrimination has been violated. Therefore, freedom of movement remains essential to preserve the right of non-discrimination across states.

I have shown, through the analysis of precarious membership, racialization and gender in migration, that the state discretionary control over membership and over the border is based on structural processes of wrongful discrimination. In Chapter Three I argued that discrimination is wrong because it is against the principle of the moral equality of human beings and because, starting from realism, there is a widespread consensus among political institutions and scholars about the moral value of the human right of non-discrimination as it is presented in the UDHR and other international conventions. Therefore, I argue for an international human right to freedom of movement based on the right of non-discrimination. When I refer to the right to non-discrimination, I refer to the prohibition of direct or indirect wrongful discrimination (for instance, but not only, through racialization and gender) that systematically, consistently and unjustly creates conditions of disadvantage in the access to life opportunities as well as the enjoyment of other rights and of social, economic and political opportunities, against specific groups. I argue that immigration control affects the right of non-discrimination through membership, racialization and gender discrimination and I argue that the basic right of non-discrimination cannot be forgone to protect the claim of the state to control immigration.

Within this framework, the definition of a moral human right to freedom of movement that I argue for and justify on grounds of non-discrimination, implies at a minimum the political liberty to move and stay at will within political institutions, such as nation-states, in order to meet basic needs and to fulfil life projects, without territorial and temporal restrictions and without imposing undue burdens on anyone.³²⁴ In this case, freedom of movement is not like the freedom to enter someone's house, nor is it akin to the freedom to enter a nature reserve without respecting the restrictions that it imposes on visitors. It is not, therefore, a freedom that is in opposition to some particular domestic law, for instance, about property or protected areas. It is instead a fundamental right that belongs to the realm of the political: a fundamental liberty against the political borders imposed by the state and other political organizations. It is, in this sense, as Benhabib said, the political liberty of entry and exit.

6.6 Conclusion

The main task of this chapter has been to offer a new justification of a moral human right to freedom of movement across countries, according to a derivative approach to human rights inspired by Shue and Nickel. I started with examination of human rights practice and the right to freedom of movement in the UDHR, analysed in the light of the UN meetings that led to the definition of Article 13. I argued for a human rights-based approach to international freedom of movement based on the right of non-discrimination.

I considered many complementary ways to justify a human right to freedom of movement. My approach is based on deriving an international human right to freedom of movement from the right of non-discrimination. In particular, given that the right of non-discrimination is widely recognised and accepted and that states have a duty not to violate such a right *in* and *outside* their borders, I have argued that the systematically, consistent and

³²⁴This definition is inspired by a proposed definition of Freedom of Movement for civilians in the Afghan war: "The ability and the perceived ability of Afghans (who do not work for the government, security forces, or NGOs or belong to insurgent groups) to move to and from a desired location at will and without undue danger, physical restriction, or economic burden in order to meet their needs." Connable Ben, Jason H. Campbell, Bryce Loidolt and Gail Fisher (eds). 2012."Recommendations" in *Assessing Freedom of Movement for Counterinsurgency Campaigns*. Santa Monica CA: RAND Corporation, p.52.

intrinsic wrongful discrimination at the border of territory and membership against migrants constitutes a “threat” that justifies the urgency of a human right to freedom of movement across borders of nation-states in order to make discrimination less likely.

Up until now, I have explored, within a framework of non-ideal theory, why a human right to immigrate is urgently needed in order to prevent wrongful discrimination. However, issues of feasibility of an international human right to freedom of movement need to be discussed and this is the goal of the next chapter.

CHAPTER SEVEN. THE GREATEST POSSIBLE FREEDOM OF MOVEMENT AND THE MAXIMIZATION OF OPEN BORDERS

7.1 Introduction

Within a framework of non-ideal theory, previous chapters have explored the possibility of an account of a moral human right to freedom of movement, justified through a link to the right of non-discrimination. I argued that a human right to freedom of movement serves to reduce the inherently wrongful discrimination at the borders of territory and membership. My examination of a moral human right requires the exploration of issues of feasibility and this is the task of this chapter. The exploration of feasibility issues is also an attempt to respond to the critique that freedom of movement and open borders are not feasible in practice.

The non-ideal methodology of this chapter is based on Sen's approach to justice and applies such an approach to migration. Sen believes that we experience justice and injustice, and we can understand injustice without needing first to have an abstract and ideal definition of justice. Sen argues for a practical reasoning in which feasible alternatives of justice are compared. Applying Sen's non-ideal approach to the issue of justice in migration and taking into account practical constraints, this chapter explores the idea of the *greatest* possible freedom of movement and the *maximization* of open borders as a way to improve justice in migration. The non-ideal argument for freedom of movement developed in this chapter comprehends degrees of openness and the increasing of freedom of movement through time. These degrees must be focused on achieving the greatest possible freedom of movement within feasible choices that are transitional to the improvement of justice in migration. In this case, a human right to freedom of movement is the benchmark against discrimination. To sum up, the non-ideal methodology of this chapter is grounded on Sen definition of justice and the attempt to develop a feasible approach for the maximization of open borders.

I argue that supposed issues of feasibility can be overcome through a transitional theory of justice based on the achievement of the greatest possible freedom of movement and the maximization of open borders. Section 7.2 offers a definition of the transitional

theory for the greatest possible freedom and the maximization of open borders. Section 7.3 explores the incompleteness of the achievement of justice as a possibility for the improvement in global justice rather than a limit to a theory for the greatest possible freedom of movement and the maximization of open borders. Section 7.4 examines the concept of feasibility in political theory and how it has been conceptualized in relation to constraints, compliance and transitional costs. Section 7.5 argues that theories that argue for porous borders or more open borders cannot solve the issue of wrongful discrimination inherent to border control. Section 7.6 examines the role of contextualization in the analysis of the maximization of open borders through examples of open borders beyond the nation-state.

7.2 The greatest possible freedom of movement

This chapter aims to respond to issues of feasibility in freedom of movement. Firstly, this is because the thesis has argued for an international moral human right to freedom of movement, which must hold to some degree of feasibility. Secondly, within the political philosophy of migration, critics of open borders and freedom of movement across countries often raise issues of feasibility and realism linked to the possibility of theorizing open borders (and freedom of movement) in non-ideal terms. Within this framework, I explore a non-ideal approach to the human right to freedom of movement in relation to some practical constraints and I introduce the concept of the greatest possible freedom of movement and the maximization of open borders as realized by the means of feasible degrees of openness.

I need first to explain the link between a human right to freedom of movement and open borders. A human right to freedom of movement and the possibility of open borders are distinct concepts, but they are also in an unequal relationship. Indeed, theories for open borders do not need to ground themselves in an international human right to freedom of movement. For instance, they might be justified by arguments of distributive or reparative justice. By contrast, a human right to freedom of movement implies some degree of open borders. Therefore, advocating for an international human right to freedom of movement requires not only justifying such a right on moral grounds (for instance, against the intrinsic wrongful discriminatory status of the border, as argued in earlier chapters) but it also requires examining the possibility to overcome some constraints of feasibility about open borders

(because a right that cannot be applied is not a right). Therefore, the feasibility of a human right to freedom of movement depends in part on the feasibility of open borders. Within this framework the scope of this chapter is to explore the possibility of the greatest possible freedom of movement and the maximization of open borders.

Usually, scholars assume some degree of openness or closure of borders. The status quo, with state unilateral control over the border, can also be described in terms of degrees of openness. These degrees include temporality: for instance, there are degrees of time in membership (for how long people have the right to stay? Membership can be temporary, renewable, indefinite) and degrees of rights (a stratification of different statuses that give access to different rights like migrant membership that guarantees different degrees of participation in the civil society but not political membership). The question, then, is not about establishing degrees of openness (which contemporary borders regimes do very well). Arguing for degrees of freedom of movement without a criterion for the comparative assessment of such degrees would not help to make wrongful discrimination at the borders less likely which, as argued in Chapters Four and Five, it is a structural part of border control. Therefore, keeping in mind that borders are intrinsically wrongfully discriminatory and that a human right to freedom of movement is morally justified, what is needed is a criterion of justice that guides us towards a more just freedom of movement and open borders with the final goal of fully open borders. We seek a transitional theory of justice that leads to the achievement of full justice in freedom of movement and that takes feasibility into account. Indeed, as Nickel argues, there are several conditions that a moral human right must meet in order to be considered a human right³²⁵ and one of these criteria is feasibility.³²⁵

Therefore, as a criterion to guide a transitional theory of justice for the achievement of fully open borders, I argue for *the greatest possible freedom of movement and the maximum achievement of open borders*. The greatest possible freedom of movement implies *the maximum possible degree* of open borders in terms of right to enter and stay that can be attained at some point and in a given context. The idea is that in order to realize an international human right to freedom of movement, the goal of achieving the greatest

³²⁵ Nickel, *Making sense of human rights*, pp.77-91.

possible freedom should frame states' policies as well as the international governance of migration. Therefore, the greatest possible freedom must be a shared goal of a human rights-based approach to migration policy. I consider degrees of open borders or the achievement of "more open borders" a transitional process towards an ideal of full open borders and to the full enjoyment of the right to freedom of movement.

There are different ways to specify the meaning of the greatest possible freedom of movement and the maximization of open borders. First, I distinguish among the *maximization* of open borders and the *greatest possible freedom* of movement because I consider open borders instrumental to freedom of movement. The latter indeed is a principle that represents a human need independent from how societies are politically organized; on the other hand, open borders represent a substantive position related to the fact that nation-states claim discretionary control over borders in immigration. Therefore, the achievement of a transitional justice in migration needs the maximization of open borders (the maximum degree of open borders that is possible to achieve in a given situation and in a given time) whereas full justice in terms of freedom of movement overcomes the question of open borders simply because it assumes no borders among states.

There are several ways to understand the achievement of the *greatest possible freedom* of movement in a transitional theory of justice for a human right to freedom of movement. First, the feasibility of a moral human right to move freely across countries might be understood in terms of considering it implementable in *most* countries, but this does not mean that it must be feasible in *all* countries. Feasibility in *most* countries is a criterion described by Nickel when he examines the feasibility of all human rights.³²⁶ Indeed, if it is true that a right that is not applicable is not a right, it is also true that for a human right to be valid, it does not need to be applicable in *all* countries. In this case, within a human right to freedom of movement justified on the ground of making discrimination less likely, I might argue that such a right is feasible if it is applied in *most* countries. Therefore, pursuing freedom of movement in most countries would be a sufficient achievement for considering freedom of movement a human right.

³²⁶ Nickel, *Making sense of human rights*, pp.77-78.

Second, the greatest possible freedom of movement might be related to the application of the criterion of the greatest possible freedom in immigration according to feasibility in terms of maximization of openness that each country is able to achieve. Therefore, a non-ideal approach to freedom of movement implies considering not only a gradation through time in terms of the openness borders, but also contextual degrees of achievability according to the peculiar constraints of a given context. Finally, these two approaches (feasibility in most countries, or feasibility as contextual achievement) might also intersect and the application of the transitional criterion of justice of the greatest possible freedom of movement would imply the greatest number of countries applying the greatest degree of freedom of movement that is achievable. In all these cases, the aim is maximally open borders in order to achieve the greatest possible freedom of movement.

There are objections to the achievement of feasibility. For instance, the state unilateral right to control over the border leaves the decision to participate in freedom of movement mostly in its hands. Such decisions would not be morally neutral, given the structural wrongful discrimination of border control. If only a few countries participated, they would carry the burden of states that take advantage of free movement in other states but do not share the (possible) costs of its implementation. Again, states that do not participate would have a duty to morally justify the fact they continue structural wrongful discrimination at the border, defined earlier as intrinsic to migration control.

In these cases, I think that a transitional theory of justice in migration includes processes of improvement of justice in freedom of movement that are degrees of justice, rather than looking for a perfect situation of justice in migration. In order to explain what justice and feasibility mean in this context of transitional justice, the following sections will explore how the greatest possible freedom of movement is based on an improvement of justice in migration and a more detailed definition of feasibility.

7.3 Improvement in the achievement of justice in migration

This section examines the idea of the limited achievement of justice in freedom of movement. Within a non-ideal approach to justice in migration, I consider the pursuit of the greatest possible freedom of movement and the maximization of open borders to be entwined with the idea of *improving* justice in migration, rather than linked to a perfect and ideal situation of justice in migration. I refer in this approach to justice in migration to Sen's definition of justice, which states that we do not need to have a perfect theory of justice to understand what injustice is.³²⁷ Sen's approach to justice and injustice starts from the possibility of experiencing justice and injustice, and he assumes that we are able to understand the injustice that surrounds us even though we do not have a general and abstract definition of justice. In this case, the alternative to an abstract theory of justice is the exercise of practical reasoning which requires a framework for the comparison of feasible alternatives of justice rather than the representation of a perfect situation of justice that cannot be achieved. Sen aims at developing a comparative perspective of feasible scenarios of justice. In this case, feasibility is linked to depicting possible (and comparable) scenarios for improving justice or, at least, decreasing injustice. Within this approach, Sen chooses social choice as a framework for exercising practical reason.

A theory of justice based on social choice is rooted in a comparative approach of available choices. This implies recognising the achievement of partial resolutions of justice and that "even a complete theory of justice can yield incomplete rankings of justice". Sen's overall approach to the idea of justice is non-ideal and he gives priority to choices that are achievable (even with limited degrees of improvement in justice) over an ideal but unfeasible idea of justice. In the spirit of Sen's approach to justice, I argue that a theory for the reduction of injustice in migration does not need a theory of perfect justice in migration. Therefore, a transitional theory that aims at making migration more just does not need a perfect situation of feasibility of open borders in order to improve justice against wrongful discrimination. Rather, aiming to reduce injustice in freedom of movement and make discrimination less likely, I argue for the maximization of open borders in order to achieve the greatest possible freedom of movement (and the greatest possible justice in migration). This does not mean

³²⁷ Sen, *The Idea of Justice*.

that wrongful discrimination must be tolerated, but rather that the achievement of partial feasibility should not limit the improvement of justice.

In this case, the exercise of reasoning demands a framework of feasible alternatives of justice and the comparison of alternative scenarios of justice implies the contextualization of each scenario. Therefore, more just migration needs reasoned comparative assessment of feasible choices: it needs the comparison of possibilities of openness and their feasibility in order to verify where to set the limits and the criteria for realizing the greatest possible freedom of movement. Feasibility in open borders is linked to depicting possible (and comparable) scenarios of openness and freedom of movement and involves the identification of real-choice possibilities within a non-ideal approach to justice in migration. Therefore, an investigation of the possibility of achieving the greatest possible freedom of movement and the maximization of open borders must take into account its own limits within the framework of real-world circumstances. There are several factors to take into account when looking for the maximisation of open borders: incompleteness and unpredictability are factors that we cannot control, and we must accept the partiality and the incompleteness of our results in the achievement of open borders; the acceptance of the partiality of each solution implies acceptance of the fact that in non-ideal theory we can reach only partial justice in terms of open borders; in such a case, the aim is to reach the maximum condition of justice that is achievable in open borders under feasible conditions.

As a matter of principle, my conception is based on prioritising an international human right to freedom of movement over the exclusionary right of the state to control its border. In this case, the binary open/closed approach typical of the discussion of borders rooted on a strong definition of self-determination is substituted for an attempt to achieve a coherent non-ideal theory for open borders that can, to a certain extent, support government policies. This implies that a scalar theory in open borders is an ongoing process defined by its partiality, incompleteness and temporality: open borders are acquired to a certain degree and over a given time period and these conditions are in a constant process of change.³²⁸ The aim of full

³²⁸The definition of a scalar approach to open borders is indebted to the literature on feasibility, in particular the works of Holly Lawford-Smith and Pablo Gilabert who have developed a scalar approach of feasibility in moral and political deliberation. They do not focus on migration and borders, but on justice and feasibility in political theory, in which feasibility has a lot to do with the possibility of the implementation of theoretical principles.

open borders involves an ongoing process of advancements, stops and reversions rather than a binary option of inclusion/exclusion open/closed that is given once and for all. The criterion that defines this process is maximization: achieving maximally open borders under feasible conditions in a given context and time. This implies that we can have very different degrees of open borders according to the context. Consequently, non-ideal theory in open borders must deal with the temporality and partiality of its own results, keeping in mind a human right to freedom of movement as the benchmark against discrimination. In this case, partiality and temporality are not a weakness of the philosophical investigation but part of a scalar (maximised) achievement of justice within non-ideal theory. When the best balance of feasibility and openness has been achieved in a given context and has reduced discrimination in migration, we have reduced injustice in migration to some degree. It is through balancing feasibility and openness that we achieve the maximum degree of open borders and the greatest possible freedom. In this case, low feasibility implies low open borders and high feasibility implies high open borders.

The highest feasibility allows maximally open borders and the lowest feasibility allows minimally open borders. Justice in migration implies the maximization of open borders under feasible conditions. Justice in migration is not achieved once and for all, but is an ongoing process based on reducing levels of injustice. We also have injustice in migration when degrees of feasibility and openness do not correspond: for instance, if we have high feasibility and low openness of borders or if we have low feasibility and high openness of borders. Balancing feasibility and openness must aim at the greatest possible freedom in open borders according to the fulfilment of a human right to freedom of movement across countries.

The aim here is limited compared to the achievement of perfect and ideal justice in migration and it is instead entrenched with the feasibility of practical choices. Freedom of movement and therefore the feasibility of open borders in non-ideal theory implies starting from realism and examining feasible conditions to achieve more justice in migration. The aim is not to reach a perfect condition of justice in open borders, but maximum possible justice in open borders under feasible conditions. The issue then is how to set the bar of feasibility in order to achieve the human right to freedom of movement, and therefore the non-violation of the right of non-discrimination, as effective as possible.

7.4 A definition of feasibility for open borders

Objections against a human right to freedom of movement are related to feasibility constraints. Indeed, a non-ideal theory for a moral human right to freedom of movement might, to some extent, respond to some objections about feasibility and compatibility with other rights. Therefore, it is necessary to clarify the meaning of feasibility and what type of constraints it refers to. This section explores the meaning of *feasibility*: starting from the examination of some ways in which feasibility has been discussed within political theory, the section investigates a suitable interpretation of feasibility for open borders.

It is important to outline that I do not aim to discuss feasibility extensively within political philosophy, nor do I consider feasibility a criterion for evaluating the quality of a philosophical theory in general. What I aim at is investigating the meaning of feasibility within a theoretical approach for open borders. For this reason, rather than examining the overall literature on feasibility within political philosophy, I concentrate only on some aspects of feasibility that are relevant for my purpose. This analysis excludes those theories that, although approaching feasibility, are not based on a distinctive philosophical definition of it beyond its broader and general linguistic meaning. By contrast, I take into account those thinkers that consider feasibility to be a distinctive concept and that acknowledge it as a specific criterion that must be fulfilled. For the purpose of this chapter, I explore one of the possible threads in the definition of feasibility that might help to develop a definition of feasibility that is appropriate for the greatest possible freedom in open borders.

In some cases, feasibility has been interpreted as a criterion for assessing the practicability of political theories; the formula *ought implies can* is included in this category of interpretation.³²⁹ It refers to the possibility of achieving a certain ideal given the conditions of human world. The origin of the formula *ought implies can* is typically attributed to Immanuel Kant: briefly, it means that an action (the ought) that moral commands to an agent must also be possible to be achieved by the agent.

³²⁹ See Lawford-Smith, Holly. 2013. "Understanding Political Feasibility." *Journal of Political Philosophy* 21(3): 243-259; Kurthy, Miklos, Holly Lawford-Smith and Paulo Sousa. 2017. "Does Ought Imply Can?" *PloS one* 12(4): 1-24.

This primary definition of feasibility as *ought implies can* is what Lawford-Smith and Gilabert call the binary definition of feasibility: a binary on/off option in which a theory is either feasible or not. Similarly, open borders are often examined through this binary perspective: in some cases, starting from the realistic assumption that “states have borders” controlled by the state leads to dismissing open borders as an unachievable chimera; this critique assumes a binary on/off approach (a feasible/unfeasible alternative) to open borders and international freedom of movement.

Gilabert and Lawford-Smith³³⁰ develop another interpretation of feasibility that they call the scalar approach. Here, an agent, given certain circumstances, can achieve a certain outcome. Scalar feasibility is related to the possibility of comparative assessments within practical limits. Gilabert and Lawford-Smith link binary and scalar feasibility to what they call hard and soft constraints. A binary definition of feasibility is linked to hard constraints (something is or is not logically or physically possible), while a scalar conception of feasibility implies soft constraints such as culture, which they believe can be overcome to some degree. Juha Räikkä distinguished another set of constraints, in this case related to *transitional costs*; he refers to a set of constraints represented by the costs of the transition from one type of social institution to another.³³¹ He defines these transitional constraints as strong and weak constraints and states that “when evaluating the feasibility of a social institution [...] a political theorist should consider some of the weak constraints too, namely those that entail moral costs of the changeover”.³³² Räikkä argues that the feasibility condition within political theory concerns its acceptability once the moral costs of the changeover have been considered.³³³ Thus, feasible means “capable of being successfully used” and feasible and possible are not the same thing.³³⁴ Therefore, practicability does not mean that something is immediately achievable in the real world, but rather that a theory must be coherent with the possible implications of realism.

³³⁰ Gilabert, Pablo. 2012. “Comparative Assessments of Justice, Political Feasibility, and Ideal Theory.” *Ethical Theory and Moral Practice* 15(1): 39-56; Gilabert, Pablo. 2017. “Justice and Feasibility: A Dynamic Approach” in *Political Utopias*. Oxford: OUP; Lawford-Smith, “Understanding Political Feasibility”; Gilabert, Pablo, and Holly Lawford-Smith. 2012. “Political Feasibility: A Conceptual Exploration.” *Political Studies* 60(4): 809–25.

³³¹ Räikkä, Juha. 1998. “The Feasibility Condition in Political Theory.” *Journal of Political Philosophy* 6(1): 27-40.

³³² Räikkä, “The Feasibility Condition”, pp.36-37.

³³³ Räikkä distinguishes between political feasibility and the feasibility condition. Political feasibility is not really related to philosophy and it primarily belongs to the possibility of realizing certain policies in a relatively short timeframe.

³³⁴ Räikkä, “The Feasibility Condition”, p.38, n30.

Finally, another way to understand feasibility is by examining stability through time. Rawls argues that feasibility is the problem of creating stable institutions with citizens who are willing to comply with these institutions. Pettit and Brennan criticise Rawls's approach to feasibility.³³⁵ They argue that Rawls's ideal theory assumes general compliance and implies that individuals are open to adapt to general principles of justice: once the desirable situation of justice has been achieved, full compliance is assumed. On the contrary, Brennan and Pettit argue that individuals vary in their virtuous motivation and a more modest approach to feasibility is needed. This is related to the recognition of the need to incentivise virtue. This incentive-compatibility issue comes from economics and refers to arrangements that are not too demanding, are sustainable by individuals and compatible with incentives. The second aspect of feasibility highlighted by Pettit and Brennan is its durability through time: it is the intertemporal stability issue (rooted by them in Greek and Roman philosophies) which looks for institutions that are "stable in the presence of human ordinary motivation". While Rääkkä's transitional soft constraints are temporary (they have a start and an end within a fixed period of time), feasibility in terms of compliance implies stability and durability over time. Within a human right to freedom of movement and the consequent greatest possible freedom of movement the question of feasibility might include all these factors: feasibility in terms of transitional costs to a regime of full open borders and feasibility in terms of durability and stability of open borders over time. In both cases, feasibility can be defined in terms of degrees to achieve the greatest possible freedom of movement. Considering these approaches as a framework of analysis for freedom of movement and open borders, the feasibility of freedom of movement might be dependent on the domain of constraints that are feasible on a scalar degree. The concept of soft and hard constraints may be useful for investigating freedom of movement and open borders but it needs to be clarified what, in this particular case, soft and hard constraints are. Indeed, a scalar approach to open borders implies accepting that there are degrees of feasibility in the achievement of open borders and that these degrees of feasibility are degrees of openness; however, the point is where the bar

³³⁵ Brennan, Geoffrey and Philippe Pettit. 2007. "The Feasibility Issue" in Jackson, Frank and Michael Smith. *The Oxford Handbook of Contemporary Philosophy*. Oxford: OUP, p.260. In an earlier work Pettit considers the issue of feasibility in these terms: "which institutions are likely to attract full or at least *adequate* compliance?" and "which are the institutions that once in place we can be confident that will remain in place?" in Pettit, Philippe. 1992. "Institutions" in Becker, Lawrence C. and Charlotte B. Becker. *Encyclopedia of Ethics*. New York: Garland Publishing, p.613.

is set for defining these degrees and how. Therefore, there is a need to define the meaning of feasibility and what the soft and hard constraints of feasibility are in the case of freedom of movement.

A theory for open borders, in order to be feasible, does not need to be fixed in time: it does not need to be applied through time in a coherent way because soft constraints change through time. The feasibility of open borders is a scalar feasibility, and this means that the stability of open borders is based on a certain degree of flexibility. Indeed, a scalar feasibility is not fixed once and for all. The fact that weak constraints are not a binary option implies that they also include a degree of variability, negotiability and possibility of change through time. Compliance and stability are, therefore, also flexible. Within this framework, feasibility in open borders is a flexible process both in its extension and in its durability through time. The feasibility of open borders is not established once and for all. On the contrary, it is a scalar process defined by continuous adjustments. Indeed, it is defined by contextualization and partiality.³³⁶

7.5 Openness: why more open borders is not enough

In order to explain my account, I compare it with the feasibility of theories for *more* open borders. Indeed, while scholars in favour of state unilateral control over the border question the feasibility of full open borders, I think that the feasibility of open borders is less problematic for those theories that instead argue for “more open borders”, for open borders only for vulnerable people like refugees and asylum seekers, or for freedom of movement as a freedom offered to certain groups in terms of reparative justice for historical wrongdoings. The reason that issues of feasibility in these cases are less problematic is because they are already balanced by the fact that the state retains control of membership and freedom of movement for other categories of migrants.

The first thing that is worth noting is that openness requires investigating both the openness of membership (what membership entails) and the openness of territorial borders (the right to cross and stay). These two aspects of openness within freedom of movement are

³³⁶ Sen, *The Idea of Justice*.

interrelated and influence each other; indeed, if the state has the unilateral (or mostly unilateral) right to control its borders and therefore to exclude people at will from crossing and staying, then strong membership status is necessary to limit the power of the state over the individual. For instance, Seyla Benhabib maintains the right of the state to control its borders and at the same time argues for a human right to membership. She considers that freedom of movement should be adjusted to take account of democratic institutions.³³⁷

Benhabib claims that democracy requires “porous borders” in a context where “a people” is a dynamic, contextual, conflictual and continuous process and in which the ethnos and the demos (contrary to Walzer’s argument) are not the same thing. Benhabib focuses on membership statuses within a state, rather than discussing the state right to select migrants at the border. Her discourse is about the right to membership and is based on the distinction between the moral duty to welcome refugee and the discretion of the state on migration policies. She argues that once *first admission* is granted, within a moral dialogue I should be able to justify, with grounds that would be acceptable to each of us equally, why you can never join our association and become one of us. These must be grounds that you would accept if you were in my situation and I were in yours. She thinks that reasons about

ascriptive and non-elective attributes such as your race, gender, religion, ethnicity, language community, sexuality [are not 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.³³⁸

Reasons instead might be related to the length of stay, qualifications, resources, competency in the language of the country and other skills. She considers that such a human right to membership is distinguished from political membership. The former indeed is a more general right than legislation about citizenship within single democratic states; she argues that states can differentiate in terms of how they allow people to acquire membership, but they must have a clear and fair procedure to naturalization and citizenship.

³³⁷ Benhabib, *The Rights of Others*, p.220.

³³⁸ Benhabib, *The Rights of Others*, p.138.

Her account of porous borders is related to some mediation between the discretion of the state in admitting voluntary migrants and its moral duties in granting fair membership to whomever is inside. Undoubtedly, a human right to membership is more fundamental in terms of the condition of closed borders than in a situation of freedom of movement. The higher the discretionary power of the state in selecting members and closing its borders, the more important it is for the solidness of membership for immigrants to act as a protection against the state. This is because the risks of having precarious membership or being left without legal membership and being undocumented affects the whole life of a human being. Therefore, strong legal membership status is important especially if the state has discretionary control over membership.

Throughout the thesis I have argued that precarious temporary status, undocumented migration, dependant visas and the consequent fragmentation of rights and lives, are the dystopic results of state unilateral control of membership, which is applied for the advantage of the state itself by selecting preferred members within a multitude of disadvantaged applicants. The ideal of a human right to membership highlights, by the means of contrast, the fact that precarious membership is not unintended. Rather, it is the result of the exercise of the state right to discretionary control its borders, against both migrants and asylum seekers. States have increased their discretionary approach in the application of refugee law, substantially restricting access to membership despite maintaining formal respect for international law.

I think that Benhabib is right to argue that states must make the path to citizenship clear and available in order for people to be able to acquire political rights; however, I think that a human right to membership is useless in the face of discrimination at the borders of states. Benhabib's theory does not question admission criteria; she argues that there might be, in practical terms, abuses of the criteria for selecting members, but such criteria remain normatively valid.¹¹ In contrast, I argue that the border and therefore its admission criteria are intrinsically discriminatory, and this implies that they are normatively discriminatory. The problem with a human right to membership is that it may address the issues raised by precarious membership within a country, but cannot address the discriminatory selection of membership at the borders. On the other hand, I argue that if freedom of movement is in

place in terms of the right to enter and stay, it also *becomes* a status, not only as a political liberty against any state but also because it offers, by itself, some of the basic characteristics that are acquired by other membership statuses such as the right to stay and to settle.

I argue that a human right to freedom of movement does not require holding a specific membership status in order to be exercised; this is because a human right to freedom of movement implies (by its own definition) indefinite leave to remain in any state and therefore, in a condition of perfect freedom of movement, nobody is undocumented. In this case, disentangling some rights from the bundle of citizenship rights would be an advantage for a mobile person, rather than a burden, as it is in the case of precarious state memberships. However, given that everyone has the right to freely cross and stay in any country the question (and this may be the main question for open borders) is what this membership entitles persons to. Benhabib argues that, in the case of European citizens, the distinction between legal citizenship and membership of (EU) aliens is minimized and there is a disaggregation of citizenship and of the rights this entails to.

The point, however, for the case of freedom of movement, is how these rights are disaggregated and who gets what. It is worth noticing that some years ago, within the EU, freedom of movement did not include the possibility of using freely and fully the welfare system of states others than the country of citizenship, but only the possibility to travel freely, to look for jobs without the need of a working permit and, given these conditions, to settle. The extension of welfare rights within a system of freedom of movement has been characterized by increasingly connecting those welfare rights to residence status; and therefore it has been connected to grounding these rights on residence and sedentariness rather than on legal citizenship. For EU citizens, factors such as the length of stay, the contribution to the tax system and residence in the same local area have substituted for legal citizenship as a means to acquire welfare rights, while citizenship has become mostly representative of full political rights. If we shift the focus from international migration to freedom of movement within a country, we see that these factors are taken into account not only by states but also by local councils; therefore, the space for welfare rights is becoming more local and related to sedentariness rather than citizenship.

It is also well-known how efficient the system of controlling the external border of the EU has become. The differentiation in membership rights (within the EU) between EU citizens and non-EU citizens highlights the different treatment and struggle that people have if they do or do not have the right to freedom of movement. The answer to this, however, is not that whomever is in the EU (and only in the EU) should have the same rights, because in this case the discriminatory selection at the external border of the EU and each other state in the world remains. Rather, the issue is that if we want everybody to enjoy the same rights, each state (including in and outside the EU), or at least most states, should participate in freedom of movement.

Critiques of freedom of movement tend to link a full bundle of rights to citizenship. However, I argued that welfare rights, for instance social housing or a full right to healthcare, are becoming more local and often the criteria of residence in a given area is needed for these rights to be acquired; this is to say, the borders of membership in terms of a bundle of rights are not necessarily related to national citizenship but in some cases to local membership, which rewards those who aim to settle and make their life in a certain area. I think that offering a detailed account of what persons are entitled to when entering in a country in terms of accessing the welfare system beyond basic human rights implies a very contextualized approach to states and its regions and is more akin to political science than political theory; indeed, states can offer very different provisions of rights to their inhabitants for historical, economic and political reasons. For instance, there is no point arguing for free healthcare for migrants in the US if the US does not guarantee free healthcare to its own citizens. Moreover, some states can barely provide basic rights and therefore positive duties beyond basic human rights should be negotiated with singular national or local organizations, while the negative duty of guaranteeing freedom of movement should belong to the global governance of migration and nation states.

The question is, I suggest, whether freedom of movement entitles non-citizens to the same bundle of rights of citizenship, whatever this bundle is. In terms of feasibility and realism, there are two ways in which freedom of movement has been approached: on the one hand a situation in which freedom of movement entails freedom to work and settle but does not give access to a strong bundle of rights; and on the other, a situation where freedom

of movement entails a stronger bundle of right (e.g. the EU). Maybe an approach based on the first version of freedom of movement is more feasible than an approach based on the second. However, a right to freedom of movement understood in this way does not offer any protection to the weakest and those who have been victims of past injustice. In the first case, feasibility constraints are softer than in the second case; indeed, they do not require a commitment to certain costs by the state in the same way that the second does.

7.6 Some examples of a feasible approach to open borders

I do not argue (within non-ideal theory) for a perfect condition of freedom of movement but for the greatest possible freedom of movement. This section examines some examples of open borders and argues that reasons to limit freedom of movement in a certain area (for instance, reasons to protect the environment or historical/artistic heritage) need to be considered. This section examines some examples of open borders and their scalar feasibility and partiality. This helps to clarify what a scalar approach to open borders is. Each case highlights a different perspective on open borders and what scalar feasibility means in relation to partiality and maximization.

The first case examined here offers an example of the maximisation of open borders in non-ideal theory: this is the case of open borders among legitimate political institutions based on mutual recognition. Examples of this type of cooperation are freedom of movement of citizens among member states of the EU and the most recent open border policy agreed by African Union member states for African citizens. These types of agreements allow citizens of member states to move freely among them. In cases such as these, the achievement of open borders is a matter of agreement between political entities that recognise each other as legitimate political institutions (agreements to open the borders between states and agreements to open the borders via institution that are above the nation state or that gather more nation states together). The EU and AU policies to open borders have maximum feasibility and can achieve the maximum degree in open borders because they are based on non-controversial mutual cooperation and recognition. It is worth clarifying that recognition does not mean sharing the same values about religion, culture, language and identity, but rather reciprocity in open borders, seen as valuable by all the parties involved. In this case,

we have a situation of non-controversial mutual cooperation and thus an example of a high degree of feasibility of open borders in non-ideal theory. It should be noted that in the case of the EU and the AU, open border policies include only citizens of states involved, while the criteria applied to non-citizens who are within the borders of member states can vary. Therefore, these examples show the feasibility of open borders among a group of states, but exclude whoever is outside those agreements.

The second case examined here is based on limiting the number of people living in an area with a fragile ecosystem that is presented by Christopher Bertram.³³⁹ The example refers to the provisional validity of border control in the case of an area inhabited by a few human beings, the ecosystem of which would be completely destroyed if accessed by an unlimited number of individuals. Looking at this case through the lens of a scalar approach to open borders, it is clear that the feasibility of open borders would have a quite different degree than in the case for reciprocity among nation states. While states in a situation of mutual cooperation have the potential to reach fully open borders for their citizens, in the case of the area with a fragile ecosystem the maximum feasible degree of open borders could actually be very low; for instance, maximally open borders might include limiting access to an island to a very small number of people or even none (unless the life of those human beings is also at risk). Indeed, according to a scalar approach to open borders the unavoidable destruction of the ecosystem of the island is a factor to consider in terms of feasibility constraints.

A third example refers to mass movement of population pressing at the borders of states. In this case the parties involved are not political entities of the same kind: while in the first example we had agreements and reciprocal recognition among states that maintain their legitimacy through reciprocal recognition, this example involves a structured nation-state and individuals at the borders. The massive movement of population through the Balkans in recent years restricted by the displacement of the police at the frontiers as well as the movement of population from Latin-America towards the US (blocked by force at the Mexican border) challenge the existence and the recognition of the frontier in itself.

³³⁹ Bertram, Christopher. 2018. *Do States Have the Right to Exclude Immigrants?* Cambridge: Polity Press.

In these cases, but also in less pressing situations, most of the literature in political philosophy considers migration and freedom of movement an issue for the nation state; from a different point of view, the issue is border control applied by the nation state. In this case, the massive movement of population is independent of the control of the nation states (both sending and receiving) and calls for global governance of mobility and freedom of movement rather than leaving each case to the attitude of single nation states. A feasible approach to open borders is inevitably contextualised: the feasibility of open borders is scalar because it is related to a given situation in a given time. Nevertheless, through contextualization it is possible to have some idea about justice in open borders. This means that mass migration is a global issue that requires global governance but local solutions: a scalar approach to open borders, to be feasible, must also be comparative and local.

What kind of institutions can coordinate the global governance of migration? Who decides what is feasible? As Betts explains, contemporary global governance of migration is not organized multilaterally in the same way as, for instance, monetary stability through the International Monetary Fund (IMF) or trade through the World Trade Organization (WTO).³⁴⁰ In fact, he argues that the International Organization for Migration (IOM) does not have a mandate provided by the whole international community, as many UN agencies have, and it does not have normative authority. This makes protecting migrant rights transnationally a difficulty task. On the other hand, as Betts³⁴¹ outlines, different agencies focus on different aspects of migration (for instance human rights law for refugees; the International Labour Organization (ILO) focuses on labour rights for migrant workers). In addition is a range of public and private institutions like non-governmental organizations which play a role in addressing issues in migration at national and international level.

However, the issue is not only about how the global governance of migration is organized but also its agenda. Branka Likić-Brborić³⁴² highlights how migration governance at national and international level has seen migration as a benefit for global political economy

³⁴⁰ Betts, Alexander. 2011. "Introduction: Global Migration Governance" in Betts, Alexander (ed). *Global Migration Governance*. Oxford: OUP, p.2.

³⁴¹ Betts, "Introduction: Global Migration Governance", pp.2-3.

³⁴² Likić-Brborić, Branka. 2019. "Global Migration Governance, Civil Society and the Paradoxes of Sustainability" in Schierup, Carl-Ulrik, Branka Likić-Brborić, Raul Delgado Wise and Gülay Toksöz (eds). *Migration, Civil Society and Global Governance (Rethinking Globalizations)*. London and New York: Routledge, pp.38-39.

and development. Such liberal focus on migration has dominated many multilateral debates accompanied by the focus on security and border control as a way to manage ordered and organized migration. Alongside other scholars, she argues that the global governance of migration has marginalized a rights-based approach on migration. Crépeau and Atak³⁴³ argue that to shift the focus towards a rights-based approach requires a stronger involvement of the UN in migration governance, for instance increasing the capacity of the UN agencies that already work on migration. They also argue for the establishment of,

a standing platform on the human right of migrants that would enable systematic interaction between all relevant stakeholders (including Member States, Global Migration Group agencies, other international and regional organisations, civil society and migrants themselves) on a broad range of cross-cutting human rights and migration issues.³⁴⁴

On the same wavelength, Piper and Grugel³⁴⁵ argue that a shift is needed in the global governance of migration towards a rights-based approach. They focus on a bottom-up approach in which migrant social movements try to influence the “policymaking agenda and expose the work violations and human rights abuses that migrant workers, especially at the lower end of the labour market, routinely face”.³⁴⁶

Taking into account the arguments of these scholars, I argue that a human right to freedom of movement should be included by the actors of the global governance of migration as a goal to pursue. Thus, migrant movements, UN agencies, states and NGOs should work towards a human right to freedom of movement as a way to stop discrimination in migration. Therefore, the global governance of migration should shift its focus from a liberal and market-related approach to migration to a human rights-based approach that includes a human right to freedom of movement. This might be a way to end the inherent discrimination that migrants face with border control. Issues of feasibility might be coordinated at local level and

³⁴³ Crépeau, François and Idil Atak. 2016. “Global Migration Governance: Avoiding Commitments on Human Rights, Yet Tracing a Course for Cooperation.” *Netherlands Quarterly of Human Rights* 34(2): 113–46.

³⁴⁴ Crépeau and Atak, “Global Migration Governance: Avoiding Commitments on Human Rights, Yet Tracing a Course for Cooperation”, p.119.

³⁴⁵ Piper, Nicola and Jean Grugel. 2015. “Global Migration Governance, Social Movements, and the Difficulties of Promoting Migrant Rights” in Carl-Ulrik Schierup, Ronaldo Munck, Branka Likic-Brboric and Anders Neergaard (eds). *Migration, Precarity, and Global Governance: Challenges and Opportunities for Labour*. Oxford: OUP.

³⁴⁶ Piper and Grugel, “Global Migration Governance, Social Movements, and the Difficulties of Promoting Migrant Rights”, p.268.

although this might constitute an issue in some cases, the goal at national and international level should be that of attempting to overcome those *facts* that did not allow to consider freedom of movement as a human right in the UDHR of 1948. Hence, this approach to open borders implies accepting the partiality and limit of each possible solution for open borders. Partiality is influenced also by factors such as incompleteness and unpredictability that are not controllable, and in such a case we must accept the weakness of our philosophical outcomes as the best possible result.

To conclude, my theorization of a human right to freedom of movement is about shifting our focus from the priority of the border to the priority of freedom of movement.

What underlines my approach to the achievement of the greatest possible freedom of movement and the maximization of open borders is the idea that freedom of movement should be the guiding principle of the political analysis and the global governance of migration, and then *ad hoc* measures might be examined and contextualised in case competing claims arise. This shift of perspective in political philosophy means that “starting from realism” does not necessarily imply starting from the nation-state, but rather from a complex international landscape in which a multitude of actors are taken into account. Freedom of movement in this case would be a *prima facie* right and a non-absolute right; but, it would be border control that needed to be justified rather than mobility. While starting from the border gives priority to the nation-state and degrees of freedom of movement are adjusted accordingly, I argue for giving priority to a human right to freedom of movement and then, within the global governance of migration and mobility, agreeing to some kind of border control if this is needed, and only for the time that it is needed.

7.7 Conclusion

This chapter has examined issues of feasibility and freedom of movement. I argued for the greatest possible freedom of movement and the maximization of open borders as a principle of transitional justice in non-ideal theory. The greatest possible freedom of movement requires maximally open borders (as the freedom to transit across countries and the freedom to stay in a country) that can be attained at a specified point and in a specified context. There are two ways to achieve the greatest possible freedom of movement (these can also intersect): on the one hand, the greatest freedom of movement implies that the greatest

number of countries would open their borders to each other; and on the other, that each country would apply maximally open borders according to its possibility.

I have examined this scalar approach to freedom of movement according to several factors: the incompleteness of the achievement of justice (Sen), both in terms of absolute limits and in terms of transitional justice; feasibility issues, divided into soft and hard constraints and compliance and transitional costs; and finally, the exploration of practical possibilities of open borders.

CONCLUSION

Broadly, the thesis is situated within the debate about justice in migration and it has endorsed the scholarship that advocates freedom of movement and open borders.

More precisely, the thesis has investigated the possibility of an international human right to freedom of movement and it has argued for a theory for the maximization of open borders that is coherent and attractive within non-ideal theory.

At the heart of this approach to freedom of movement and open borders is the idea that membership and citizenship are becoming more precarious and thus also threatening the bundle of rights that they guarantee. Most of this precariousness is caused by the implementation of states' policies aimed at increasing temporary membership, hardening criteria for naturalization and depriving citizenship for dual nationals. On the other hand, borders select voluntary migrants through mechanisms of wrongful discrimination based on new and historical processes of racialization and gender stereotyping.

The thesis has argued that freedom of movement and the maximization of open borders would limit the precariousness of membership that states are implementing, and consequently limit the destabilization of rights, life options, and individuals' choices. Also, freedom of movement would deprive states of the possibility of wrongfully discriminating on the base of race and gender at border control. Therefore, the thesis has argued that a human right to freedom of movement overrides states' right to control their borders and issues of feasibility could be addressed *ad hoc*, rather than presenting a reason to reject a human right to freedom of movement (including the right to immigrate).

In conclusion, I believe that there are a cluster of arguments that show that a human right to freedom of movement is urgently needed. For this reason, I consider my work complementary to other approaches in the literature on freedom of movement. However, I have explored an original way of arguing for a human right to freedom of movement based on the idea of wrongful discrimination as a "threat" to the right of non-discrimination and therefore I have argued for a human right to international freedom of movement based on a

non-violation account of the right of non-discrimination. In order to overcome issues of feasibility, I have argued for a principle of transitional justice based on the greatest possible freedom of movement across borders and the maximization of open borders as a gradual process towards full freedom of movement.

There is still lot of work to be done towards the completion of the arguments I have presented; for instance, wrongful discrimination might be further investigated in its intersection with class. Moreover, the analysis of the tension between gender roles and gender identity in wrongful gender discrimination might be extended to LGBT issues in migration.

Nevertheless, I think that the two original principles that I have presented – a human right to international freedom of movement based on a non-violation account of non-discrimination and the idea of the greatest possible freedom of movement as a principle to guide the global governance of migration – were worth this investigation.

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