How Political and Legal Theorists Can Change Admission Laws

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INTRODUCTION: 'WHY BOTHER READING ANOTHER PHILOSOPHICAL ARTICLE ON IMMIGRATION?'

This article is another theoretical account of immigration among the many philosophical contributions that have appeared over the last twenty years.[1] Most of them have already adequately exhausted the major arguments involved in the ethics of migration. More importantly, political philosophy seems to have little impact on improving immigration policies. So why bother reading this article as it is unlikely to provide new insights or change anything? This article, rather pretentiously, claims that there are at least two opportunities for change that to date have remained practically unexplored. First, the legal foundations of current policies have been insufficiently challenged by theorists from *the perspective of the law*. Second, theorists have concentrated primarily on identifying good (practical) reasons for the admission and exclusion of aliens in general. They have not spent much concrete thinking in how to effectively involve aliens in order to respond to those practical

[1] See for an overview of the main arguments and bibliographical data: Veit Bader, *Ethics of Immigration*, 12 CONSTELLATIONS 331 (2005); Michael Blake, *Immigration*, A COMPANION TO APPLIED ETHICS 224 (2003); PHILLIP COLE, PHILOSOPHIES OF EXCLUSION. LIBERAL POLITICAL THEORY AND IMMIGRATION (2000); Chandran Kukathas, *Immigration*, THE OXFORD HANDBOOK OF PRACTICAL ETHICS 567 (2003); Antoine Pécoud & Paul de Guchteneire, *Migration Without Borders: An Investigation Into Free Movement of People*, 27 GLOBAL MIGRATION PERSPECTIVES 1 (2005); Jonathan Seglow, *The Ethics of Migration*, 3 POLITICAL STUDIES REVIEW 317 (2005); Berry Tholen, *The Europeanisation of Migration Policy - the Normative Issues*, 6 E.J.M.L. 323 (2004).

reasons.[2] The failure to come up with legal challenges has strengthened the practice and belief among officials that current admission laws are unproblematic from the legal perspective. The insufficient focus on voice of the alien has fostered the practice of unilateral immigration policies that do not seek to involve the affected aliens. By contrast, this article shall explore the two opportunities for change. Sections I and II propose two examples of how to challenge legally current admission practices. Section III tries to find out how to render the scholarship on ethics of migration more productive in a practical sense. I will argue that rather than producing reasons for adopting a particular openness or closure of borders, political theory can provide reasons for adopting a new default framework for discussing, negotiating and determining particular levels of openness.[3] The default position is to be set in favor of aliens: their admission is the normal case and the exception, i.e. exclusion, will need extra justification.[4] I will propose some guidelines for how to make this justification framework effective. Ultimately, this article seeks to urge political and legal theorists to come up with proposals for concrete institutional arrangements that will improve our current admission practices.

I. First Example of Legal Argument: Exclusion is Not Inherent in Sovereignty

1. The Problem: States do Not Justify the Exclusion of Aliens

This article starts from the almost trivial observation of the current admission practices: when denying aliens admission to their territory, states do not substantially justify the exclusion vis-à-vis the excluded aliens. The lack of justification is evidenced by the extremely limited legal and institutional possibilities for challenging the exclusion. First, the review of exclusion measures is restricted to a legality test. This includes checking the satisfaction of the formal legal requirements (e.g. competence of the particular agency, deadlines, etc.), and the factual fulfillment of the statutory conditions for exclusion (or absence of fulfillment of the conditions for admission). But this does not include a proportionality test. In other words, a disproportionate exclusion is lawful as long as it passes

[2] Some authors offered insightful views on giving voice to aliens. But either these accounts are too hypothetical and abstract (Bruce A. Ackerman, Social Justice in the Liberal State (1980)), or they focus primarily on giving voice to aliens already residing in the territory (legally or illegally) (Saskia Sassen, Losing Control? Sovereignty in Age of Globalization (1996); Seyla Benhabib, The Rights of Others. Aliens, Residents, and Citizens (2004)).

[3] This is very similar to Phillip Cole's position in this issue. But I am not sure that granting free movement the status of a *fundamental right* is the most expedient route.

[4] Michael Blake argues in this issue for the opposite default position: "individuals have to make some sort of showing before they can be understood to have a right to emigrate" – or immigrate for that matter. However, Blake concedes that "in a world as riven with injustice as our own … such a showing will not be difficult to make".

the legality test. In addition, especially when concerns for public order are at stake, the appreciation of the facts is left almost entirely to the immigration officials. Secondly, though states have been organizing review of exclusion measures by independent courts, more than often this *judicial* review does not extend to the merits of the case but is limited to the legality of the ruling by the lower reviewer. Thirdly, and probably most importantly, the review never goes beyond the statutory criteria for admission and exclusion. Apart from outright racist and discriminatory criteria, the actual content of the statutory conditions for exclusion issued by the legislator cannot be challenged. In fact, nothing prevents the legislator to issue a full immigration stop.

2. The Cause: Inherent Sovereign Power and Carl Schmitt's Exclusion Thesis

It is crucial to see that this administrative and legal practice is rendered possible mainly by a particular rule of international and domestic *positive* law (hereafter: the rule of inherent sovereign power): states have the *legal power inherent in sovereignty* to admit or exclude aliens *as they deem fit* (subject to international obligations, e.g. admission of refugees, protection of family life). The problem with this rule is not that states have the power to exclude aliens, but rather that they have the power to do this as they deem fit.[5] What can make the exclusion of aliens so special that it is beyond justification?[6] Arguably, the only thesis that can produce such special status is an argument to the effect that the exclusion of aliens is somehow *essential or inevitably necessary*. Any thesis that makes a weaker argument will already allow the justification process to get started. Probably the most explicit and elaborate argument in this sense has been advanced by Carl Schmitt.[7] Though

[5] In this respect, most contributors in this issue already go beyond the legal framework by providing us with *arguments or justifications* for a particular level of openness or closure; porous borders (Arash Abizadeh), fairly open borders (Rainer Bauböck), cosmopolitan citizenship (Rafaelle Marchetti), fundamental human right to entry (Phillip Cole). See also footnote 17.

[6] This question is directly related to the much more familiar paradox of admission and/or membership rules of a community: who should be included when deciding who is to be excluded? See, for instance, a formulation of this problem from the perspective of consent theory: COLE, at 186-187, and from the perspective of discourse theory: BENHABIB, at 15. See also Blake's observation in this issue that the focus on the 'rules for membership' rather than the 'rules applicable to members' make the theoretical discussion so problematic.

[7] It is Hans Lindahl's excellent re-mobilization of Carl Schmitt's theory in connection to immigration that first brought Schmitt's relevance to my attention. Hans Lindahl *Jus Includendi et Excludendi*: *Europe and the Borders of Freedom, Security and Justice*, 16 THE KING'S COLLEGE LAW JOURNAL 1 234-247 (2005). For the rest, I relied primarily on Carl Schmitt's DER NOMOS DER ERDE IM VOELKERRECHT DES JUS PUBLICUM EUROPAEUM (1950) and HET BEGRIP POLITIEK (B. Kerkhof and G. Kwaad trans., 2001) (1963). For analyses and interpretations of Schmitt's theory I used the following studies: TH. DE WIT, DE ONONTKOOMBAARHEID VAN DE POLITIEK. DE SOUVEREINE VIJAND IN DE POLITIEKE FILOSOFIE VAN CARL SCHMITT (1992); D. DYZENHAUS, LEGALITY AND LEGITIMACY. CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR (1997); Jozef Van Bellingen, *Politiek en Historiciteit bij Carl Schmitt*, 10 TIJDSCHRIFT VOOR DE STUDIE VAN DE VERLICHTING EN VAN HET VRIJE DENKEN 253 (1982).

Schmitt did not address immigration specifically he has rendered explicit a central but deeply flawed assumption (hereafter: the exclusion thesis): exclusion is prior to and constitutive of to a political and legal order. This assumption underpins the rule of inherent sovereign power and is also echoed in the neo-Hobbesian and communitarian accounts of migration. Even leading progressive scholars believe that Schmitt revealed a sound assumption that presents them with a true dilemma which liberal theorists have to address.[8] The exclusion thesis roughly goes as follows: i. prior to the political and legal order there is no standard for justification; ii. to create a legal order it must be determined what and who is included in the order[9]; iii. inclusion is prior to and constitutive of a legal and political order; iv. inclusion implies exclusion, and exclusion co-determines what is included; v. exclusion is also prior to and constitutive of a legal and political order. It follows that exclusion is necessary for the creation and continuation of a political order (because it is constitutive). In addition, since the exclusion is prior to the legal order, there is *ultimately*[10] no standard for justifying (or criticizing) the exclusion. What does this mean for the rule of inherent sovereign power and (immigration) law? First, it establishes that states are *necessarily free* to decide *at will* who to include and exclude. In effect, the expression of the sovereign will is ultimately an act of inclusion and exclusion. If states were not free to decide at will who to exclude they would be subjected to a standard, i.e. a standard beyond the sovereign will. Yet standards only exist if there is an order in the first place. And this order is only possible thanks to an act of exclusion, which is in itself beyond justification.[11] Second, the exclusion thesis establishes why exclusion is also necessary for the *preservation* of the order. Unwanted immigration can challenge the actual grounds for the exclusion beyond the initial exclusion. But since the state cannot justify this initial exclusion, unwanted immigration is challenging the order itself. Hence, the authorities have the duty to fend off immigration (by all means) in order to restore the order.

3. Refutation of the Exclusion Thesis and the Rule of Inherent Sovereign Power

The exclusion thesis is conceptually flawed. Firstly, it is possible to include (and establish a community or order) without excluding. 'We, the People' may mean White Anglo-Saxon Protestants (WASPs) *only*; and then the inclusion is combined with exclusion. Alternatively 'We, the People' may mean *at least* WASPs are included; here no prior and constitutive exclusion has taken place. Secondly, exclusion involves an intentional act. The mere fact of not being in a place or not having access to a place does not mean that one is excluded. Hence, if you are not included in a place it does not necessarily mean that you are excluded.

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[8] E.g. Chantal Mouffe and contributors in THE CHALLENGE OF CARL SCHMITT (Chantal Mouffe ed., 1999); GIORGIO AGAMBEN, STATE OF EXCEPTION (K. Attell trans., 2005).

[9] For Schmitt the quintessential act of inclusion is an actual and physical taking of land (Landnahme). I cannot elaborate here on Schmitt's focus on territoriality.

[10] By contrast, there is a justification standard applicable to *subsequent* exclusions, namely the initial exclusion.

[11] Cf. the principle of state liberty: 'ce qui n'est pas interdit, est permis'. (The Case of the S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sep. 7).

Thirdly, reliance on exclusion is also problematic for it often refers to the notion of 'everything' or 'all things'. Consider the following exclusionary statement: "*Only* x is included and therefore *all things but* x are excluded.[12] So, *everything* that is not-x is excluded." If the object of exclusion is '*every*thing or *any*thing (but x)' – as opposed to *some*thing- the exclusion becomes meaningless or at least useless for purposes of practical knowledge. To be practical, i.e. to constitute a reason for *action*, it must still be specified what is *at least included* in the 'everything': if not our actions will depend on a full knowledge of the 'everything' (universe?). In other words, what is excluded cannot be derived from what is included. The exclusion thesis is also empirically flawed. The *practice* of international law and legal pluralism simply disproves that the legal order can be traced back to (or reconfirmed as) an initial act of exclusion as expressed by the sovereign will (of the nation, prince, or what have you). Furthermore, there is hardly any evidence of a connection between the exclusion of aliens and the creation of a legal and political order. Firstly, comprehensive and effective immigration laws are a very recent phenomenon. This would imply that legal orders are an equally recent phenomenon which is absurd. Secondly, contrary to common belief, the reasons behind immigration restrictions have rarely been the creation of a distinctive legal community.[13] Thirdly, a legal order comprises particular substantive legal liberties, rights and duties; immigration laws do not establish any of these. It follows from the conceptual and empirical objections that exclusion is not 'essential' or 'inevitably necessary'. The structure of a legal order and sovereignty simply cannot account for exclusion being beyond justification. Hence, we must reject the rule of inherent sovereign power, not for the sake of morality or benevolence, but as a matter of the structure of law.

II. SECOND EXAMPLE OF LEGAL ARGUMENT: AUTHORITY OF LAW AND IMMIGRATION LAWS

Both officials and aliens are norm subjects of immigration laws: aliens must obey the immigration laws. But the legal community considers the alien as a norm subject only for purposes of excluding him from that same community.[14] From the perspective of contemporary legal theory – especially an extended reading of Joseph Raz's analysis of the authority of law – this is highly problematic. It may withhold immigration laws the status of law vis-à-vis the alien. The argument goes as follows.[15]

1. *The law claims obedience.* Law is (inter alia) a matter of practical reasoning. Legal directives are special reasons, namely protected reasons: they contain an exclusionary reason

[12] Of course, the previous objection already showed that this need not follow.
[13] JOHN TORPEY, THE INVENTION OF THE PASSPORT. SURVEILLANCE, CITIZENSHIP AND THE STATE (2000).
[14] Cf. GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (1998).
[15] JOSEPH RAZ, THE AUTHORITY OF LAW. ESSAYS ON LAW AND MORALITY (1979); Joseph Raz, *Authority, Law and Morality*, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 194 (1994). Using Raz for applied legal theory requires serious health warnings. Probably most importantly, Raz aims at understanding the law, while I am conceptually validating a particular area of the law.

not to consider other reasons for purposes of assessing what to do. The legal directive claims to constitute a sufficient and exhaustive reason for action: the law claims general obedience from its norm subjects *because it is the law*.

2. *In order to claim obedience, the law must claim legitimate authority*. The law can only make this claim if it purports to have legitimate authority. Legitimate authority means that the law is *in fact* a sufficient and exhaustive reason for action.

3. *In order to have legitimate authority the law must fulfill the normal justification condition*. Legitimate authority is subject to normative and non-normative conditions. The most important normative condition is normal justification: the norm subject does *normally* a better job of complying with reasons that *apply to him directly*, if he obeys the law.

4. *Most legal systems have only de facto authority*. Most, if not all, legal systems cannot satisfy the conditions for having legitimate authority. At the very best, they have legitimate authority in *some areas* of the law regarding *some people*. But more often, legal systems have only *de facto authority*: i.e. some norm subjects regard the legal authority as having legitimate authority. Still, de facto authority relies on the notion of legitimate authority and thus on normal justification.

5. *In order to have de facto authority, the law must have the capacity to have legitimate authority*. While the legal system may not satisfy the conditions of legitimate authority, it must at least have the *capacity to have legitimate authority* (in order to count as law). It must come close to having legitimate authority, i.e. close to satisfying the normal justification condition.[16]

6. *In order to have the capacity to have authority, the law must at the least consider the relevant reasons applicable to the norm subject*. Though a legal directive may be wrong vis-à-vis a norm subject, it must at the least reflect the legal authorities' judgment on the reasons that apply to the norm subject. And even failure to do so need not disqualify the directive as long as there are reasons to obey the law provided by other areas of the law.

7. *Immigration laws do not consider the reasons applicable to aliens: immigration laws lack the capacity to claim legitimate authority*. Immigration laws do not reflect a judgment on the reasons applicable to the aliens. In addition, other areas of the law cannot provide sufficient reasons to obey the law either; the whole point of immigration laws is to exclude the excluded alien from all other areas of the law. So immigration laws fail to come close to satisfying the normal justification condition because they take away any reasons for respecting the law. Hence, immigration laws cannot count as law vis-à-vis aliens. This leaves legal authorities with three options, of which only the last is plausible. First, they simply do nothing and betray their own legal system. Second, they cease to treat the alien as a norm subject, and transform him into a legal object (like animals or plants). But this compromises their contemporary political culture that since the abolition of slavery ceased to treat humans

[16] It is my own reading that the capacity to have legitimate authority also means coming close to satisfying the normal justification condition.

as legal objects. Third, they change their laws to the effect of seriously considering the reasons applicable to the alien.

III. ARGUMENT FROM POLITICAL THEORY: GIVE EFFECTIVE VOICE TO ALIENS

1. Ethics of Migration and General Admission as the Default Position

All political theorists agree that immigration restrictions must be justified.[17] But instead of raising the question about how this justification can take place, they try to find out what makes a good justification for admitting or excluding aliens. Yet their arguments can only establish whether there are *normally* stronger reasons to admit aliens or to exclude them. However, in principle we are interested in what is just or right, not in what is *normally* just. Only if it is impossible, inefficient or *unjust* to establish with certainty what is right to do we revert to a normal case. The normal case is then the starting point for determining what we ought to do: we need less proof and justification for adopting the normal position than for the exception. The normal case is informed by either statistical regularity or ethics, i.e. the balancing of practical reasons. This is precisely what political theorists have been doing: balancing *ex ante* and *in general* the reasons for admission and exclusion of aliens. And from the pluralistic approach that considers all types of practical reasons (moral, political, prudential, and realistic) it follows that the general admission of aliens has the strongest case.[18] So there are good reasons for changing the default framework in favor of the alien: aliens should *normally* be admitted and states have the burden of proving the exception, i.e. exclusion.

2. The Default Position and Effective Voice

The default position will give the alien voice that enables him to challenge and negotiate admission policies, provided that the framework is effective. And here lies another task for political and legal theorists: propose institutional arrangements that render the new default position effective. To get us started I outline some guiding principles. Firstly, theorists should build on our experience with involving disenfranchised persons in other areas of public life (e.g. multi-level politics, participatory technology assessment, civil rights movement, etc.). They should also consider existing proposals on new immigration policies as real institutional options rather than academic exercises[19], e.g. for Europe: People Flow. Managing Migration in a New European Commonwealth (2003)[20]; Draft Directive on

[17] Tholen, at 334.
[18] For arguments and extensive references see especially supra Bader and COLE.
[19] In this respect, we look forward to examining Marchetti's forthcoming study "Globally Agreed Freedom of Movement: Toward a World Migratory Regime", as cited in his contribution in this issue.
[20] By THEO VEENKAMP ET AL.

Minimum Guarantees for Individual Freedom, Security and Justice in Relation to Decisions Regarding Movement of Persons by the Meijer's Committee (2005)[21]. Secondly, though immigration is an international phenomenon, theorists should not be emphatic about international solutions. Most immigration restrictions are still national or regional. While international standards certainly help, the national roll out is paramount. International solutions easily become a pretext for inertia. Thirdly, as social phenomena and the effect of public policies are unpredictable, it is an illusion to produce stable and comprehensive institutional arrangements. Launch and learn is the proper attitude. We must not fear failure: probably from the alien's perspective we cannot do much worse. Finally, the effectiveness of the institutional arrangement matters, not its particular legal status. There are various legal vehicles available to shape the default position (e.g. individual or group rights, procedural and material rights, legal liberties, official leniency or tolerance, constitutional rights, fundamental human rights). Lawyers should explain the theoretical and practical differences. But we should not be emphatic about a particular vehicle in the abstract: its effectiveness can only be gauged after implementation. This is another reason to get started.

Conclusions

Over the last twenty years theorists have adequately elaborated the main arguments from the ethics of migration. Yet two important things were left unattended. First, the *legal* status of the so-called rule of inherent sovereign power has remained practically unchallenged. Second, few, if any, suggestions have been made to the effect of giving the alien voice to challenge the justifications of admission policies. As a result it has become far too easy for officials to refrain from making any improvements in our admission laws. This article has shown that we can do better. There are legal arguments against the rule of inherent sovereign power. Furthermore, political theories provide us with very good reasons to change the default position and give voice to aliens. And we, theorists, can make this voice effective if we start proposing concrete institutional arrangements, today rather than tomorrow.

[21] By Pieter Boeles et al. in 7 E.J.I.L. 301 (2005).