

**THE RIGHT TO LEAVE AND THE RIGHT TO ENTER:  
TWO SIDES OF THE SAME COIN**

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## Introduction

What would the world look like if everyone were able to leave the country of his or her residence and live elsewhere? What would this mean for citizens who live in places where violations of basic rights, corrupt governments, dictatorial regimes, warlords, dangerous gangs or guerilla's prevail? If those people knew there is a safe haven they are able to enter, would you begrudge them of a secure life in that place? It seems to have become a tendency to focus on the negative consequences of higher migration flows. More open borders would supposedly undermine the sovereignty of states and lead to an unfavorable lack of control over who enters the country and who does not. Yet I believe there are many good reasons to defend looser border controls and actually far fewer reasons to support strict immigration policies.

Moreover, if you think about the content and the intention of laws and treaties that the major part of the international community have agreed upon in the past, the extent to which most countries restrict entrance nowadays is quite surprising.<sup>1</sup> The Universal Declaration of Human Rights (UDHR) is the paragon of the libertarian spirit that advocated the belief of more open borders and the recognition of the significance of free movement.<sup>2</sup> Ignited by the horrendous events of the Second World War, this document aimed to set conditions to the actions of governments, limit their ability to harm its citizens and to prevent any repetition of extreme violation of human rights. In pursuance of this goal, the treaty incorporated the right to freedom of movement and residence between the borders of each state and the right to leave your country. Sadly, what is forgotten nowadays, is that the right to leave and the right to move across borders are of utmost importance to the fulfillment of human rights, the reason for which they were stipulated in the first place.

Yet, even more surprising to me, is the conviction with which almost every country in the world defends the right to leave a country, while they simultaneously resist to acknowledge a subsequent right to enter another country. The act of confidently endorsing the right to leave in your country and to facilitate depart of citizens combined with the subsequent lack of taking any responsibility whether or not the person is able to settle anywhere else, seems incoherent to me. As Phillip Cole

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<sup>1</sup> Dimitry Kochenov provides a comprehensive overview of the laws and treaties concerning migration in 'The right to leave any country including your own in international law' (2012, 47-55).

<sup>2</sup> The spirit is libertarian in the sense that it is based on the idea of the inviolability of human dignity and the protection of the liberty and security of individuals against governmental actions (Whelan, 1981, 637).

pointed out “one cannot consistently assert that there is a fundamental human right to emigration but no such right to immigration; the liberal asymmetry position is morally ethical, but also conceptually incoherent” (Cole, 2000, 46). Cole argues that in case of nation state, the right to exit one’s state is dependent upon entry elsewhere because there is no livable ‘space’ of statelessness (2011, 203-204). I share the same conviction that the notions of depart and entrance are conceptually intertwined.

Remarkably, the existence of this connection is usually not refuted, but often just ignored or belittled, for example in the paper of the Global Commission on International Migration (GCIM) of the United Nations. First it specifies, “the existence of a right to leave does not entail an automatic right to enter other states” (2005, 1). While later, the rapport acknowledges the connection of the two by stating, “there is an obvious disjuncture with respect to the right to leave in the fact that there is no corresponding general right to enter another state” (2005, 16). So they seem to be aware of the logical problem, yet chose not to tackle it and ignored it instead.

I believe this conceptual connection between the right to leave and the right to enter should not be dismissed so easily and needs to be addressed. Before these rights will be discussed, I will treat the concept of rights and, firstly, argue rights ought to have correlative duties in order to be useful and, secondly, argue that any fulfillment of a duty eventually requires positive action. Then I attempt to justify the moral right to leave based on the ground that citizens should be able to withdraw their citizenship and leave a state in a democratically legitimate polity. So I argue states have a positive obligation to protect the right to leave. In order to protect the right to leave and to make sure that it is of use to the people, the governmental duty to ensure this encompasses the removal of the threat that there are no countries available to enter. Furthermore, I discuss the different ways in which governments could remove this threat. After that, I treat the aspects that could potentially undermine a right to enter. Then I will unify the developed accounts of the right to leave and the right to enter by demonstrating that the fulfillment of their correlative duties both require a supranational institution, entrusted with the task to coordinate migration. Finally, I discuss whether the right to enter includes a right to enter any country and if it also entails a right to citizenship.

### **One. Rights and correlative duties**

The study of rights has a comprehensive amount of theories as the interpretation of rights is subject to a lot of controversy. Therefore, before we can make sense of a moral right to leave, it is necessary to pin down what rights are, mean and imply. The first controversy is the notion of the correlative duty. Some scholars argue not every right makes a *claim* on some institution that ought to ensure the protection of the right. Onora O'Neill, for example, argues human rights do not need to have correlative duties if it can be proven that the normative foundation for the right is weak. As a result, if the right is not properly protected, nobody can be held responsible for its breach (O'Neill, 2005, 430). In order to find out if this holds, I will assess the claim that rights can be mere privileges or liberties without an obligation as its counterpart.

Imagine a girl named Lisa. Lisa lives in Moldova and in Moldova people have the legal right to freedom of speech and movement. Lisa is gay and wants to promote the position of gay people in Moldova by joining a non-violent protest in the city. The protest consists of a march through the city with signs and they are all going to wear colorful clothes to draw attention and recognize each other. However, on the day of the demonstration, she receives threats via social media that say she must not participate or she will be hurt. Despite this setback, she decides to go anyway. When arriving at the designated spot, she sees a crowd of angry people who are not dressed colorfully and clearly did not come to join the march for the gay cause. The angry people are extremely violent towards the demonstrators and in reaction to the upheaval a police troop arrives. However, instead of helping the protesters pass and restraining the violent behavior, many police officers join the mad people because they feel their violence is justified. They yell at Lisa, call her names, throw with rotten fruits and prevent her from joining the rest of the protest-group. After trying to break through the mad wall of people, she eventually gives up seeing that the situation is pointless. Dripping with rotten juice, smelling like garbage and grief-stricken she returns to her home. When she opens her mailbox at home she sees the content of the threats have escalated and now concern her safety and that of her loved ones. Scared to death, she decides to never stick up for her beliefs again.

What does this example show? First of all, the participation in a peaceful march for the right of a minority is a clear manifestation of the right to freedom of speech because the participants aim to convey a message to the people of their country and do so by marching through public space. Yet, in this scenario, Lisa has not been able

to *use* this right to the freedom of speech and movement because she was violently obstructed and this obstruction disabled the exercise of her speech and the ability to move freely.<sup>3</sup> Furthermore, due to the traumatizing experience, she intends to refrain from any further expressions of her beliefs.

Now, if you support the claim that such rights to freedom of speech and movement are merely liberties then you would agree that it does not matter if Lisa is able to actually use the substance of these rights or not because these rights do not yield any obligations whatsoever that could protect the use. Wesley Newcomb Hohfeld named this sort of rights ‘liberties’ or ‘privileges’. The concept entails that people *do not* have the duty *not to interfere* with the exercise of a liberty (Duarte d’Almeida, 2016, 556). Hence, the government in this case, would not have to take any responsibility for the past events, withhold the angry people, discipline their troublesome behavior or even keep their own police officers from impairing the protest. The crux is, that even though people and officials interfere with the right to freedom of speech of movement, they are allowed to do so according to the liberty account of rights, as they are not obliged to ensure the right is not interfered with, either by the officers or any other person.

This also means that there would be no reason for the government to find a way to prevent a repetition of the same sort, make any sort of amendments towards Lisa or provide some sort of protection for Lisa so that she feels like speaking her mind again. So when the right is interfered with, there is no reason why anybody should compensate or restore the interference because the liberty conception of rights does not generate any responsibility or obligation on part of the government. In sum, the government does not need to offer some protection for the right to freedom of speech and movement, refrain others from interfering or keep from interfering with the rights itself.

Next, consider the following similar hypothetical case. There is a boy named Dimitri who lives in Russia. Suppose there is no legal right to freedom or speech in Russia. In Moscow people have organized the same march as in Moldova and Dimitri wants to participate just like Lisa wanted to. Yet, just like in Lisa’s case, Dimitri receives threats and is obstructed by a crowd of angry people who scare him, humiliate him and obstruct him from joining the march. The police force does nothing

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<sup>3</sup> You could also say other negative rights, like the right to safety and non-discrimination are harmed, but I will not address these rights for the sake of simplicity.

about it and partially participates in the violence too. Again, the government does not have any responsibility to do something about the situation. However, different from the previous case, the lack of responsibility is evident because there is no legal right to freedom of speech and movement in the first place.

Then, if you compare these two scenarios, how does the existence of a right to freedom of speech and movement improve the situation for our first protagonist? In both cases, they are not able to use the substance of the right to freedom of speech and movement and in both cases the government has no responsibility whatsoever to do something about the interference with the right. So it seems that the presence of a right to freedom of speech and movement, understood as a mere liberty, does not improve the situation for Lisa in comparison with Dimitri. Regardless of the presence of a law, they are both unable to use the freedom of speech and movement. Thus, seeing the presence of a legal right to freedom of speech understood as a privilege is not of any use to the holder of the right, it renders the right useless.

So, if you adopt a libertarian notion of rights, the introduction of the legal right does not improve the situation in any way. That brings up the question why you should introduce the right in the first place. What these examples demonstrate, is that we want legal rights because we believe subjects have the moral right to be able to use or exercise the substance or content of the right.<sup>4</sup> Rights are created because they can be of value to right-holders and they can only be of value if the substance of the right has some use. Therefore,

(p1) rights must be of some use to the bearer of the right.

Perhaps though, you can think of cases in which liberty rights do have some use for the right-bearer. Suppose Lisa wants to engage in a simple protest on her own by standing in front of a store she knows to be guilty of evident homophobic behavior. She has made a sign, stands a couple of feet away from the entrance of the store and gently chants the slogan she composed. Her presence is no nuisance to the rest of the people passing by and the employees of the shop have not noticed Lisa yet. All together, her presence does not bother anyone. Then, a police officer walks by and Lisa catches her eye. She dislikes lesbians and wants Lisa to stop her protest so she

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<sup>4</sup> Henry Shue also argues rights ought to enable the right holder to enjoy the substance of the right in *Basic rights: Subsistence, Affluence and U.S. Foreign Policy* (1980, 16).

walks over there and tells Lisa she needs to stop now. Astonished, Lisa invokes her freedom to speech and movement, explains her cause and ensures the officer that she does not bother anyone. In spite of Lisa's attempts to persuade the officer that her protest is harmless, the officer stands her ground and demands Lisa to quit. Scared of the consequences, Lisa gives up and goes home. In this example, Lisa could not use her right to freedom of speech and movement.

Yet, it may be that Lisa refused to stop and stubbornly continued her practices. Then the police officer could have called a colleague and they could have put her, in a non-violent or threatening manner, in the police car and drove her home. In this case, no other right is breached besides the right to freedom of speech and movement and still, Lisa was unable to use these rights. Also, to take it even further, if the right to physical security and the right to fair trial are understood as liberty rights too, then the police officer could have done way more. She could have taken violent action, like tearing her sign apart, pushing Lisa away or even hitting and arresting her. In the same manner, any other citizens would be allowed to remove Lisa from her place, destroying the sign or even physically harm her and nobody would have any obligation to prevent this from happening or restore the harm done.

It appears to be totally pointless to introduce a right that yields absolutely no assurance that the right is protected from interference either by the people or the government itself. And if even the government itself does not have the duty not to interfere with the right, there is no guarantee the introduction of a legal right will improve the situation compared to its absence beforehand. The same could be said about rights in general. Take some classical examples of rights like the right to safety and physical security, what use would it be to have a right to safety when policemen have no duty not to assault citizens themselves or have no obligation to stop an assaulter when he faces one directly? Or what use would it be to have the right to fair trial when any arbitrary and unfair imprisonment of a person is allowed seeing that the government does not have the duty not to infringe the right? Before any right can be useful, the respondents of that right must not tolerate the interference with the substance of the right.

So I argue, in order for a right to be useful, its presence must be of use to the right-holder and this requires a subsequent responsibility to protect it and a duty to refrain from interference. Thus, every right ought to be accompanied by some obligation. This sort of concept of rights is what Hohfeld called 'claim-rights' and

means that rights impose a duty on a subject. In Hohfeldian terms, this duty encompasses omissions as well as actions (Duarte d'Almeida, 2016, 555). So, a right is only useful if there is an assurance that someone protects it and some institution present that can be held responsible for this protection, therefore

(p2) only claim-rights are useful.

This results in the first claim about rights, called the *Usefulness of rights claim*.

(c1) All rights ought to have a correlative duty, otherwise they would be of no use to the right-holder.

## **Two. The negative/positive distinction**

So far we can conclude that, if there were a right to leave, it would be accompanied by an obligation on the government's part. In order to examine if a right to leave yields the duty to ensure there is somewhere to go to, the character of this duty needs to be clarified. In the previous sections I mentioned the substance of a right that has to be enjoyed before the right can be of use. Yet what people consider this substance to be differs. The second controversy in theories of rights is the negative/positive distinction that each assigns another substance to different kind of rights. This distinction is relevant as the corresponding duty is dependent on its interpretation.

Traditionally, people maintain the distinction between on one hand negative rights, like the freedom of speech and movement, that only entails that people have the right not to be interfered with the use of a certain right, and on the other hand positive rights, like the right to education and health care, that entails people have the right to be actively supported to ensure the right-holder can use the concerning right. I will discuss the traditional conception of negative rights that claims these sort of rights merely yield a negative duty, meaning the government only has the obligation not to interfere with a certain right itself.

Even though rights and duties are connected to the extent that the latter is a correlative of the former, it is important to note that the negative/positive distinction can be applied to both rights and duties separately. In the realm of rights, the distinction amounts to on one hand the negative conception that entails the right-



holder has the right to non-interference with the use of substance of the right. This definition is uncontroversial and therefore I will assume that

(p1) negative rights are rights to non-interference.

On the other hand, positive rights demand more in the sense that they require active measures on the government's part to ensure these rights can be used. In the duty domain a negative duty entails the duty-bearer has the duty not to interfere with the use of the right's substance. A positive duty means the duty contains positive action to ensure that the right can be used. Note that the conception of positive rights and positive duties coincide while the definitions of negative rights and negative duties diverge. As the current treatment of rights concerns national law, the duty-bearer or respondent of rights, is the government.<sup>5</sup>

Recall Lisa's right to freedom of movement in Moldova, but now the right is accompanied by a duty imposed on the government. If the right to freedom of speech and movement were indeed negative, then this would mean Lisa must not be interfered when she wants to use the right. All it takes to protect the right is that she is left alone and free to enjoy the freedom of speech and movement. However, as was demonstrated, Lisa was not able to express her right to freedom of speech and movement due to the severe threats, angry people, violent behavior and the physical obstruction. So she was interfered in her attempt to speak her mind and move freely in a public space.

Now if the corresponding duty of the government would be that they should merely refrain, as the body political, from interfering with the enjoyment of the right, this would hardly prevent the interference with Lisa's right to freedom of speech and movement. In this scenario, it would only mean the policemen should not actively join the crowd of angry people. If the government were the only respondent of the duty and if they would apathetically stand on the sideline watching the whole upheaval, they would have already fulfilled their duty, while Lisa is unable to use her right. If the other angry people decide to obstruct Lisa's way, then the government would not have the duty to stop the angry people from obstructing Lisa because this

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<sup>5</sup> Alan Gewirth mentions the duty-bearer as a respondent in his analysis of rights that identifies five aspects, namely, the subject or right-bearer, the nature or function, the object or substance, the respondent or duty-bearer and the justification of rights (1996, 8-9).

would require positive action on part of the government's side, instead of mere negative forbearance. So the conception of the duty correlative to a negative right as one where only the duty-bearer has to refrain from interference seems insufficient to meet the requirement of the right to non-interference because this right could still be breached.

What then, does a negative right require from its respondent? In Lisa's case, her negative right to non-interference with her freedom of speech and movement would require *other people* refrain from interfering with the right. So,

(p2) the right to non-interference primarily involves the right not to be interfered by any party, not just the respondent.

This raises the question of how the government can prevent that other people interfere with the right to freedom of speech and movement. If the police force in Moldova had warned the violent crowd they should not harm Lisa or impair her attempt to express herself because otherwise repercussions would follow, then this probably would have soothed the crowd and led to their withdrawal. Moreover, the government could have created a safe environment where it is well known threatening someone has consequences and cannot go unpunished. Or they could have arrested persons who demonstrated severe violent behavior as they pose a genuine danger for the safety of others. In any case, there are a lot of actions the government could have undertaken to ensure Lisa's right to non-interference is met.

What these actions have in common is that they are all positive in the sense that they require the implementation of actions and that their aim is to prevent that others, the third party, interfere with the right. The point is that the negative right of a right-holder can be violated by many other causes apart from the actions of the respondent. Thus, the respondent needs to tackle these causes too before the right is not interfered with. Seeing that it is the definition of a negative right that it entails non-interference with that right, the correlative duty ought to ensure that the right is not interfered with and considering this is, in a society with many people, only possible by creating an environment that ensures this and setting up procedures for any missteps, the duty requires positive action. As Henry Shue points out '[...] although the goal [of a right] is negative, the duties correlative to the rights will turn out to include positive actions' (1980, 37). And "a right has not been fulfilled until

arrangements are in fact in place for people to enjoy whatever it is to which they have a right” (1980, 16). So, as the adoption of these measures is necessary to fulfill the duty,

(p3) in order to keep third parties from interfering, the fulfillment of the government’s duty to ensure non-interference requires positive action.

This results in the second claim about rights, which is called the *Third Party claim*.

(c2) Even if a right is negative, seeing that it is a right to non-interference, the correlative duty involves positive action needed to prevent third parties from interfering or to restore interference.

### **Three. The moral right to leave**

Many countries defend the right to leave, yet based on what grounds?<sup>6</sup> Do people indeed have the moral right to leave a country? And if they do, for what reasons? Scholars argue for a right to leave on many different grounds. Anna Stilz, for example appeals to the strong interest people have in traveling and relocation (2016, 77). Frederick Whelan bases his plea for a right to leave on its importance to human autonomy and dignity: “We acknowledge and actually grant a largely unqualified right to leave, in accordance with basic liberal values centering on individual autonomy and initiative” (1981, 637). David Miller invokes the extension of the right to freedom of movement people have within their borders and argue this should also apply to crossing-borders (2016, 23). Yet, these strategies are all accompanied by many conditions and especially the interest account, the view that people have a right to leave based on the interest they have in visiting other countries, can be subjected to a lot of concerns about its interpretation. Therefore, I will adopt a different strategy. I argue a denial of the right to leave would undermine the democratic legitimacy of a political authority.

On basis of what do we accept the rules and laws the state imposes on us? You cannot choose where you are born and grow up and each place of birth is encapsulated in a political system, the result of sheer luck in which you had no say at

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<sup>6</sup> See Dimitry Kochenov’s comprehensive overview of the laws and treaties concerning the right to leave in ‘The right to leave any country including your own in international law’ (2012, 47-55).

all, so why should you comply with the set of rules they created? It is easy to get frustrated thinking about the powerless position you are in when faced with a political authority that forces their laws on you. History provides us with examples in which people's discontent with the regime of their country caused upheaval, conflict and revolutions, like the French Revolution.

However, if you do feel like you can influence the constitution in your state of residence, the arbitrary character of your place in the world and the subsequent rules you have to follow seems less frustrating. So in order to keep people content they should have the feeling their voice can shape the political climate in their country. If a political authority comes into being based on the will of the people, we call the subsequent polity 'democratically legitimate'. Democratic legitimacy is crucial for the peace and happiness of the residents because if it is absent, people feel coerced, powerless, frustrated and are more likely to revolt. So it seems that,

(p1) in order to maintain a peaceful society, states need to be legitimate.

Besides the democratic component, I argue legitimacy requires consent because the agreement of all residents of a certain polity is what gives the constitution and the political authority its normative power. Theories that adopt this view of legitimacy are social contract theories. The most basic accounts of legitimacy specify it entails the approval of group A that a group B has power over them and that this approval is not an artifact of the power group B has over group A.<sup>7</sup> As the democratic component of a democratically legitimate polity generates the principle that the group A must also be authors of the procedures that yield the composition of group B, an approval must also include an agreement to the political procedures and institutions that bring about group B, besides the acknowledgment of the power of group B itself. Furthermore, while contemporary political theorists tend to focus more on agreement than consent, I do not think the two are that distinct as 'consent' entails agreeing to something and eventually boil down to the same notion that the agreement to a certain set of political institutions is what makes the political authority legitimate.<sup>8</sup>

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<sup>7</sup> Bernard Williams (2005) sets forth the Basic Legitimation Demand (BLD) in his book *In the Beginning was the Deed: Realism and Moralism in Political Argument*.

<sup>8</sup> Almost all social contract theories formulated by Hobbes, Locke, Rousseau and Rawls eventually stress that the justification of a democratic polity is derived from the consent of the people. Only Kant

Hypothetical consent theorists argue it is irrelevant whether or not people actually consent to the laws. What matters is to what they would have consented to from a rational perspective because it is in your best interest to do what is rational. Still, to rationally know what is in your best interests, you need to know values, beliefs and other characteristics of the person in question. These are unavailable in the hypothetical situation that merely assumes the people as abstract and rational beings. Therefore it is also impossible to determine what people in this hypothetical situation would agree to without relapsing in an objective account about the best design of a polity. Furthermore, as it is the idea of the social contracts that the agreement to a certain set of institutions is what generates the legitimate character, such an account would undermine the purpose it was created for.

Traditional consent theorists like Plato and Locke argue consent is necessary for legitimacy and automatically given, in any case tacitly, for example by residing in a country and voting (Hyams, 2014, 17). While I agree with the former, I do not with the latter. As voting and residing in a country are practices that are part of everyday life, they do not say much about the opinion of the citizen about the political order. Moreover, the residence in a certain country is often not a result of a free choice, but a consequence of brute luck. And consent does need to be given freely because otherwise the whole point of giving consent, to demonstrate it is your own will to comply with something, is undermined as it is no longer truly your desire to do so, but the lack of alternatives that make you agree. This also means consent must not be given automatically because it would not be a conscious choice if it was and it has to be before it can count as a decision that reflects the will to comply with something. Thus consent ought not to be given either automatically or tacitly.

Then in what manner can people consent to a certain political arrangement? People do not need to sign a contract and any other way of tacit consent remains problematic as it would presuppose the political system of the state of which you aim to make your verdict on. Still, if people like to do so, they can write and sign a sort of statement that specifies they agree to the political constitution of the state. Along these lines they conceivably can consent in a conscious and active manner. Yet, in reality, this is not customary. This means that in practice almost no one has actually

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does not ascribe any importance to consent and Rawls's justification is founded on the original position (Hyams, 2014, 4).

agreed to the polity they reside in while it is necessary for the legitimacy of that polity. So it seems that,

(p2) unless people have given active consent to the polity, it cannot be determined whether the concerning state is truly democratically legitimate.

Apart from this ideal need for consent to a political design, I argue consent can comprise an effective tool for the evaluation of the practical implementation of democratic theories. Like Graham Smith (2009) points out, people in general pay no attention to the evaluation of the effectuation of democratically legitimate ideals. Christopher Meckstroth (2015) also stresses the importance of a way to evaluate the practices that have resulted from a certain interpretation in the form of institutions of democratic legitimacy. According to Meckstroth, static democratic theories neglect a whole dimension of politics, namely the interaction with citizens, characterized by consent and disagreement about the ideals of their society and the institutions in which they take form. Therefore we need a way in which we can assess whether the institutions that have sprung from democratic theories do what they should do, namely providing that the ruled are rulers themselves. So,

(p3) in order to evaluate the implementation of democratic theories, citizens need to be granted a moment of feedback.

Can we conceive of another way to determine whether people approve of the democratic arrangements and design of the polity or assess the implementation of democratic theory without using their agreement or lack of it? It might be conceivable to think of a democratic theory that is objectively and inherently the best because you can invoke values like freedom and political equality which together yield the idea that everyone should have an equal say in the political arrangement and have the opportunity to do so. Still, such a conception can be translated to multiple possible institutions, so the manner in which this is implemented would still be in need of evaluation if the democratic theory were based on the idea that it is the people who rule. So how can we know if the state is truly legitimate? Fortunately, there is a way in which political authorities can ascertain their legitimacy. Even if people do not actively agree to the political order, they still can be enabled to disagree by giving

them the opportunity to withdraw from the society in question. If people are given the choice to denunciate their citizenship and go somewhere else, the choice not to do so is a conscious and free one and can therefore be interpreted as some sort of tacit consent, even though it is a weak one. So the only way in which people can be taken to consent by compliance is by giving them the opportunity to dissent. Hence,

(p4) only by giving the people the opportunity to dissent, the fact that people do not use this can be interpreted as a mild form of consent to the political order.

So now the question pops up, can you dissent without leaving the state? If you wish to renounce your citizenship and retract from the rules and institutions of your country, do they stop applying to you? I argue you cannot fully deny and retreat from a political order unless you physically leave the state because the institutions of the countries, like laws, keep on affecting you, even if you just mind your own business and do not harm anyone else. For example, in most countries you are not allowed to sleep just anywhere, so doing that in the wrong place might get you arrested. Moreover, as your identification papers expire, you become an illegal and this will probably get you in trouble. And these are examples where you do not do anything but merely be somewhere, so let alone if you, for example, want to build a house, cultivate your own food and give your children alternative education. In all these cases laws and procedures obstruct the practices you wish to perform and therefore you are unable to retreat from the society you wish to reject. Thus,

(p5) you cannot truly dissent and reject the political order without having the possibility of leaving the territory the polity occupies.

In sum, as states need to be legitimate to maintain peace and legitimacy entails the people who are subject to a political authority must agree to the political system by which it is constituted and as a tool to evaluate the translation of democratic theory into political institutions, citizens ought to consent to a polity before it is truly legitimate. However, as this consent cannot be assumed as this would undermine the voluntary character of the decision and contradicts with the notion of consent itself, in practice consent is hardly ever given. So in order for states to ensure their legitimacy

they ought to enable citizens to disagree with the political order and as they cannot dissent and retreat from the political system completely without actually leaving the state physically, political authorities ought to acknowledge there is a right to leave. Thus in legitimate democracies, people have the right to leave.<sup>9</sup> This results in the *Inverted consent claim*.

(c3) Seeing that consent can only be expressed in an inverted manner by having the possibility to leave, in democratically legitimate polities people have the right to leave.

#### **Four. Governmental duties**

The right to leave that results from the *Inverted consent claim* is a good example of a negative right because it suffices if people are non-interfered with their choice to leave the state in order to support the normative foundation of the right that people ought to have the opportunity to disagree. Moreover, following the *Third party claim*, the correlative duty the government has involves measures to prevent others from interfering with the right or to restore the harm done by interference. For these reasons,

(c4a) democratically legitimate governments have the positive duty to ensure the right-holders of the negative right to leave are kept from interference.

So what would be necessary to ensure non-interference of the right to leave? What does the correlative duty of the right to leave entail? Does it follow that governments ought to facilitate some sort of entrance to another country? To explore the nature of the duty, let's analyze its constituents.<sup>10</sup>

The first component of the governmental duty is to make sure the political power itself does not interfere with the right to leave as it is conceivable some civil servant, institution, procedure or law of the polity unnecessarily obstructs the right. Recall Lisa's hypothetical situation in Moldova. Yet now Lisa has had enough of her inferior position as a gay person and does not agree with the political institutions so

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<sup>9</sup> There are other accounts of democratic legitimacy that are not based on the idea of consent and if you adopt one of those, this conclusion will not hold. Still, even then the right to leave could be justified by other values and moralities.

<sup>10</sup> Henry Shue (1983) provides an analysis of the duty to ensure the enjoyment of basic rights.



decides to withdraw citizenship and, consequently, move to another country. In this case a civil servant can, for example, stop Lisa at the border security without any good reasons. While this is wrong in many other ways, it would conflict with the right to leave as Lisa is unjustly impaired in her attempt to leave. So the first duty governments have is to ensure none of those who are part of the political body interfere with the exercise of the right to leave.

A second manner in which the right can be impaired is the following. Imagine in Moldova there is a whole bunch of forms Lisa has to fill in before she can execute her plan. Also, she keeps being sent from one official to the other and needs to make appointments over and over again, yet no one seems to really want to help her or able to explain properly what she must do to leave the country. All together the whole process is extremely tiresome and tedious, and when she finally is able to leave, months have been passed. In a slightly more indirect manner, such sort of political institutions with superfluous procedures and protocols trouble the exercise of the right to leave in this case. Therefore governments should design these institutions in an effective manner so that they do not unnecessarily complicate leaving the country.

Nevertheless, non-governmental institutions, persons and other causes can still interfere with the right to leave. For example, there might be only one gasoline distributor in Moldova and if a notorious fascist family who does not wish to serve gay people or any other minority group rules this company, Lisa could get stuck with the negative consequences. Like if, due to persisting extreme weather conditions, planes cannot fly and Lisa is forced to leave the country by car. Now she cannot do so as she is unable to obtain gasoline to fuel her car because the distributors will not let her. In this scenario, the gasoline distributor interferes with Lisa's right to leave and therefore the government has the duty to prevent or restore such interferences.<sup>11</sup>

Note that the government can only be held accountable to prevent or restore interferences that can be anticipated. Seeing that any random strike of bad luck like sudden illness or other misfortunes could interfere with the effectuation of the right to leave, it would be unreasonable to demand that the government has the duty to eliminate all causes that could potentially interfere with the right. Moreover, the desirability of such an extensive meddling is questionable. A car crash or sudden unemployment can disable anyone from leaving the country in the time span that he

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<sup>11</sup> In this example, you could think of other common rights that are interfered, besides the right to leave, like the right not to be discriminated on sexual grounds.

or she might had in mind, yet as it would be too demanding to suggest the government ought to prevent or restore all these misfortunes, the scope of their duties reaches to causes that form systematic and non-arbitrary threats to the right to leave.

Also, this implies that not every impairment of the right to leave means the government has forsaken its duty and is accountable for its breach. To say this would be to adopt a consequentialist account of duties and distort the way in which behavior is considered to be good and bad as only the result of the conduct is relevant instead of the intention and the thoughtfulness of the approach. Governments cannot be held responsible for every impediment to the right to leave. If it does happens that someone's right is seriously breached, then an examination of the causes, the extent to which they could have been anticipated and the measures that were taken to prevent the interference together determine if the government could be held accountable for the interference and considered to have failed to fulfill its duty properly.

Moreover, if a person already is obstructed and unable to exercise the right to leave by some cause that could have been anticipated by the government, then it is not too late to make amendments. In the gasoline example, the government could have put pressure on the company and forced them to sell gasoline to Lisa. In this manner the interference could be restored. So, even if a person is already obstructed, the government can make it up by setting things right. In sum these aspects combined generate the *Governmental duties claim*.

(c4b) To ensure non-interference with the right to leave, governments have the duty to

- a. keep any of its officials from interfering,
- b. design their institutions in an effective way,
- c. anticipate systematic threats and eliminate them,
- d. and restore interference.

#### **Five. Systematic threats to the right to leave**

Now that an analysis has been provided of the different aspects of the duty, lets examine the possible manifestations of each part and the measures that would be required to prevent or stop interference. If the lack of countries to enter composes a systematic threat, then the government has the responsibility to do something about it.

In this case you might be able to argue governments ought to ensure some entrance to another country in order to keep the right to leave from interference. Lets find out which measures follow from the set of duties put forward.

The first part of the *Governmental duties* specifies that the persons belonging to the political body must refrain from interference themselves. In this case, the sort of interference is quite straightforward as it involves simply abstaining from meddling with someone's attempt to leave the state. To realize this, political authorities could ensure that their officers have no incentive to interfere and/or deter interference by assigning a penalty to it, like resignation or a fine. The second duty concerned the design of effective governmental institutions. Applied to the right to leave this amount to the creation of institutions that do not obscure the process that must be undertaken when you want to leave. Redundant bureaucratic procedures and prolonged appointments can make the effectuation of the right to leave unnecessarily complicated and thus have to be avoided or changed for the better. Lets skip one ahead and go to the last duty. The fourth duty was to restore done interferences and this entails any harm done that has disabled or troubled the exercise of the right to leave should be eliminated and/or compensated for.

Yet, the most troublesome constituent of the *Governmental duties* is the third one as it leaves the questions open what phenomena count as threats and which can be anticipated. There is disagreement about what counts as a threat to the exercise of the right to leave, primarily concerning the role of entrance to some other country. Phillip Cole (2000) argues the right to leave is dependent on the right to enter. He points out the lack of entrance to another country would impair the right to leave. Contrarily, Christopher Heath Wellman (2011) compares citizenship to other voluntary associations and therefore the lack of any available alternative to the one you wish to leave does not constitute a problem for the effectuation of the right to leave.

Wellman (2016) uses analogies like marriage and soccer teams to demonstrate people have the freedom to engage or disengage with whomever they want to. However, what Wellman misses in his analogies, is context. Like Phillip Cole points out, "when one exits marriage, one does not need to have another marriage to enter [so in this scenario] the right to exit does not depend on entry elsewhere" (2011, 203). Wellman overlooks the fact that in the analogies he provides, it is not necessary to be engaged in a certain association. He illustrates the freedom of association by appealing to examples of marriage, sports-teams, international treaties and even

families (Wellman, 2016). Evidently, you can live a normal life being unmarried, not-being member of a soccer team residents or even as an orphan in an orphanage, but you cannot live a normal life while not being in a state because there simply is no stateless territory you could live on. Seeing that any livable piece of territory is occupied by a certain polity,

(p1) there is no livable space of statelessness.

Moreover, as you cannot live in a castle above the clouds, fly your whole life above the occupied air zones of countries due to a lack of oxygen, live on the middle of the thundering and transforming sea,

(p2) you need to be residing in some state in order to just *be* on the face of the earth.<sup>12</sup>

Now, the concept of leaving literally means ‘to go to another place’. Therefore the availability of another place to be is crucial to the performance of the action ‘to leave’, hence,

(p3) in order to effectuate the act of leaving you need to have another place to go to.

Then, if you want to leave the state, but no state is willing to let you enter their state, you are physically unable to take a single step over the borders of the country you want to leave for every possible piece of land you would put your foot on will be part of the territory occupied by some other polity, that has refused to let you enter. You need access to some piece of land to be on before you are able to go away from the place you want to leave, so,

(p4) you cannot leave one state, without being able to enter *some* other state.

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<sup>12</sup> Although it may be possible to start an extremely advanced settlement on the middle of the ocean, where you have exceeded the borders of states, or on top of rough mountains, but as the climate and resources there would be insufficient to keep a person alive, let aside provide any reasonable standard of living, I will leave this aside.

Since a lack of some place to go disables the performance of the right to leave, we can state such a situation would seriously interfere with people's right to leave. The concept of leaving and entering are logically connected in a world where all territory is demarcated and occupied by a political authority. Considering that the lack of some country to enter obstructs the performance of the right to leave, compromises a threat that can be anticipated and is also systematic because it can occur on a frequent basis, the government has a duty to dispose of it. This results in the claim called the *Lack of entry threat*.

(c5) The absence of some state to enter interferes with the right to leave and therefore constitutes a threat that governments need to remove.

#### **Six. Measures to ensure some entrance**

What can governments do to prevent there is a lack of countries to enter? In order to remove the threat that the residents of the country who want to leave cannot do so due to a lack of states to go, states can negotiate with other governments if they might be willing to let them in. If, for example, Lisa wanted to leave Moldova, the government of Moldova could have talked to Russia about letting her in. Still, there may be countries who are willing to do so, but if they are not, an impasse arises because Moldova has no authority whatsoever to force Russia, in this case, and therefore Russia has no incentive at all to comply with Moldova's proposal. The point is that no state has a special position that enables them to coerce another state.<sup>13</sup> States each view themselves as sovereign polities with a right to self-determination and this results in the premise that,

(p1) all states are equal and therefore one cannot force another to comply with its policies.

This problem is not easily resolved. While every state that craves to be democratically legitimate is burdened with the same task of fulfilling the duty to remove the *Lack of entry threat*, the duty is diffuse through the existence of so many countries. Moreover,

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<sup>13</sup> However, economic and political dependence between countries could lead to a situation where one state indeed has power over another one and can force them to comply with certain things. Still, in theory every state is considered to be equal.

the expectations of succeeding are probably low due to the complexity of the issue. In order to succeed, there has to be some institution that is granted the power to make states comply with the arrangements they specify. There are two complementary manners through which states can resolve the *Lack of entry threat*.<sup>14</sup>

Firstly, to ensure people have some place to enter, states can agree that the polity that is in the most suitable position to provide entry must do so. To adopt this strategy successfully, states must decide upon clear criteria that lead to a specific country. As is demonstrated, states cannot be coerced by another state and so it is necessary all countries to which the arrangements apply, agree to the discussed criteria otherwise they will never be ratified. Hence,

(p2) any international treaty that sets forth rules about entrance must be the result of the agreement of each country that takes part in it.

Imagine states have agreed on the criteria that stipulate when which country is obliged to provide entry for certain citizens and Moldova and Russia have also agreed to the treaty. In Lisa's case the criteria specify that Russia provide entry for Lisa. Despite the ratification of the treaty, Russia decides they do not want to grant entry and refuse to let Lisa in. There still is no authority that can force Russia to comply with the treaty they have signed. So it seems that there must be an institution with the authority to tackle the *Lack of entry threat* effectively. The best way to create an institution with the power to make states comply with its agreements is the creation of a supranational institution. The idea of a supranational institution differs from an international one by the fact that in the former states need to hand over a part of their sovereignty to the overarching body. In this way the institution stands above the state-level and is given the power to act like such. This body can operate as a sort of mediator or coordinator between the people who wish to leave and the government of the country they wish to enter. So,

(p3) the creation of a supranational institution that is granted the sovereignty to coordinate migration matters is necessary for the effective removal of the *Lack of entry threat*.

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<sup>14</sup> These approaches are inspired by Phillip Cole's strategied for the enforcement of human rights in the international arena (2011, 201).

Now, the only thing left to do is to ensure states actually agree to the creation of such an institution. How could this be accomplished? The answer is actually quite easy. As this measure offers the best prospects to fulfill the duty to eliminate the *Lack of entry threat*, and seeing that the achievement is necessary to effectuate the right to leave, which is fundamental to democratic legitimacy, every government that desires to be democratically legitimate, ought to carry out these measures. Following (c3), (c6) and (p3) this results in the *Compliance claim*.

(c6) Since all legitimate democracies have the duty to eliminate the *Lack of entry threat* and seeing that the creation of a supranational institution entrusted with the task coordinate migration offers the best prospects to achieve this considering the limitations expressed in (p1), all these states ought to comply with this.

#### **Seven. Appeals to the right to exclude**

The claim that governments ought to comply with the creation and establishment of a supranational institution in charge of coordinating which country has to provide entry to certain migrants so that one may be considered as democratically legitimate, probably evokes a lot of resistance. A lot of scholars appeal to the state's right to exclusion in debates about migration and would, for the same reasons, not support the notion that governments need to hand over the sovereignty to decide independently who are going to be its citizens. Christopher Heath Wellman and David Miller comprise the most prominent proponents of the view that states have good reasons to have a right to exclude. And if states indeed have a strong right to exclude, this may undermine the *Compliance claim*. Therefore, it is crucial to examine the reasons for the defense of a state's right to exclude.

Important to note is that even though there may be good reasons for retaining the sovereignty of immigration fully within the state-borders, this does not immediately undermine the *Compliance claim*. Like in every decision-making process, there are a lot of variables that can be taken into account. As Miller points out "[...] Nearly all accounts of rights are conditional in this sense, since they concede that catastrophic circumstances may arise in which even basic human rights can justifiably set aside" (2016, 13). In order to make a strong case against the *Compliance claim* it

must be demonstrated that the justifications for the right to exclude *outweigh* the reasons for the *Compliance claim* or demonstrate the two claims are mutually exclusive and the right to exclude prevails.

David Miller draws on three reasons for controlling immigration. The first one is the overall number of citizens. Miller argues the policies or targets that states have decided upon take into account a certain population size. When the state is no longer able to regulate the numbers itself, this could have negative consequences for the completion of the targets the government has set (Miller, 2016, 27). I think this is a good point and have to be taken into consideration in the creation of the set of criteria that determine which country ought to provide entry under certain circumstances. In concert with the supranational body, states can indicate what amount of immigrants would seriously obstruct the achievement of certain policies. On the other hand, if states know in advance that there is a big chance they have to provide entry to more people, they can take the population growth into consideration. In any case, an open conversation about the amount of people that would ideally be granted a residence and the amount that is able to be enter in order to execute some policies could lead to a satisfactory arrangement for the regulation of immigrants by the supranational body.

The second reason Miller gives for controlling immigration is the interest states have in the prevention of radical cultural shifts. Even though societies are always multicultural to a greater or lesser extent and societal cultures are in a constant flux, there is an interest in keeping the immigration flow at a certain level so that the convergence of language, political values, norms and socially accepted behavior of different cultures can take place. A radical divergent cultural impulse may cause serious friction in the society (Miller, 2016, 28). Again, I think this is an aspect that has to be taken into consideration seriously. During the formulation of criteria, the importance of the cultural background can be taken into account so that an exorbitant amount of people from the same culture that severely differs from the one present in a specific country can be prevented.

Until so far, Millers reasons for letting countries themselves control immigration are compatible with the tasks set for the supranational institution. Rather than objections to the lack of self-control countries have, they are important elements, crucial for the peace and prosperity of societies that have to generate helpful guidelines in migration matters. Thus,



(p1) The criteria that specify when a state is obliged to provide entry should take into account the maximum desirable population size and the prevention of radical cultural divergence.

Finally, Miller argues states have the right to determine the composition of the citizen body. By the entry of the citizens in the population the balance between all sorts of groups will change and as this will affect the course of the polity, states have “the right to determine its own future membership” (Miller, 2016, 29). This appeal to a state’s right to self-determination is also the foundation for Wellman’s right to exclusion. So before we react this point of Miller, lets look at Wellman’s argument.

Wellman bases his argument for the right to exclude on states their right to self-determination and the subsequent freedom of association. He argues (1) legitimate states ought to have self-determination, (2) freedom of association is an integral part of self-determination and (3) freedom of association enables someone to engage with the ones who they see fit. Therefore, legitimate states are entitled to include or exclude people in the way they wish (Wellman, 2016, 81). Wellman provides all sorts of analogies he uses to point out states have a freedom to associate.<sup>15</sup> He tries to defend the second and third premises by comparing a nation right to freedom of association with an individuals right to choose and reject its marital partners. In marriage, Wellman says, you are free to pick your own partners and refuse the ones you do not want and therefore states also have this freedom of association.

Yet, instead of defending his premises, Wellman jumps right ahead to defend his conclusion that states have the right to freedom of association and therefore can exclude or include anyone they like. He does so by continuing to extent his individual marriage analogy to the state-level and by providing a subsequent analogy of states joining forces and their right to choose to associate with other state or not (2016, 82). What Wellman overlooks is the fact that the nature of the actors is completely different on the individual in comparison to the state level, while he treats them as the same solid unit. In his example he points out Norway has the right to decide if they want to join with Sweden and states do have the right to associate or not with other

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<sup>15</sup> Which is peculiar as he does not set forth a premise that states have a right to freedom of association or in first instance. Moreover, he does not offer analogies in support of any of the premises he formulated (Wellman, 2016, 81).

states based on their entitlement to self-determination. But this kind of association applies to actors on the same level, namely the national one, and in this sense it is evidently states have the right to engage with countries of their own choosing, for example by creating treaties or joining international organizations.

However, when you discuss the inclusion of individuals in the whole association, a proper extension of the marriage analogy, which applies to the individual, would mean you have to take into account every citizen, as the polity is the aggregation of all the wills of individuals. Now of course there are democratic procedures that can generate decisions on the inclusion or exclusion of people and it is precisely the democratically legitimate character of the government that is supposed to make the government speak on behalf of its citizens. But it is still inevitable that a great part of society does not agree with a decision to exclude a certain person or group. More likely though, people are unaware that these decisions are being made and unequipped to give their opinion on or influence the decision whatsoever. And if this is the case, their individual right to freedom of association is harmed as they cannot decide upon who joins their association, the society. So by introducing people's individual freedom of association as the justificatory ground, as is done by the marriage analogy, to defend the right to exclude turns out to be self-contradictory. It is contradictory because precisely that individual freedom of association on which the argument is founded, is undermined by its application to the state-outsider relation. With this in mind, it can be said that

(p2) Wellman's marriage analogy does not logically extend to the state-immigrant relation as it yields an internal contradiction.

Now let's return to Wellman's main argument. He argues "A state is thought to be entitled to a sphere of group autonomy that includes all self-regarding matters. In other words, as long as state's conduct does not wrongfully impact any other country, it has full discretion to order affairs however they see fit" (Wellman, 2011, 15). This phrase reveals that a state's right to self-determination is conditional. If it regards matters that affect other states in a wrongful manner, then states are not entitled to self-determination on this point. So in order to demonstrate that the justification for the right to exclude falls short, I need to react to the first premise that stipulates legitimate states are entitled to self-determination and argue that this right is not

unconditional with regard to migration because that could wrongfully impact other states.<sup>16</sup> But first let's adopt Wellman's premise that,

(p3) states are not entitled to self-determination regarding matters that wrongfully impact other states.

Yet how could the complete governmental control over its members wrongfully impact another state? As was pointed out in the previous section, states have the *Governmental duty* to remove the *Lack of entry threat*. To do this effectively, they ought to comply with the creation of a supranational institution that formulates criteria and procedures for the mediation between migrants and the states they wish to enter. Now, if a state decides not to adhere to the *Compliance claim* and maintain in control of who they include or not, they dissociate from the system and make it a bit harder for the states in the supranational body to provide entry for the migrant. Especially if that person wanted to enter that certain state, but was refused citizenship because of their autonomous border control, then the other states are burdened with the task to find a place both the migrant and receiving state agree on. So any state that refuses to include a migrant encumbers other countries with the task of providing entry to some other state.

From a more general perspective, it is evident matters of inclusion and exclusion do not merely concern the subjects of the state as these matters determine who is considered to be subject of a state and who is not. In other words, exclusionary practices determine who is part of the demos, therefore it is a concern about boundaries and any concern about boundaries affect both what is within the possible limitation of the boundary as what is left out by the limit of the boundary.<sup>17</sup> So due to the nature of exclusionary practices as one that defines who is part of the demos, the resulting decisions have affect beyond its own borders. And if a country adopts a very restrictive inclusion policy, it can wrongfully trouble other countries. For example, Libya and Turkey took the responsibility to provide entry for more than a million

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<sup>16</sup> Even the strongest version of the sovereignty principle expresses self-determination only on internal matters, so issues that affect other states do not fall under its scope. Nevertheless, consequentialist arguments are disregarded as any decisions might have some affect on other states, so it is crucial to demonstrate decisions about membership and of immigration intrinsically affect other states (Cole, 2000, 180).

<sup>17</sup> For an elaborate treatment of the boundary problem see Arash Abizadeh (2012) 'On the demos and its kin'.

Syrian refugees while the other adjacent countries, far more equipped to provide housing, only admitted a few hundred refugees. This factual, though extreme, example demonstrates that a restrictive exclusionary policy can have enormous consequences for surrounding countries that are encumbered with the responsibility to do what those states simply disregarded. Therefore,

(p4) exclusionary practices of one particular state could seriously burden other states.

The crux is that a state's right to self-determination is plausible insofar it only affects the destiny of its own subjects, as a restriction on immigration also harms other citizens and troubles other governments, it is no longer a mere issue of self-determination. So following (p3) and (p4),

(p5) governments do not have the full right to determine whom they include or exclude on their own.

Another way to justify the right to exclude is based on the claim to territorial rights. Seeing that territorial rights are part of the idea of state sovereignty, the right to exclude immigrant is considered to be an essential part of state sovereignty. Yet, Clara Sandelind (2015) unified the concept of state sovereignty with open borders. She argues that the right to exclude immigrants cannot be based on the justification that it is part of the territorial rights of a country. Following the Kantian theory of territory rights, their justification stems from the protection of the residents and the interests they have and "these interests are a) having a secure and stable place on earth, b) having the capacity to exercise control, in conjunction with others, over one's material and political environment, c) having one's basic human rights protected and d) living under a minimally just system of law" (Sandelind, 2015, 3). The inclusion of immigrants does not harm any of the interests that territorial rights are meant to protect and therefore territorial rights fail as a justification for the exclusion of immigrants.

Furthermore, other accounts that justify border control appeal to the undesirable consequences of an unrestricted immigration policy, yet seeing that these hypothetical catastrophic scenario's are based on speculation and hardly have any

evidence in their defense, these justifications purportedly fall short in constituting a strong case for the right to exclude.<sup>18</sup> Examples of these objections are the fear of chaos and instability, but like Sandelind points out, these objections assume a large amount of immigrants to be the consequence of more open borders, yet this does not need to be the case nor does the lack of a strong right to exclude mean states are obliged to let everyone in.<sup>19</sup> There are good examples of states which have open border policies for quite some time, like the Nordic countries and the member states of the European Union, where it did not lead to an undesirable amount of immigrants nor a total lack of control over immigrants (Sandelind, 2015, 22).

In sum, since (p1) Miller's arguments for immigration control are compatible with my account, (p2) Wellman's analogies in support of the freedom of association do not hold and (p5) states do not have the right to exclude based on the principle of self-determination, the arguments Wellman and Miller use to defend the right to exclude do not undermine the *Compliance claim*. Moreover, a defense of the right to exclude based on territorial rights does not hold as they are justified by the protection of the interests of their residents and the inclusion of immigrants no threat imposes to these interests. Finally, speculations about radical scenario's like culture shifts and enormous migration numbers are based on hardly any evidence and the evidence that does exist proves the contrary, so these concerns do not yield a strong case for the right to exclude. In conclusion, grounds for exclusion are questionable and not strong enough to entitle states to dismiss the *Compliance claim* that aims to create a supranational institute to regulate migration. Moreover, the concerns that do make sense can be made compatible with the *Compliance claim*. This results in the claim called the *Rickety right to exclusion*.

(c7) Seeing that the reasons for the right to exclude are not compelling enough to make a strong case, it does not justify states to discard the *Compliance claim*.

## **Eight. The right to enter**

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<sup>18</sup> See Kieran Oberman (2016) 'Immigration as a Human Right' for a discussing of these kind of objections.

<sup>19</sup> In case of war, however, like now in Syria, great migration flows evidently can be expected. Nevertheless, the image that prevails about the extensive scope of immigrants that would enter if they could is more likely to be based on speculations fueled by fear rather than empirical data.

Seeing that the right to exclude is the most prominent ground on which people object to a right to enter, the disempowerment of that defense might just as well lead to an account for the right to enter. Recall the mentioned necessity of a place to go for the exercise of the right to leave. Dimitry Kochenov addressed the conceptual connection between the right to leave and the right to enter eloquently. Kochenov wrote “Once a border is drawn, two spaces emerge. Consequently, dividing the right to migrate [...] into the right to ‘leave’ the space on the one side of the border and the right to enter another space on the other side, is obviously half-hearted. [...] the two rights only make sense when existing and exercised together, side by side” (2012, 46-47). In pursuance of a substantive argument for the moral right to entry, I will discuss the three strategies to justify a human right as set forth by David Miller.

Miller (2016) identified the following strategies for the justification of a human right, namely the direct-, cantilever- and instrumental strategy. First, a human moral right can be justified by the direct strategy if the right proves to serve a basic human interest. He argues three justificatory requirements have to be met before the human right can be superior to other rights, as is needed, otherwise it would conflict too much with them. The requirements entail that the grounds of justification must be sufficiently strong, feasible and compatible (Miller, 2016, 18). Miller points out that insofar the state of someone’s residence provides an adequate set of opportunities to meet generic human interests, there are no sufficiently strong grounds upon which a human right to migration can be justified (2016, 21-22).<sup>20</sup>

Secondly, there is the cantilever strategy that involves demonstrating why the right is a logical extension of an already recognized human right by pointing out why the lack of the subsequent human right would be absurd and arbitrary (Miller, 2016, 15-16). Miller adopts this strategy on grounds of the domestic right of freedom movement, but this did not work as even in national boundaries we do not have an essential interest in being able to move just anywhere (2006, 26-27). Even though the duty to ensure some entrance follows from the right to leave, it probably would not generate a logical extension in the manner Miller had in mind.

Thirdly, a right can be justified by its instrumental value. This strategy entails arguing why the right is crucial for the assurance of another human right. Miller

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<sup>20</sup> As Miller concludes the human right to migrate cannot be justified due to a lack of strong and sufficient grounds, he allegedly does not deem it necessary to explore the compatibility and feasibility requirements.

argues that if people do not have a decent standard of living in their country of residence people might have sufficient reason to migrate. Still, it must first be proven that other human rights do not ensure these basic interests before migration is truly necessary to meet them. Moreover, it would only justify migration to some societies, namely only the ones that do provide these basic interests (Miller, 2016, 22). So Miller's instrumental strategy does not yield an unrestricted human right to migrate.

Nevertheless, the instrumental strategy might be fruitful. If you consider the impairment the lack of some entry imposes on the right to leave, the right to enter is most likely to be essential to the effectuation of the right to leave.<sup>21</sup> As the entrance to some other country is not just a tool or a mere instrument for the effectuation of the right to leave, but, following the premises of the *Lack of entry threat*, a conceptual precondition for the act of leaving, the right to leave yields a strong justification for the right to enter. This results in the *Conceptual precondition claim*.

(c8a) As the entry to some state is a conceptual precondition for the exercise of the right to leave, and there is a moral right to leave, the instrumental strategy stipulates the right to enter is justified.

Despite of this justification for a right to enter, it may still be of no use seeing that it is unclear which government is responsible for letting immigrants enter. If there is a right to enter some country, then the collective responsibility could still impair actual entrance to a country. Recall the premise for the *Compliance claim* that specified all states are equal and therefore one cannot force another to comply with its policies. Again, it is the nature of migration issues, as people commute between governments, that the correlative duty and the respondent of rights becomes obscure. Seeing that the right to enter does not have a distinct respondent that is able to bear the correlative duty, following the *Usefulness of rights claim*, the right is left useless. Nevertheless, there is a way to resolve this. Just like the elimination of the *Lack of entry threat* required the creation of a supranational institution entrusted with the task to set regulations for migration, now the supranational institution can taken to be the respondent burdened with the duty to protect the right to enter. This results in an

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<sup>21</sup> Seeing that the right to leave is explicitly mentioned in de UDHR it can assumed to be a human right.

improved version of the *Compliance claim*, as the right to enter is incorporated, and is called the *Enhanced compliance claim*

(c8b) Since all legitimate democracies have the duty to eliminate the *Lack of entry threat* and seeing that the creation of a supranational institution entrusted with the task coordinate migration offers the best prospects to achieve this, all these states ought to comply with this. Moreover, for the reason that the moral right to enter can only be useful if it has a correlative duty-bearer and since a supranational institution would be the only suitable respondent, all these states ought to fulfill their share of the collective responsibility for the right to enter by complying with this.

### **Nine. Somewhere or anywhere**

How strong is the right to enter? Does it merely involves a right to enter some other state, or does it follow people have the right to enter any state? I will react on Miller's statements that "the right to leave one's present country of residence can be satisfied so long there is at least one other place that one is not prevented from entering" and "the analytical point is that the right to leave one particular state does not entail the right to enter any state of one's choosing" (2016, 15).

At first glance, the former statement seems plausible. If the government of your original state ensures you can enter some state, they seem to have eliminated the *Lack of entry threat* and completed that part of the duty of the *Governmental duties*. Now recall the reasons for the right to leave. The idea of the social contract entails a state is legitimate if people have voluntarily consented to its constitution. Following the *Inverted consent claim*, as long as people do not have actively consented to the political constitution and authority of a country, people must have the opportunity to retreat from the polity and leave the state before the state can regard itself as democratically legitimate. Now, if people have the right to some entrance, and the implementation of it entails they have to settle for the country that is willing to let them in or that the supranational body has assigned them to, then the subsequent country of residence is not the result of their choosing. On the contrary, their residence is the result of brute luck. This means they do not voluntarily or actively consent to the constitution of the state by entering it. So, again these people have the



right to withdraw from this society on the same ground as their original right to leave, namely the *Inverted consent claim*.

However, the case might differ when people do get to go to the country of their choosing since they sort of demonstrated their preference for the kind of polity that state has. Still, it is impossible to have all the information there is to know about a country beforehand and in the end, only actually living in the country will make you truly understand how things work and how well it suits you. A supposedly fair and just government, that is skilled in projecting a good image, may turn out to have many corrupt officials and other hidden flaws. In this manner, there are many reasons why even a country of their preference turns out to be very disappointing and reason for the person to not agree to the polity design. Besides, the *Inverted consent claim* does not rest on any premise that specifies the dissent is justified because of the arbitrary manner you winded up in the country of residence Even though a lack of desire to enter a certain country definitely does not yield any sort of agreement to that polity, a present desire does not either because you cannot know everything in advance. So an intentional entrance does not undermine the validity of the *Inverted consent claim*.

What this shows is that, if people enter any new country, they have the right to leave it as long as they did not actively consented to its institutions.<sup>22</sup> So,

(p1) following the *Inverted consent claim* people have the right to leave every country they may find themselves in.

Recall Lisa who wanted to leave Moldova. Yet, the only country she could enter was Russia. After arriving in Russia and staying their for a couple of weeks she realizes she dislikes it even more than Moldova, so she wants to leave. Now, Lisa can be appointed to enter anywhere, yet you might say why should not she send back to Moldova? The only requirement to the right to leave was that there is another country available to enter, so why not Moldova? Of course she has enounced her disagreement with the polity of Moldova, but perhaps improvements have occurred and the polity's design has changed radically. Furthermore, like previously mentioned, you cannot truly know if you would give your consent to a certain polity before you have experienced living in that country. However, as a former resident of a country

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<sup>22</sup> And even then, drastic changes of the institutions can justify the annulment of the contract.

you most likely are indeed able to judge whether you agree or not. Even if radical changes took place, you are able to judge the extent of their improvement because you have a thorough understanding of the context in which they operate. So in this case, seeing that Lisa is a former citizen of Moldova, she is able to properly judge whether she would consent to the country in advance. If she chooses to stay with her decision, she is entitled to do so. This results in the premise that,

(p2) as a former residence you can judge in advance if you consent to the polity, even if it has changed, and are entitled to maintain your dissent.

So seeing that Lisa is entitled to remain withdrawn from Moldova, she has to be able to enter another country apart from Moldova and Russia. Furthermore, each following country Lisa is placed in must recognize Lisa's right to dissent and let her leave if they pursue to be democratic legitimate polities.<sup>23</sup> If, then, the previous situation repeats itself again and again, there are less and less countries available. Suppose Lisa proceeds to do this until there is only one country left, then she must enter that specific last country. In this hypothetical situation, if Lisa had a country she preferred, she would be able to enter that specific one, even if she was placed in other countries in arbitrary manners. Hence, seeing that people have the right to leave every country and the right to remain dissented from previously entered countries, people eventually are able to enter the state of their own choosing, providing that the concerning state pursues to be democratically legitimate and therefore acknowledges this right. This claim is called the *Ability of entire entry*.

(c9) Since people have the right to leave every country and entitled to remain withdrawn from countries of former residence, people eventually are able to enter *any* country.

### **Ten. Settlement and citizenship**

The possibility to enter another country does not necessarily suggest there is a right to citizenship to that country because a temporary settlement would suffice in enabling them to leave their former country of residence. In our world we see examples of such

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<sup>23</sup> Following the *Compliance claim*, I limit the scope of available countries to the one who strive to be democratically legitimate and encumbered with the duty to participate in the supranational institutions.

temporary settlements, like refugees who stay in an asylum, business visas or vacations. So it remains to be seen whether the right to enter is accompanied by the right to citizenship. The Universal Declaration of Human rights does specify very clearly in article fifteen that (1) everyone has the right to a nationality and (2) no one shall be deprived of his nationality nor denied the right to change his nationality. Yet nationality differs from citizenship as the former is usually inherited or a product of someone's residence. In many countries you can be citizen while having another nationality. Yet, in this endeavor citizenship is more relevant as it denotes the granted legal status in a polity. If there is a moral right to some citizenship, then the entrance to another country must be accompanied by citizenship, as the person in question no longer is a member of the former state.

Hannah Arendt argued citizenship is the prerequisite for the existence of rights and necessary for people to be regarded as equals. Arendt wrote “[o]nly the loss of a polity itself expels [a person] from humanity” (1973, 68). I think this illustrates well what the absence of citizenship implies. As legal rights only reside in the political community, the exclusion from that community leaves a person completely vulnerable. Moreover, being the subject of rights is what makes citizens equal to one another as they obtain legal and political equality, which is the one thing in society that transcends their ever-present physical and social differences. As members of the same country they all fall under the same laws and authorities and for the reason that the law is precisely what stipulates the equal status of citizens, anyone who lives in the same country but is not part of this political community, is not equal to the others in this sense. As Arendt pointed out, equality is the product of the political organization. So if you consider equality to be an inherently valuable good,

(p1) everyone has a right to citizenship.

Still, there are a lot of terms that can be set to citizenship. It may be temporal, preceded by a certain procedure, or only obtained by great effort. Yet what must be kept in mind, is that the citizenship ought to yield an equal status. If your status as a citizen is temporal, than you cannot fully participate in society in the same manner as bearers of full citizenship because you lack the time to gradually develop yourself in the political community. For example, you cannot fulfill political functions that have a certain period for which you must be able to perform your function. There are many

other official functions that require a certain timespan which temporary citizenship does not grant. Moreover, in other areas you do not have the same opportunities as full citizens too because employees will not hire you with the prospect of losing you in mind, love interest might not risk to engage and people in general may treat you differently. All of this means that a temporal citizenship still generates inequality, and therefore, for the same reason that citizenship is necessary for enhancing equality, that citizenship must be indefinite too. So,

(p2) citizenship ought to be indefinite.

Remember that during the effectuation of the right to leave, the concerning person denounces his or hers citizenship status. So the person who left has no citizenship status whatsoever. That means the country that the person enters must ensure this person is able to become a citizen because otherwise, its residence would generate an unequal status, which is demonstrated to be morally refutable. So this leads to the *Citizenship claim*.

(c10) The entrance to a country must be accompanied by the possibility to obtain indefinite citizenship.

### **Conclusion**

At the beginning I have discussed the concept of rights and concluded, first of all, that all rights ought to have a correlative duty because otherwise they would be of no use to the right-holder. Second of all, I discussed the negative/positive distinction of rights and argued that even if a right is negative, seeing that it is a right to non-interference, the correlative duty involves positive action needed to prevent third parties from interfering or to restore interference. Now the right to leave could be addressed and I argued that people have the moral right to leave in democratically legitimate polities, for democratic legitimacy requires consent, also to evaluate the translation of democratic theory into political institutions, and consent can in practice only be given in an inverted manner by dissent. Following the first three claims, it can be concluded that democratically legitimate governments have the positive duty to ensure the right-holders of the negative right to leave are kept from interference.

An analysis of this duty reveals that to ensure non-interference with the right to leave, governments have the duty to (a) keep any of its officials from interfering, (b) design their institutions in an effective way, (c) anticipate systematic threats and eliminate them, (d) and restore interference. Then I argued the absence of some state to enter interferes with the right to leave and therefore constitutes a threat that governments need to remove. Furthermore, since all legitimate democracies have the duty to eliminate the *Lack of entry threat* and seeing that the creation of a supranational institution entrusted with the task coordinate migration offers the best prospects to achieve this, all these states ought to comply with this. An elaborate treatment of the justifications of the right to exclude reveals that none is compelling enough to make a strong case and therefore the right to exclude does not justify states to discard the *Compliance claim*.

Now, as the entry to some state is a conceptual precondition for the exercise of the right to leave, and there is a moral right to leave, the instrumental strategy stipulates the right to enter is justified. Moreover, for the reason that the moral right to enter can only be useful if it has a correlative duty-bearer and since a supranational institution would be the only suitable respondent, all these states ought to fulfill their share of the collective responsibility for the right to enter by complying with this. So for the fulfillment of the correlative duties of both the right to leave and the right to enter, democratically legitimate states ought to comply with the creation of a supranational institution entrusted with the task to coordinate migration.

Furthermore, since people have the right to leave every country and are entitled to remain withdrawn from countries of former residence, as a consequence, people are in practice eventually able to enter *any* country. And finally, based on the value of equality and human dignity, the entrance to a country must be accompanied by the possibility to obtain indefinite citizenship.

I have tried to demonstrate the right to leave and the right to enter are conceptually intertwined and that the two rights, following the words of Dimitry Kochenov, ‘only make sense when existing and exercised together, side by side’. If governments defend a right to leave, they must acknowledge there is a subsequent right to enter in order for the right to leave to be useful for the right-holders. These rights occupy a peculiar place in the international community due to their correlative cross-border-duties that diffuse the responsibility. Therefore, in order to protect them properly and fulfill their correlative duties, states have to comply with the creation of

a supranational institution in which they can negotiate over criteria and procedure for the coordination of migration. Concerns about drastic culture ruptures and overpopulation can still be taken into consideration during the negotiation.

As it was my intention to demonstrate the inconsistency of treating the right to leave and right to enter as two distinct and independent rights, I purposely left aside the characteristics and the situation of the people who want to leave or enter. Yet of course, deplorable circumstances and the lack of better prospects constitute the main reasons why people have an interest in leaving a country and settling somewhere else. People often take their citizenship for granted and believe they have a claim to, as it is the place of their birth or have been their residence for a long time. Such a view is easy to maintain if you live in a peaceful place in which you have many opportunities at your disposal. Sadly, what is easily forgotten, is that citizenship in most cases is simply the result of brute luck and that we have not done anything ourselves to deserve any privileged position in comparison to another person, subject to the same luck, who ended up in a miserable place. Evidently, chance prevails over the world and its outcome inevitably yields winners and losers. To even out its outcome would be impossible, yet to mitigate it is not. More open borders and looser immigration policies comprise an effective way to reduce any harm done to unfortunate people. It is not for no reason, that the importance of freedom of movement was emphasized in the UDHR, right after the events of the Second World War. In the end, there are very few reasons to defend strict border control and far more good reasons to support more open borders.

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