Moral, ethical, and realist dilemmas of transnational governance of migration

Bader, V.

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Veit Bader

Department of Philosophy, University of Amsterrdam

Introduction

Recent international and NGO documents are full of praise of the increasingly popular notion of International Migration Management (IMM). IMM does, however, not only show significant advantages, such as "going beyond the strictly national level", being "partly grounded in ethics" and focusing on the "relationships between states" – but also significant disadvantages and limitations, particularly in the following three regards:[i] (i) As all concepts of management it is still an exclusively *top down perspective*. As such it does not in itself "assume going beyond states' interests to take into account the interest of all – including sending states and migrants themselves", nor is it fit or favorable for doing so. Indeed, "notions such as management often imply a technocratic and depoliticized approach to decision making processes, thus raising the issue of liberal and democratic foundations of migration policies". In my view, the newly fashionable notion of governance may open a more appropriate perspective, if critically scrutinized. (ii) Often the praised "new questions on *how policies relate to ethical principles"* imply illusions of "win-win-win situations" regarding the migration-development-poverty nexus. Even if one focuses on "moral dilemmas" in contexts this might not be enough to correct these rosy assumptions. In my view, we also have to address serious tensions between moral, ethico-political, prudential, and realist 'oughts' to get a full picture of the huge dilemmas of migration-policies in order to avoid sheer utopianism and to elaborate a sober view. (iii) The focus on *inter-state cooperation* is still mainly or exclusively on bi- or multi-lateral agreements between states/governments. It allows to raise some critical questions on "bargaining power" and fairness of deals, and also whether and, if so, to what extent "governments reflect the interests of their own people/citizens", but it drastically reduces the complexity of levels, actors, and modes of regulation of migration both conceptually, theoretically, empirically and normatively. This obviously impacts on the main aim of many recent attempts seeking "to

establish, justify and critically discuss the ethical point of view from an applied perspective"
which I wholeheartedly endorse.

For these reasons, I start (section I) with a brief introduction of my own governance
perspective (in order to adequately map the complexity of the field of migration and migration
policies). Against this background, I briefly sketch some of the general moral, ethico-political,
prudential and realist dilemmas of migration- and incorporation policies (section II.1) and, more
specifically, of immigration policies (section II.2) that have to be acknowledged instead of
ignored by all responsive policies. I end with some sobering remarks on policy
recommendations and liberal-democratic global governance of migration and some suggestions
of how associational governance might alleviate this plight (section III).

I   Transnational Governance of Migration

Governance may be a fashionable concept but it certainly is often used in a vague an unspecified
way (Pierre/Peters 2000; Héritier 2002; Treib et al. 2006). Hence I briefly summarize some basic
conceptual distinctions between patterns, regimes of governance and of government as used in
comparative institutional studies in the social sciences (see Bader 2007b). Structured *patterns*
(or 'formations', 'configurations') of migration contain all relevant interactions between
economic, social, cultural (including ethno-national), political, legal, judicial, administrative
relations and cultural relations in all their diversity or, traditionally speaking: the relationship
between economy, society, culture, politics, nation, state, and the huge variety of migrants.

Studies of complex and changing migration patterns have to analyze the full template of
mechanisms of action-coordination – markets, networks, associations, communities, private and
public hierarchies –, all relevant (coalitions of) actors, their organisations, mobilisation,
strategies, including (different departments of) governments at all levels.

The focus of *governance* is narrower: *regulation* or steering, guidance by a variety of means, not only by rules. It includes only those mechanisms of action-coordination that provide active *intentional capacities* to regulate, including co-regulation and self-regulation. *Markets*, on the one hand, are important mechanism to coordinate actions but they do so by 'invisible hand': the changing demand ('pull') for and supply of ('push') migrant labour in the broadest sense (from unskilled to highly skilled, entrepreneurial) on partly segmented but partly overlapping sectoral, local, provincial, 'national', regional and global labour markets. Markets have in this sense no regulatory capacity and therefore should not count as modes of governance. The perspective of governance, on the other hand, is much broader than that of *government,* which focuses on one (internally highly diversified) actor – the state – and on action-coordination by 'public hierarchy', by rules, particularly law and law-like regulations. Governance, then, includes much more actors and more modes of coordination in the perspective of regulation and is well suited to describe and explain recent 'shifts from government to governance'. Yet it excludes some broad issues beyond governance: not all coordination (such as market-coordination) is governance but only coordination by 'policies' in a very broad sense.

Somewhere here include table: Mechanisms of Action-Coordination of International Migration.

Mechanisms of Action Coordination of International Migration

	Markets	Demand for and Supply of migrant labor on a huge variety of sectoral, local, provincial, national, regional, and global labor markets
M	**Networks**	of families, local to transnational chains of migrants and their various 'associations', organizations + trafficking
o		
d		
e		
s	**Groups**/Communities	of migrants sharing cultural practices, broadly speaking (social class, ethno-religious etc.)
o		
f		
G	**Associations**	Formally associated migrants, (I)NGO's etc. on different levels (from local to global)
o		
v		
e	Organizations (**private Hierarchies**)	of workers (TU's), employers, MNC's etc.
r		
n		
a	**o**	'Governing' International Migration:
	f	(historical and synchronic varieties):
n		* By *means* of: constitutional, legal, administrative
c	**G**	regulation (of markets, networks, migrant groups,
e	**o**	associations, organizations) as well as by economic,
	v	political, educational and cultural interventions
	e	* (mixed *aims*): (i) forbid and prosecute; (ii) condo-
	r	ning 'irregular' migration; (iii) restrict, highly
	n	selective allowance; (iv) invite and recruit;
	i	States (**Public Hierarchies**) (v) fairly open borders or open borders;
	n	
	g	* different *branches* of government (legislative, executive, judicial)
		* different *departments*
		* different *levels*: local, state, federal, supra-state (regional (e.g. EU) and global (UN) **polities**

By *migration* I understand the geographical movement of people in order to work or settle in other places for longer periods of time. International migration, the crossing of state-borders, is known to have many *forms* involving different *categories* of immigrants: *refugees*, *asylum* applicants, '*economic migrants*' – both seasonal and temporary (with or without temporary work permits) as well as permanent; recruited (e.g. in guest-worker schemes or green- and blue-card regimes; unskilled, semi-skilled to highly skilled) as well as non-recruited: legal admission or irregular entry and stay (e.g. overstaying visa, trafficking and other ways of 'illegal' entry and stay) – '*family re-unification*'; '*cultural migrants*' (see Bauböck 2011). IMM or *Transnational Governance of Migration* (TGM), the regulations or 'policies' of international migration have to address all these forms of migration and categories of immigrants instead of ignoring important distinctions.

In this brief article it is not even possible to illustrate the complexity of *patterns* of international migration – resulting from the interaction of traditional and newly emerging, overlapping *markets* for goods, services, labor and capital; networks, associations, organizations of all kinds and all kinds of public hierarchies – and the more or less rapid changes of these path dependent patterns. Instead I highlight only four advantages of a broad governance-perspective compared with rivaling perspectives of 'government', 'management' and 'control':

(i) the concept and the pre-theoretical frame is *more complex* than competing ones and also *more theoretically open*, inviting hypotheses and empirical studies of all relevant relationships instead of premature theoretical/empirical closures and dichotomies;

(ii) it requires a certain capacity to regulate but it also insists to analyze not only *external regulation* (e.g. by the state) but also *internal* or *self-regulation* (e.g. by families, networks of migrants and their associations and organizations) and *co-regulation*.

(iii) it does not exclusively focus on top down or *hierarchical* regulation (and 'strict coupling') but allows also for bottom up and/or *heterarchical* regulation (and 'loose coupling'). Both internal and external governance can be top down or bottom up.

(iv) it avoids an exclusive focus on actors and, more specifically, on one (monolithically constructed) state and on 'migrants' by including processes and *varieties of modes of governance* and highlighting a *multiplicity* of (internally highly diversified) *actors*.

(v) it systematically avoids *'methodological statism' and 'nationalism'*, which are so obviously inappropriate for empirical studies and normative recommendation for policies of international migration. Markets are more or less global right from the start (also labor markets as all critical historians of international and internal migration have demonstrated so abundantly), so are networks, associations and organizations; and at least since a century or so, cooperating and competing polities (from local to global) are involved in attempts to regulate international migration.

Yet, a governance perspective, fashionable as it is, may include also huge disadvantages because it comes in so many fashions, many of which are not even compatible with minimal standards of accountability and democracy.[ii] Hence I have to say at least a bit about my preferred perspective of *associative democratic governance* (see section III).

II   Dilemmas of transnational governance of migration

I.1   General Dilemmas of immigration and incorporation policies

To get a broader view of policy dilemmas it may be worthwhile to recapitulate some of the dilemmas resulting from the *intrinsic intersection of immigration and incorporation* (see Bader 2005b). Processes of immigration and incorporation depend on structural, contextual, conjunctural variables and on institutional and field-specific logics that are beyond the direct or immediate influence of any politics or policies, to start with. For this reason alone, *'politics'*

cannot determine the course and outcome of immigration and incorporation but still 'politics matters'. Yet all *policy-options of incorporation*, whether *Multicultural Policies* (MCP) or *Republican Assimilation* (RA), *Liberal Assimilation* (LA), or *Diversity* (D),[iii] are confronted with a veritable mine field of policy-dilemmas resulting from the interplay of moral, ethico-political and realist dilemmas and conundrums:

(1) If policies of *first admission* are fairly open and non-restrictive, this puts pressure on fair incorporation processes in all dimensions, particularly on welfare arrangements (the (in)famous immigration/welfare paradox).[iv] If they are strongly restrictive they may be morally and also legally indefensible and also create intended or unintended stereotypes about 'foreigners' backfiring on the integration of resident immigrants.

(2) If policies of *legal incorporation* are fair and inclusive (safe and secure resident or denizenship status and easy naturalization) they may serve as important 'pull'-factors for immigration (in all forms), if they are restrictive and exclusionary they may be morally indefensible and they seriously hinder integration processes in all other dimensions.[v]

(3) If policies of *socio-economic integration* are weak (neo-liberal) or absent, they contribute to the development of ethnic under-classes, ghettoization, structural educational under-achievement, crime, and so on thereby re-enforcing ethnic stigmatization. If they are strong – either *general* 'republican' or 'socialist' policies of equalizing socio-economic opportunities or *affirmative action* policies – they tend to re-enforce restrictive immigration policies or dramatize the dilemmas of affirmative action: as *morally* unjust or *legally* suspect (undermining equality before and in the law); 'essentialist' categorization and stigmatization, bureaucratization, undermining social cohesion, stimulating 'ethnic' conflicts, and so on.[vi]

(4) If policies of *cultural integration* are strongly assimilatory they are morally illegitimate (from any defensible 'liberal' point of view) and create or stimulate much resistance. In

addition, they reinforce stereotypes of immigrants as 'unwelcome' and 'un-adaptable'. If they are pluralist they may be conceived as obstacles to 'integration', as a threat to 'our common culture', 'our shared values' etc.[vii]

(5) If integration-policies have a strongly *unitarian institutional* bias (RA) they may be in conflict with important freedoms (of religion, of education, of association and organization) and they may re-enforce the overload of state-run public services. If they allow for a fair amount of institutional separation they may be perceived – and increasingly are so – as a threat to minimally required political unity, social cohesion and stability, and they may stimulate the unchecked strategic particularism of 'ethno-politics'.[viii]

(6) If policies regarding the predominant *public or political culture* are open and accommodationist stressing its civil or political character (like in LA and Associative Democracy) they may re-enforce ethnocentric or nationalist reactions (the recent constructions of German, Danish, Dutch or Australian '*Leitkultur*' mushrooming nowadays in many countries, as defended by RA), if they are outright ethno-nationalist and assimilationist they create 'fundamentalisms' on both sides.

My intent is not to say that 'whatever we do is wrong' but to investigate 'what is better or worse' in a given context. A precondition of this endeavour is to acknowledge that whatever policy options one wants to chose, one is confronted with hard trade-offs and serious policy-dilemmas. And these serious problems have to be confronted, though in different ways, by moral and political philosophers, by political theorists, by social scientists, and by politicians and civil servants as well. In addition, we have to deal with extremely complex situations or 'open' systems and the accompanying uncertainty of our knowledge, unpredictability of developments and the fact of deep but reasonable disagreement amongst normative theorists and amongst social scientists and policy-advisors. The main points I want to make plausible in these regards

are the following:

(i) Moral and political philosophers, specialized in clarifying moral and ethico-political arguments, can only neglect prudential and realist arguments for or against policies and policy proposals if they do not take into account the complexity of practical reason.

(ii) Social scientists specialized in descriptive and explanatory tasks like describing and explaining migration flows, processes of incorporation and also policies of immigration and integration cannot neglect explicit normative arguments if they take into account that the – contested – results of their studies play a role in public debates and policy-making either indirectly (by the sheer fact of publication) or directly, particularly if they serve as policy advisors.

(iii) Politicians and civil servants can only neglect the moral illegitimacy or the unintended, may be even catastrophic counterproductive consequences of their policies as long as they are not forcefully and effectively reminded by opposing groups and organizations, by social movements and political parties, critical public debate, courts, and INGO's.

(iv) Associational GTM provides better opportunities compared with other institutional arrangements to address these problems.

II.2 Specific Dilemmas of Immigration Policies

As already indicated, claims of what we 'should' do, or 'ought' to do are differentiated (this I call the *Complexity of Practical Reasoning,* Bader, 2007, 89ff.). They do not only include *moral oughts* (what we should do as human beings, sharing basic needs and basic rights) but also *ethno-political oughts* (what we should do as belonging to a community of cultural practitioners, in our case mainly 'national communities'). These two types of normative arguments are the main domains of moral and political philosophy. In addition we should do what is in our well informed and understood long-term interests (*prudential ought)* and we should not do what is

demonstrably counter-productive or disastrous (e.g. 'justice be even if the heavens fall'). These prudential and realist arguments are the main domains of social sciences, broadly understood.

For a long time, moral and political philosophers have been virtually silent on international migration but this has changed during the last twenty years or so (see Bader, 2005, p. 331-36). To make a long and complex story very short and simple, we find two different but internally connected universalist *moral arguments* in favor of *open borders* or free migration: the first, direct argument focuses on free movement as a universal moral (and legal) human right; the second, rather indirect argument focuses on issues of Poverty and Aid (moral minimalism) and/or on Serious Global Inequality and Redistribution (more demanding egalitarian morality). These arguments and the recommended policies of open borders and/or fighting global poverty and injustice often are opposed to each other, both ideally and in the real world, but they may also be combined, e.g. by the argument that *if and as long as* 'we' do not effectively succeed in "alleviating the terrible conditions that make them want to come here in the first place" (Pogge 1997) we have a minimalist moral obligation in favor of fairly open borders: open your wallets or open your borders (Bader 1997). As is well known by now, all this is heavily disputed amongst moral philosophers and there is clearly no need or possibility to repeat all arguments here.

The *main arguments why borders should be* (more or less) *closed* are: "(i) because moral *priority* should be given *to compatriots*, and because *states* have an important *role in the allocation of duties*, (ii) because fundamental *civil* and (iii) *political rights (including democratic political culture and virtues*) can only be guaranteed in such a way, (iv) because *social rights and welfare arrangements* have to be defended, and (v) because *ethno-national cultures have to be protected*" (Bader, 2005, p. 344). These more particularist, even 'communitarian' positions usually include mixes of moral, *ethno-political* and realist arguments, either in very strong or in weaker forms. They need not be thinly veiled welfare chauvinism. In my view, reasonable

defenders of closure, such as Michael Walzer or David Miller, do not argue for complete closure
and recognize moral obligations of 'states' and 'nations' both with regard to refugees and
asylum applicants as well as regarding unallocated duties to fight poverty (see Miller, 2005 and
2008, see Bader, 2005a and 2008). Again, serious disagreement characterizes the state of the art
amongst philosophers in all these matters.[ix]

Yet *disagreement in moral and political philosophy* does not mean that we would know
'nothing', that we could not demonstrate that specific positions are unreasonable, morally
indefensible or wrong, profoundly unjust, just as ongoing dissensus in the sciences does not
mean that certain theories or statements are untrue, indefensible, etc. In addition, in cases of
deep, reasonable disagreement it seems advisable to *economize moral disagreement* and a focus
on the demands of *moral minimalism* (on *avoiding 'malfare'* instead of maximizing welfare)
seems the best strategy to realize this (see Bader, 2007, chapter 2). We may disagree on the
demands of egalitarian justice, on a long, ever-extending list of 'human rights' but we may
agree on fighting poverty and some 'basic rights' such as security and subsistence as 'rights to
have rights' (Shue, 1980).[x] *Continuing moral disagreement* is increasingly acknowledged by
Post-Rawlsian developments in 'deliberative democracy' and 'democratic discourse theory'.
What 'morality' or 'justice requires' is open for contest and debate. This is mainly due to the
facts of '*underdeterminacy of moral principles*' such as liberty or equality and to the fact of
moral pluralism: our cherished moral principles conflict with each other (famously: liberty
versus equality), we do not succeed to consistently derive them from one basic principle and we
are unable to develop a context-independent 'lexical' hierarchy telling us that one principles
always trumps the others.[xi] Taken together, and taken seriously, these facts make the
Contextualization of Moral Philosophy inevitable, whether we like it or not. We have to deal
with inherent tensions, with serious trade-offs and the fact that no one-model or one answer fits
all contexts, and we may be able to learn that this is not 'tragic' but the normal state of affairs in

practical life. We are pushed to defend 'more reasonable' arguments in specific context (because contextualism is different from 'anything goes') and we are also invited to find better, less Big trade-offs.

Prudential arguments also can cut both ways. Neo-classical theoretical models and utopias are clearly in *favor of open borders* and of free trade that is supposed to guarantee the optimal allocation of all factors of production and hence benefiting all, at least in the long run: the particularist national economic welfare, the welfare of immigrants, and global economic welfare (Chang, 1997). Recent demographic developments and projected difficulties to finance pension-schemes also have contributed to a remarkable shift in the empirical prudential balance sheet. [xii] Yet we also know that capital, particularly financial capital after global neo-liberal deregulation is more flexible, mobile, and footloose than labor; and that free exit of capital, combined with free entry of workers, structurally weakens the organizations and power-positions of labor and tends to undermine thicker legal regulations and institutions of welfare states (as institutionalist critics of neo-classics have pointed out, in defending varieties of *closing borders*). Obviously, in the 'real world' all these beneficial or detrimental effects depend upon a huge variety of causes and circumstances, such as varieties of capitalism, of welfare regimes and pension schemes; economic cycles and types of growth and development (e.g. capital intensive or extensive); skilled or unskilled workers; types and effectiveness of immigration policies.[xiii] So, it very much depends, we cannot forecast, strictly speaking, and we seriously and reasonably disagree inside disciplines and across disciplines both conceptually, theoretically, descriptively as well as in an explanatory perspective.

Realist arguments are an important check for any responsive morality and politics/policies, in our case both for policies of fairly open borders and for more restrictive policies of closure. *Policies of fairly open borders* are said to have many inevitable and counter-productive effects: *brain drain* instead of movement of the poorest making the 'sending countries' even less well

off and blocking their relatively autonomous economic development (but what about remittances, the total amount of which is even higher than the total amount of 'development aid'). How are we to evaluate critically and soberly the said effects of fairly open border policies on *public security and on civil rights* – particularly in our age of securitization – in the receiving countries in general, in specific countries? Do all forms of migration and all categories of migrants have expectably the same effects? Etc. And what are the expectable and demonstrable effects on our conception of security and of civil rights, also and particularly of 'irregular migrants' and on refugees and rejected asylum applicants (and their kids that have grown up and lived for quite some time 'here')? What are their effects on our interpretation and application of the criteria in the Geneva Convention and the respective Protocols, etc.? How are we to evaluate their said undermining effects on *democracy, on social cohesion, political integration and unity, on socio-economic and on cultural integration and national culture?*

Can *policies of closure* actually achieve what they promise? Can borders in open economies and in supra-state polities such as the EU be effectively closed and patrolled? What are the counterproductive effects of these policies on 'illegal entries' (human trafficking) and 'illegal stay' (overstaying visa and temporary permits, evading expulsion etc.?) for the actual treatment of irregular migrants?[xiv]. Are these new fortresses and 'Frontexes' compatible with the so-called open global economy and, particularly, with basic rights guaranteed by international and regional covenants (such as the ECHR) and protocols, as well as with liberal democratic constitutions of 'nation-states'? What are their expectable effects on the treatment of legal residents, denizens and naturalized citizens?

The *social sciences* dealing with such said effects of migration (economics, sociology, anthropology, political science, history) are confronted with serious problems demonstrating a *broad range of conceptual, theoretical and empirical disagreement* both within disciplines and across disciplines resulting mainly from *(i) limits of prediction in the social sciences* and (ii)

from *normative aspects, interests and choices in all stages of the research cycle* (see for an extensive treatment of these reasons: Bader, 1997a and 2009 for migration and incorporation research).

In sum, practical philosophers, of course, cannot solve our practical normative problems and if only for this it would be silly to make them kings. Still they can contribute to increase the reasonableness of our normative debates on immigration in the same way as social scientists can contribute to increase the descriptive and explanatory accuracy of our cognitive/epistemic public debates: not by replacing citizens, politicians, parliaments or governments, but by participating *as citizens* (public or political intellectuals) in public discourse and by a new, self-reflexive kind of *policy-advise.* This is not the place to spell out the variety of public roles in-between 'scientocracy' and 'armchair reflection in the ivory tower' (Bader, 1997a) nor the various ways in which we can and should 'democratize science' and 'expertise democracy' which all have in common that the relevantly effected stake- and knowledge-holders should be included in the policy process (Bader, 2011).

III Some guidelines for associational transnational governance of migration

For many reasons, recent *parliamentary, multi-party democracies* are deficient and incapable to address urgent issues of risk-decisions (see Bader, 2001 and 2007a), particularly because of limited and misguided information, qualification and practical knowledge and sensitivity. *Neo-corporatist* 'shifts from government to governance' may promise more effective and efficient problem-solutions but suffer from rigidity, exclusion of relevant stakeholders and publics, are intransparent, technocratic, difficult to control and also suffer from a serious lack in democratic legitimacy. Compared with these better known models of democracy, *associative democracy* provides the better alternative to make governance-arrangements in general, TGM in particular,

more effective and more transparent and democratic: it shares with (neo-)corporatism the inclusion of relevant stake- and knowledge holders in debates, decision-making, implementation and control but broadens the range of included stakeholders and democratizes the inclusion of experts. It shares with parliamentary party democracy its contestational character without falling pray to the fairly uninformed, polemical, populist, highly rhetorical and short-sighted type of majoritarian politics that characterizes politics in our decade. Associative democracy introduces antagonism into the 'consensus-politics' of corporatist policies. It introduces contest and confrontation where it matters most and where it is potentially most productive: in the definition of issues, in the deliberation and negotiation on alternative ways to solve these issues, and in the decision, implementation and control of the chosen strategy to solve the problems. In other words, it contributes to 'democratize science' and to 'expertise democracy'. Learning from experiments with European comitology and building on a broad and deep range of studies of institutional pluralism in multi-level polities and in social and minority-pluralism, we now have better means to *avoid the selective and closed character of corporatist interest-representation* by applying the following principles to the composition of governance arrangements:

(i) the range of represented interest- and knowledge holders can be much broader but has to remain selective because the respective arrangements or committees have to be working (deliberating, negotiating) bodies. Politically responsive bodies (parliaments, governments) have to decide on minimal thresholds and on representativity;

(ii) a stakeholding principle has to guarantee that minorities that have structural difficulties to organize are represented (advocacy) and also that experts or knowledge-holders are represented;

(iii) an adversarial principle has to guarantee that groups/organizations known for divergent and oppositional interests and ideas are represented.

(iv) in addition we know principles and institutional devises to increase the responsibility, transparency (see Bader, 2010) and democratic legitimacy of governance arrangements without

loosing their problem-solving capacities, e.g. the ones proposed by Schmitter and others for the EU: democratic mandate, sunset principle, functional separability, supplementary, requisite variety, and the avoidance of spillover-effects.

Let me now draw the different lines of my argument together in order to spell out some *guidelines for transnational governance of migration*. I hope to have shown that TGM is a highly complex and contested thing and so is the philosophically and scientifically informed practical design of minimally appropriate institutions and policies. To sum up, TGM has to take into account: (i) many levels of regulation, (ii) many relevant actors, and (iii) a broad variety of mechanisms and strategies of regulation. The discussion of the 'state of the art' in normative theory and in the social sciences makes it imperative (iv) that we take the many relevant but conflicting normative arguments into account. (v) Given the serious moral disagreement, moral minimalism seems to be the best strategy. Wherever possible more demanding moral standards should be considered. (vi) In order to guarantee that we take minimal morality as serious as we should the burden of proof should be squarely placed on the ethno-political, prudential and realist defenders of (more) closed borders (see above with Carens and Zolberg); more in particular we should not try to hide but rather highlight the serious disagreement amongst social scientists regarding prudential and realist arguments. (vii) Only contextual judgment can be, if at all, appropriate for dealing with this complexity, for weighing and balancing the conflicting normative oughts, and for finding more productive ways out of the many policy-dilemmas, paradoxes and Big Trade Offs. For a start they have openly and fully to be acknowledged instead of rather implicitly treated or even ignored, as is so often the case. (viii) Acknowledging that relevant knowledge is not only 'theoretical' and 'scientific' but also practical and local, the

relevant stake- and knowledge-holders have to be included in research and in all kinds of advisory (and also decision making) bodies.

Yet, who are the relevant knowledge- and stakeholders and how to include them on which levels? These are some of the basic issues to be resolved in designing new regimes of *associational TGM*, an endeavor that is way beyond the limited purposes of this paper. Here I give only some very rough and preliminary indications drawing on existing attempts.

Existing refugee-regimes and proposals for immigration-regimes and policies already include some important steps in the direction of more complex and more appropriate TGM for two reasons: first, they include two or *more levels or tiers* and, second, they are based, in the case of the refugee-regime, on a *combination of minimalist moral (and legal) standards[xv] with more demanding ones*. The general design principle would clearly be in line with a democratically amended and more transparent version of *subsidiarity* (known from the EU): locate deliberations and decisions at the levels where the most reasonable balances amongst conflicting 'oughts' under the condition of more adequate information and practical knowledge can be expected. Decisions on the minimal rules and requirements should be taken and controlled at the global level (by existing or newly created UN institutions) but allow and stimulate more demanding standards on regional, federal and state/provinces levels. The existing *refugee-regime* is already a two-tear system (UN, state) or even, in some countries such as Canada (Quebec) and Switzerland (cantons) a three level system and it could evolve into a four-level system, e.g. by respective initiatives of the EU (regional system).[xvi]

Something like this could also be proposed for a *general immigration regime* that would not only recognize a right to protection from fear of violent persecution but also a right to fairly free movement and settlement which would have to be translated in respective

international covenants, protocols and institutions. Clearly, a precondition for such a development would be that states would accept to qualify their unconditional claim to 'sovereignly' decide, without any need for reasonable argument, on admission.[xvii] On the basis of long-term *prudential* arguments, Veenkamp and others (2003) have elaborated such an immigration regime for the EU.[xviii] On the basis of universalist *moral arguments*, Jordan and Düvell (2003) and Marchetti (2003, 2007) have tried to do so for a global immigration regime. Marchetti (2007), for example, argues for the "(n)ecessity to create a legal-political structure able to manage and implement the 'good' at stake, i.e. the right of residency. Since the agency entailed in the movement of people refers primarily to the global level of political action, then the principles of justice to apply in this case have to be consistently calibrated as world responsibilities." This would require to settle the "issue of assigning moral responsibility, i.e. making every agent accountable in each political sphere" or on each level. Important steps would be: (a) an international convention containing a "code of conduct to be implemented through a two-tier mechanism at the domestic and global level"; (b) a World Migration Agency (a reformed UN institution: all-inclusive, as a forum to negotiate and deliberate conflicting claims, fair weighing; it should have supranational competence entailing the authority to override national decisions". (c) "Rules of non-discrimination such as univerality of admission through temporariness, equality of treatment between locals and foreigners, and the most favored nation clause are the most appropriate candidate norms for this new regulatory framework. They would produce a *prima facie* duty on the receiving countries to admit impartially without discriminating among sending countries… a system of burden/benefit sharing through national quotas should also be agreed upon to set the quantitative criteria for receiving countries [taking economic development, natural resources, countries' performance in developmental aid etc. into account, VB]. In contrast to national policies … each country

should admit its fair share of migrants regardless of the other countries' compliance with the organizations decisions" as a mechanism against races to the bottom, Dublin-like agreements etc. The whole is seen as "the institution of multilevel citizenship". If no legal sanctions for non-complying states are available in the near future, at least mechanisms of blaming and shaming should be used and (threatening) economic sanctions could add some power to this.

Obviously, this proposal runs into some well-known troubles, such as: should all the different forms of migration and admission be treated by one scheme? Should the top level, say the UN, decide not only on general rules and conditions but also on numbers of migrants and distribution per country? Would not the rule of non-discrimination among sending countries result in a dramatic weakening of well allocated associational duties and drastically overestimate the force of unallocated global or cosmopolitan duties?[xix] Marchetti's attempt also demonstrates more general and *inherent difficulties to design 'universal regimes'*. My arguments in favor of contextualized morality and judgments also imply that we should focus on *specific migration problems* (e.g. temporary migration, refugees), use the minimalist standards and 'rules of thumb' as guidelines to criticize existing regimes and propose *defensible institutional solutions for these cases.*

In conclusion: Given the enormous complexity of migration and of TGM together with the fact that productive institutional thinking in this regard is only getting off the ground fairly recently it is not surprising that these proposals right now are fairly clumsy. 'We' (political philosophers, theorists and social scientists) cannot tell 'them' (politicians, governments, civil servants, INGO's etc.) what they 'should do'. Maybe we are better in telling them what they definitively should not do, e.g. engaging in *policies* that encroach upon minimal moral and legal standards and expectably *make all parties actually worse of,*

if they matter at all. Even if there may be no 'best practices' (fashionable EU talk) we might agree on 'better' or 'worse' practices, or minimally on unacceptable/illegitimate practices in a comparative perspective.

The really worrying issue is that in the case of international migration, as in other cases of high risk decisions such as the regulation of finance-driven capitalism or ecologically sustainable development, the existing institutions of *governance* are in such a deplorable state that we will not be able to live up to the most minimal requirements and that we may not have the time needed for ratcheting up by democratic experimentalism. If one takes the even more deplorable state of today's 'governments' into account, the future seems grim.

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Notes

i   See recently for an extended criticism: Geiger and Pécoud 2011.

ii   See for a critical treatment: Pecoud 2011.

iii   See Bader 2007c for a discussion of these ideal types.

iv   To alleviate this Big Trade-Off, I have defended the idea of a 'stairway of rights' that fits into my idea of 'differentiated morality': see Bader 2005 and Engelen 2003. We should resist the abstract moral postulate that we have to treat all types of migrants: seasonal, circular, recruited, invited, regular or irregular in exactly the same way granting them right from the start the full package of rights of nationals or citizens. We should also be aware of the counterproductive effects of 'regularizing' all migrants by attempts to fight all 'illegal migration' and, inevitably, more or less drastically restrict 'legal migration'.

v   Stepwise, temporally differentiated regimes of legal incorporation are in place in almost all immigration-states. Achieved results like fairly save denizenship and dual nationality, however have to be vigorously defended against recent attempts to subsume them again under 'security', 'loyalty' and 'restrictive immigration' policies.

vi   See my six rules of thumb for flexible and wise policies of affirmative action: Bader 1998:462ff. The recommended *general* policies to fight structural disadvantages of minorities in an indirect way depend on well-functioning welfare-arrangements that, paradoxically, are recently under attack, under ´reconstruction´ or in serious decline in all European states without viable powerful alternatives. Without such safe institutional backings it is incredibly difficult to prevent strategies of *divide et impera* particularly under conditions of negative sum games

vii   States are obliged to *strong anti-discrimination policies* by their national laws and constitutions, by EU-law and regulations, and by international covenants. They have to be

combined with instead of opposed to flexible MC- policies to address all cases of serious cultural inequalities.

viii   In this regard, *associative democracy* provides a flexible alternative to the opposite models of unitary republicanism and old-fashioned, rigid (neo-) corporatism that is responsible for much of the unintended effects of MCP mentioned above (see Hirst/Bader 2001, Bader 2003). Here we are faced with another, fairly general dilemma: The most common tension and the most often recognized trade-off exists between *policies of equal socio-economic opportunities* - even if the egalitarianism is moderate and minimalist – on the one hand, and actual *cultural recognition and institutional pluralism*, on the other hand. Egalitarian policies seem to demand a fairly strong and unitary state and fairly thick national commitments and solidarities inimical to institutional pluralism and wide ethno-religious cultural diversity (see however Banting/Kymlicka 2005). This trade-off is either neglected or simply 'resolved' by defenders of RA and LA in favor of the former policies only.

ix   The strength of Joe Carens' position, starting from ideal theory, is that he puts the burden of proof clearly where it belongs: only strong and contextually convincing arguments in favour of closure can overrule moral priorities favoring free movement (see his restatement of 'The Case for Open Borders' in his forthcoming book, 2011, chapter 9).

x   The moral right to basic security is the basis of the legal right for refuge and asylum (recognized in the Geneva Convention and the Protocols), but a comparable legal right to basic subsistence has never be agreed upon as binding.

xi   See Carens 2000, 2002, Galston 2002, Bader/Engelen 2003. See Bader/Saharso 2004 and Bader 2007, chapter 2 for a defense of 'moderate' contextualism

xii   See for the EU: contested projections 2030 or 2050; policy-initiatives by the Commission: Peo Hansen 2009. Recent debates on 'blue card' and on 'circular migration'.

xiii See for Canada vs. Europe: Banting/Kymlicka (eds), 2005; v. Parijs (ed.), 2003; recently for the Netherlands: v.d. Beek, 2010).

xiv See for discursive effects: Vollmer (2010).

xv See Bader, 2005, p. 351 and 360, note 126; and 2005a, p. 101.

xvi See the recent ruling of the ECtHR that forces the EU and member-states to revise the 'Dublin agreement'.

xvii Marchetti (2007); Schotel (2008) for a powerful argument to give 'aliens' a stand before courts

xviii See also Demos 2003 and 2004 for critical debate. Hansen (2009) for policy-declarations.

xix For the latter problem see my debates with Miller: Bader 2005a and 2008. Rainer Bauböck (personal communication) also criticizes Marchetti's 'global utilitarianism'.