

Choosing Whom to Govern

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Books under review in this essay:

The Rights of Others: Aliens, Residents, and Citizens, by Seyla Benhabib. Cambridge, UK and New York: Cambridge University Press, 2004. xii, 251 pp. \$23.99 paperback; \$65.00 hardcover.

According to the principle of state sovereignty, the rulers govern. In democratic theory focused on the state, the key issue is how those who govern are chosen and, once chosen, the rules according to which they govern. According to the principle of popular sovereignty, the people govern; they are the authors as well as the subjects of law. The key issue is choosing who constitutes the people. Who is to be admitted into membership and how must they conduct themselves once admitted? In democratic theory focused on the people, the key issues are how members are chosen, how they are included to be part of the "people" who govern within a bounded territory and in an economically, socially, politically, and militarily interdependent world of very diverse peoples.

A community must decide who to admit into membership. Further, what are the terms of membership once admitted? Benhabib focuses on both issues as key ingredients of democratic theory based on the principle of self-determination, for "democratic governance implies drawing boundaries and creating rules of membership" (174) However, the cosmopolitan content of rights, such as Article 3 of the European Convention on Human Rights (ECHR) stating that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment," is an absolute norm. In contrast, the Refugee Convention allows exceptions for those deemed security threats. Article 3 of the European Commission on Human Rights is completely universal and at odds with the principle of democratic voice and the reflexive acts necessary to constitution making. The state, not the community, provides the norms both of admission and good citizenship. The sovereign state, independent of rather than in response to the community, controls the identity of the nation through its rules of membership admission (and revocation), and its rules of good conduct as a citizen. The modern democratic state adjudicates this tension based on cosmopolitan human rights

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principles that are context transcending and rational norms of procedure and debate. According to Benhabib, all modern constitutions offer membership according to a schedule of rights justified in universal terms. Those universal norms demand inclusion, but the democratic polity draws restrictions in defining who constitutes the polity. In constructing the dialectic as simply one between universal norms and particular interests of the demos, the universal norms are placed in a trump position.

How does a democratic polity adjudicate the dialectic between the bounded community of a state and the transcendent universal principles on which a democratic state must be based according to Benhabib? Following Jürgen Habermas, the principles of discourse ethics provide the answer. In the dialectic between these international "universal" norms and the decisions of democratic legislatures, variations in "iterations" in relation to the political and legal culture of individual polities are possible, where iterations are defined as contentious public debates and disputes in a fluid and open process that defines the identity of the democratic polity and the sovereign nation. Every fluid iteration is a transformation of an authoritative original meaning in a new and different context so that the original is "aufgehoben" in Hegel's expression (not used by Benhabib) where the original is preserved through its continuous deployment, stored away in its current expression, and transformed through interaction with the world at its external territorial boundaries and between and among its internal social fault lines.

These iterations are "democratic" if there are "complex processes of public argument, deliberation, and exchange through which universalist rights claims and principles are contested and contextualized, invoked and revoked, posited and positioned, throughout legal and political institutions, as well as in the associations of civil society" (179). Who participates in the argumentation or "discourses"? Each and every individual has the right to initiate a debate through a "speech act" and request a justification of practices and presuppositions. The participants in such debates are not simply members of the same polity, but potentially any individual impacted by the normal norms one upholds. Thus, cosmopolitan "rights" define the legitimacy of the polis and who participates in the debates, while the demos with its more selective membership interprets which variable interpretation is applicable in a particular context in different political and legal cultures. Whatever variations, if those cultures fail to live up to those cosmopolitan values that define the boundaries of a democratic polis, the polity has failed.

What are those transcendent universal metanorms? The end is equality—the applications must be nondiscriminatory in formulation and execution. The process of deciding on that equality must be transparent. Those who decide are and must be responsible. Further, the application of the principle of equality applied in a transparent way in a democratic contextually rooted process must be measured in accordance with a norm of accountability that demands that reasons be offered and all affected parties be given a voice in the process of making the decision to ensure moral respect and egalitarian reciprocity. Institutional practices that offend any one of those principles must be subjected to critique.

How do we defend out particular interests and the rights of our group at the same time as we take on the issue of the membership rights of others? Those issues of membership are about both entry to that membership and the benefits and respect accorded through that membership. How can we belong to bounded communities within which we debate these issues with a cosmopolitan impact at the same time as we engage in a universal and open moral conversation? For the very methodology raises the question of democratic citizens of a particular state who by definition exclude others from debate, and a discourse ethics that demands that they can be part of the debate when the debate itself mediates between the demands of universal morality and the ethical, political, legal, and operational practices

that bind us as members of a community. By definition, we have a cosmopolitan focus with a particular locus.

Seyla Benhabib, the Eugene Meyer Professor of Political Science and Philosophy at Yale University, approaches the problem of membership acceptance and rejection first through an examination of the third article of Kant's doctrine of cosmopolitan right dealing with the right of hospitality, secondly Hannah Arendt's focus on the stateless and the importance of everyone belonging to a polis and being a "legal" person, and then Rawls's *The Law of Peoples*. If Kant supplied the universal philosophical moral principles without being able to derive from those principles the right to membership in a state but only a right to hospitality, Arendt supplies the right to membership in a state—but without the articulation of universal moral principles upon which to base that right, but only the "historical arbitrariness of republican acts of founding whose arc of equality will always include some and exclude others" (66). Only the collective will of sovereign polities will provide guarantees and protection for rights to membership in some sovereign state. For Benhabib, Kant, and Arendt fail because their "moral cosmopolitanism founders on their legal and civic particularism" (66). In contrast, for Benhabib, each and every individual has rights independent of their state membership in the recognition of their universal status as human persons and such "cosmopolitan rights create a network of obligations and imbrications around sovereignty" (67).

If one is to start from a premise of popular rather than state sovereignty to articulate a theory of membership, the road forks in two directions. On one route, the "people" are defined in "civic" terms as simply all those who are members of a state. In the other route, the "people" are defined in nationalist terms as a nation that may or may not constitute or even be recognized by a state. Though Benhabib initially claims that, "Rawls's Law of Peoples is state-centric and cannot do justice either sociologically or normatively to questions raised by border-crossings," (72) Benhabib also states that Rawls distinguishes states from peoples and argues that "peoples, not states, are the relevant moral and sociological actors in reasoning about justice on a global scale" (77). This apparent contradiction in interpretation is clarified when it is understood that in developing his overall philosophical position, Rawls moved from the individual and his/her role and rights in a liberal state in which citizens do not have to agree on the good, but they do have to agree and to arrive at an overlapping consensus about justice and the right, to the political liberal society created by that state, and then to the peoples by whom and for whom states are created. However, in the historical genealogical order of development, the people come first, the state comes second, and the conception of the individual as a person deserving of respect and as a possessor of rights comes third.

For Rawls, that is why a people constitutes a state as a sovereign body serving all its citizens, not just the members of the people. The people assign sovereignty to the state while not abrogating the obligation of the state to preserve itself as a people. Though an individual member of a people carries obligations from birth to death, a people lacks the sovereign power of enforcement. State sovereignty is only developed when a people create a state that, in turn, will create and will enforce by law and coercive force the individual's obligations to the state and the rules of admission into that state.

Both Rawls and Benhabib as defenders of procedural justice share a high regard for transparency as a metanorm, Rawls in the guise of the "veil of ignorance" that insists that no one hides behind a device, such as the Ring of Gyges, that puts one individual at an advantage in terms of deliberation and decision making over another. Both share a high regard for rational public discourse, what Benhabib from the perspective of discourse ethics calls "free public reason" and Rawls calls "practical discourse." Benhabib also places

herself on the side of a people's sovereignty rather than state sovereignty. Both respect the fundamental thesis of multiculturalism and its aspiration to create an atmosphere of mutual recognition between and among different cultures and systems of value that respects differences and allows for tolerance of various interpretations of the good that often conflict and are sometimes incommensurable. Both recognize the importance of culture to the recognition of rights and that such rights are really only respected in liberal societies. So where do they differ and why is Benhabib so critical of Rawls?

In general, although they both provide a neo-Kantian system of norms for mediating conflicting interests and value discussion to legitimate political decisions, the major difference is that for Rawls, the public sphere is content neutral and impartial governed by an overlapping consensus and provides a place for interests to be debated, whereas for Benhabib it is procedurally neutral but, like Will Kymlicka, a contentious arena to debate values as well, for cultural membership impacts on the public sphere in many ways, though Kymlicka, true to his Canadian roots, puts far greater emphasis not only on the importance for liberalism in giving substantive recognition in the public sphere to those differences but also on the crucial importance of a specific culture as a necessary condition for individual freedom, for it is only when cultural membership is recognized as a primary good that we can have individuals who can respect themselves and can participate in public debate with confidence.

Suspicious of impartiality and a wall between the public and the private realms, in Benhabib, the self embedded in social relationships has a Kantian duty to engage in public debate when the norms of the private sphere come into conflict in the public sphere, for associational ties project the values of each group into the public arena. Like Kymlicka, Benhabib explicitly values cultures that offer choice and that allow individuals to opt out of their cultures, valuing cultural transformation over cultural preservation and reproduction. Unlike Kymlicka, she argues that the public space must be preserved as an arena where that choice can be made and, in this respect, is closer to Rawls. Hence the importance of preserving schools as neutral places provided the procedural norms are followed, instead of permitting them to be used to display through performative rather than speech acts the symbols of one's personal culture. Her final two chapters take on actual practices: the disaggregation of citizen rights between identity and rights to social benefits in the European Union, and then voting rights and the rights to wear head scarves in schools.

In the disputes over head scarves in France and Germany where the global confronts the local and national, we have an opportunity for a critical examination of Benhabib's portrait of the dialectic interaction of the principles of discourse ethics and process norms of transparency and accountability applied to the application of the universal norm, the equal right of every human being, regardless of political status, to have certain inalienable rights and to be respected as a legal person, to a particular context.

In France, *l'affaire du foulard* began in 1989. Three Muslim girls—Fatima, Leila, and Samira—were expelled from their school in Creil for wearing head scarves, breaching a compromise reached by school authorities and their parents. The three girls consulted M. Daniel Youssouf Leclercq who was once president of the National Federation of Muslims (FNFM) in France and headed an organization called *Intégrité*. Benhabib does not state that FNFM (as well as the Union of Islamic Organizations of France [UOIF]) was widely considered to be radical, and that the government subsequently made efforts to set up a rival national Muslim organization through which it could negotiate to adjudicate such issues as halal preparation of meats, training of Imams, appointing Imams for hospitals and prisons, etc. The affair culminated recently when the French National Assembly voted 494 to 36 with 31 abstentions to ban the wearing of "ostentatious" (as distinct from "discreet") religious

symbols in public schools—large Christian crosses, Jewish yarmulkes, and head scarves worn by religious Muslim women.

Benhabib interpreted the girls' gesture as using French freedoms to challenge the French notion of *laïcité* that insists on a wall between the private and the public realms in matters of religion in the public arena; schools must remain neutral with respect to religion. By bringing a symbol of the home into public space, the girls challenged the state. They also confronted the Muslim definition of the place of the woman in the home; a head scarf traditionally reinforced identification with that cultural and normative history rather than serving a public role of democratic contestation. For Benhabib, the decision to wear a head scarf was "a conscious political gesture" on the part of the three girls, a gesture of both identification and defiance.

In determining that any "ostentatious" religious display was banned, the principle of equality was observed. The commission of inquiry and the debate over the laws were transparent. According to human rights and discourse ethics norms, the principle of accountability, however, was offended when the girls themselves were not evidently given the opportunity to both speak and be heard. Benhabib argues that if they had been heard, "it would have become clear that the meaning of wearing the scarf itself was changing from being a religious act to one of cultural defiance and increasing politicization" (191). Benhabib never explains why a religious act became primarily an act of political cultural defiance. If it did, perhaps the responsibility belonged to French culture and not to the girls. Benhabib chastises the authorities—not for their motives, intentions, or even their decision, but for the process of reaching their decision without allowing the girls to be interrogated about their intentions and motives to account for their actions before the school community.

Democratic legitimation allows debate; it does not demand debate, especially in an intolerant atmosphere, one where there is no evidence of harm. "Neutrality" may be a deep cultural trait. But it is not necessarily connected with cosmopolitan rights when the onus is placed on students and not the institution for observing neutrality. It defines tolerance by making that which is to be tolerated publicly invisible—not an obvious interpretation of a cosmopolitan norm of transparency. Benhabib privileges accountability over transparency and thereby redefines transparency as repressing religious expression in the public sphere.

Why interrogate the girls? To ascertain their intentions and motives! Benhabib speculates on the intentions of the girls—possibly acts of cultural defiance, adolescent acting out to gain attention and prominence. Benhabib also speculates on their motives—fear, conviction, narcissism? Other than the reference to FNFM, which she never describes as reputedly radical, Benhabib provides no evidence for her hermeneutical explanation or justifies her speculations in the language of psychobabble. Nor does she ever consider that it might be an assault on both their rights and their privacy to demand such a public accounting, and that such a request for an accounting might not be simply a discussion of differences but a demand for the girls to defend their actions when the issue might be that there is no reason that their action needs to be defended. Penalizing does not only arise from criminalization but also from subjecting people to forms of discourse to which they may object and where the demand for an explanation may itself be in need of justification. It is one thing to offer an opportunity for individuals to discuss an issue; it is another to demand that individuals justify their actions in an atmosphere of widespread opposition. In any case, what relevance do intentions and motives have to assessing rights to free expression? And why are the intentions and motives of the state—possibly, and likely, pandering to the anti-Muslim vote and the backlash—not interrogated?

For Benhabib, this failure "reimprisons them [the three girls] within the walls of patriarchal meaning." The norms of respect and equal treatment for religious beliefs require

that they "clarify how they intend to treat the beliefs of others from different religions" (192). Where was there any suggestion that the wearing of a head scarf made any statement about disrespect for the beliefs of others? Why should the three girls be asked to defend something that they themselves had not put into question and when there is no evidence of harm? In addition to demanding an interrogation of the wrong party, part of the problem is that Benhabib privileges transparency, equality, and accountability as universal norms over liberty and fraternity, without accounting for their privileged status, the particular interpretations of each, or the tensions between those interpretations. In other words, the dialectic is not only about political culture but about the particular interpretations given of supposedly cosmopolitan norms, including the proposal that expressions of cultural difference that are perceived as politically defiant must be defended in public. Privileging of the "universal" norm of public accountability in this particular way is simply an invisible form of justifying state repression politely rather than ruthlessly in the name of tolerance and rational discourse. The many omissions of context by Benhabib, such as the fact that because of municipal debates and considerations and the resultant opposition, there are just over fifteen mosques—most in private homes—in a population of five million Muslims, reinforces this critique.

Benhabib's case of the German scarf issue supports such an interpretation. In 1998, Fereshta Ludin, an Afghan-born naturalized German who taught kindergarten was barred by the state of Baden-Wuerttemberg from wearing a head scarf when she taught. Upon refusal to comply, she was fired. In the effort to balance individual liberty with the principle of public neutrality by the state, in September 2003, the German High Court ruled that individual states were free to ban or to permit wearing of head scarves in the German school system, but that states had to find arrangements "acceptable to everyone" while balancing religious liberty and the neutrality requirement. Legislatures were asked to take into account and give reasons for balancing the following principles: the freedom of religion of the teacher, the rights of parents to determine the education of their children and the cultural identities and traditions to which they would be exposed, the rights of children not to be exposed to religious influences without consent, and the obligation of neutrality on the part of the state. The issue was one of "ostentatious" display of membership in the teacher's religious community of origin, a community of "fate and memory," and whether that prevented the teacher from carrying out her duties as a civil servant of the state.

Though no sufficient basis in existing law was available to make such a decision when the teacher was fired, the High Court did not reverse the ban but simply ruled that the legislature had to decide such matters. Instead of dismissing the ban until the legislature made a decision, even though there was no legal foundation for it, the ban was upheld and the legislature given time to decide. The public had a right to weigh and the onus was placed on the people in authority who imposed the ban to have a legal foundation for their actions and for the legislation itself interfering with civil liberties to be justified by reasons. This fits in with the discourse ethics. But the absence of a legal foundation for action was not seen as a reason for chastising the authorities who imposed the ban without lawful authority.

Unlike the French decision, Benhabib does not fault the German decision because it instantiated discursive ethics and its focus on the process of making a decision. Decisions without a legal basis were not faulted. The fact that many if not most states in Germany would soon legislate the ban only indicated that the legislatures did not have to provide real proof that wearing a religious head scarf would, in fact, be a bad influence on children and would interfere with the rights of parents to determine their children's religious affiliation. Benhabib demonstrates that discourse ethics provides an opportunity for the prejudices of communities to be reinforced by "rational" rules of process. In the evaluation of that

process, crucial pieces of information concerning context are omitted; in 2005, Germany has a population of approximately 3.2 million Muslims, about 8 percent of the total, but less than half a million are citizens. Further, popular beliefs of effects displace ostensible proof. Legal rules of law and rules of evidence are set aside. And ostensible universal norms like "transparency" and "accountability" are given very particular and, I would argue, warped interpretations. Finally, the debate on these very marginal issues of prejudice provides a distraction from the many issues and circumstances that point to the broadening democratic deficit.