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Jonathan Josefsson

To cite this article: Jonathan Josefsson (2019) Non-citizen children and the right to stay – a discourse ethical approach, *Ethics & Global Politics*, 12:3, 32-49, DOI: [10.1080/16544951.2019.1678800](https://doi.org/10.1080/16544951.2019.1678800)

To link to this article: <https://doi.org/10.1080/16544951.2019.1678800>



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Published online: 22 Oct 2019.



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ARTICLE



Non-citizen children and the right to stay – a discourse ethical approach

Jonathan Josefsson 

Department of Thematic Studies – Child Studies, Linköping University, Linköping, Sweden

ABSTRACT

The increased efforts of democratic states to enforce immigration control and deportations have sparked heated public debates about the rights of non-citizen children to be granted asylum. Local communities, anti-deportation movements, and children themselves have rejected the justifications provided by state authorities and have mobilized claims in the public sphere for the rights of non-citizen children to stay. To date, scholars have primarily analysed normative issues about the rights of non-citizen children with departure in legal positive rights as enshrined in domestic and international law; however, scholars have paid less attention to political theoretical aspects of the issue. This article takes its point of departure from claims for non-citizen children's right to stay as formulated in the public sphere and uses discourse ethics to theorize in what ways these claims challenge state power and contemporary laws on asylum. In addition, this article contributes to the scholarly debates about the pressing global political issue of child migration and the political theory of human rights for children. Building on Seyla Benhabib's concepts *reciprocity* and *democratic iterations*, this article develops a discourse theoretical approach that offers an alternative framework to a legalistic approach for the normative analysis of the rights of non-citizen children.

ARTICLE HISTORY

Received 10 June 2019

Revised 26 September 2019

Accepted 27 September 2019

KEYWORDS

Non-citizen children; human rights; migration; right to stay; deportation; democracy; mobilization; reciprocity; democratic iterations; discourse ethics

Introduction

When the brothers Hakob, 13, and Hasmik, 14, had lived in Sweden for 5 years, their applications for residence were rejected, and they were to be deported to Armenia (Dagens Nyheter March 8, 2007, my translation). Protesting the decision, their schoolmates, teachers, and the local community started a petition demanding that the brothers should receive residence permits. While protesting outside the office of the Swedish Migration Agency, one of the placards summed up their refusal to accept the justification offered by the state agency for the deportation of the brothers: 'Give us a reason, why?'. In Sweden's largest morning newspaper, the schoolmates stressed the unreasonableness of the agency decision: 'Completely sick, they're Swedes now' and 'For us, it's naturally quite incomprehensible. Here we have a family that's lived in Sweden for 5 years, the children speak fluent Swedish and are fully integrated into Swedish society' (Ibid).

CONTACT Jonathan Josefsson  jonathan.josefsson@liu.se  Department of Thematic Studies – Child Studies, Linköping University, Linköping, Sweden

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Some years later, the rejection of a residence permit to a two-year-old French-Algerian girl, Haddile, produced an even stronger wave of public protests claiming that she had the right to a residence permit (Aftonbladet September 21, 2012, my translation). Haddile, born in Sweden to an Algerian mother, was found malnourished with severe brain damage as the result of abuse and neglect when she was four-months old. She was placed in family foster care. After 2 years in foster care, Haddile's application for a residence permit was rejected. The migration agency stated that the highest priority was to reunify Haddile with her mother. Meanwhile, she was to be transferred to an orphanage in France since she was a French citizen. The public reaction to the decision was strong. A Swedish newspaper started a petition protesting the decision, which had soon collected about two-hundred thousand names. Haddile's foster parents and professionals were enraged and declared the denial to be unreasonable and contrary to Swedish commitments to the United Nations Convention on the Rights of the Child (UNCRC) and the best interests of the child.

In response to the public outrage in these two cases, the Swedish migration authorities defended their decisions by noting that they were in line with the laws and policies that the parliament and the government put in place per ordinary democratic order and Swedish commitments to international laws such as the refugee convention and the UNCRC. However, Hakob and Hasmik's and Haddile's cases are just two cases among many where the deportations of non-citizen children and youth¹ by European countries and the USA have been publicly contested and condemned as unreasonable, inhumane, and in conflict with the fundamental rights of children (Josefsson 2017b). In an era when states have increased their efforts to enforce immigration control, anti-deportation movements and non-citizen children themselves are challenging the political power of these states and is calling into question the legitimacy of contemporary systems of immigration control. They are claiming a right to stay. One of the most well-documented movements is the political struggle for legal status by the 'Dreamers,' children of undocumented migrants in the USA (Nicholls and Fiorito 2015; Corrunder 2012; Patler and Gonzales 2015). Similar movements and campaigns can be found in a range of other countries such as the UK, Australia, Israel, The Netherlands, and Sweden (Josefsson 2017b; Rosenberger, Stern, and Merhaut 2018; Ataç, Rygiel, and Stierl 2016).

I suggest that the two cases described above and the international anti-deportation movements for non-citizen children demonstrate three pertinent challenges to the contemporary legal and political orders of modern democracies such as Sweden. These challenges require further theorization. First, while states reserve the right to deny non-citizen children residence permits in order to enforce immigration control, local communities, anti-deportation campaigns, concerned citizens, and the children themselves are continuously refusing to accept the justifications provided by state authorities (Josefsson 2017b). Cases like Hakob and Hasmik and Haddile reveal a discrepancy between the legal reasoning about the rights of non-citizen children by state agencies and the moral reasoning supporting the claims of non-citizen children in the public sphere. Second, the contestations of legal decision-making concerning

¹In this article I use the term *non-citizen children* to refer to persons under the age of 18-years old that are resident in a country without being legally recognized as citizens. This includes both *asylum-seeking children* that are under asylum process and *undocumented children* that have entered or are being born in a country without legal status as well as children that after rejection of asylum or a permission has expired are staying in the country without valid legal status.

residence permits and deportations expose some general challenges around citizenship, migrant rights, and immigration control that have confronted international society for decades: membership in the wake of global migration can no longer be considered bounded within a single territory (Benhabib 2004; Bosniak 2008; Carens 1987, 2010, 2013; Lindahl 2013; Wellman and Philip 2011). Third, these cases also highlight questions about human rights, membership, and immigration control that are specifically related to children and childhood. Although non-citizen children have typically attracted strong moral attention in public debate and can refer to child-specific legal provisions, a large number of child migrants today are functionally stateless and the fundamental rights to protection, family life, education, and health care that these children have under international law are in practice unenforceable (Bhabha 2009, 2014; Josefsson 2017b).

To date, scholars primarily have analysed the controversies involving children's rights and immigration control using as the normative standard international treaties such as the UNCRC, the Refugee Convention, and the European Convention of Human Rights (Bhabha 2014; Lundberg 2011; Sandberg 2014; Smyth 2014). Consequently, the inability of national immigration authorities and the international society to ensure children's rights has resulted in a call for more of standardized approach, implementation, and monitoring of the international law using a top-down legalistic model. In addition, using the UNCRC as an analytical framework to study children's rights has been questioned (Josefsson 2016b; Reynaert, Bouverne-De Bie, and Vandeveldel 2012; Vandenhole 2015; Vandenhole et al. 2015). One criticism points to the fact that the academic embrace of the UNCRC and its hegemonic status has hindered a critical scrutiny of the convention itself (Ferguson 2013; Quennerstedt 2013; John Tobin 2013). This limitation has resulted in a theory deficit in the field as this approach often equates children's rights with the convention itself, ultimately replacing theory itself (Josefsson 2016b, 23; Quennerstedt 2013). Moreover, although a legalistic approach can address questions of justification internally to a legal system itself, it seems to have difficulties analytically addressing the plurality of claims and questions of justification that are apparent in the public sphere outside the present legal framework.

On the other hand, we can see a growing interest among philosophers to engage with moral and political issues around children and childhood (Archard and McLeod 2002; Archard 2015; Brake and Ferguson 2018; Gheaus, Calder, and Wispelaere 2019; Josefsson 2016b; Wall 2010). Nonetheless, with a few exceptions (Ferracioli 2018; Josefsson 2016b; Lemberg-Pedersen 2018; Lister 2018; Schweiger 2019; Yong 2016), philosophical issues around child migration are rarely scrutinized. As I point to in this article, while these contributions have addressed some important components about non-citizen children's rights, there are central facets about contexts, claims and conceptions about children in migration that have been left out. Here, this limitation is addressed by positing new and critical insights derived using a discourse ethical approach. Although the philosophers and political theorists have recently engaged the open/closed border debates and ethics of migration, producing a significant amount of scholarly work (Carens 1987, 2010, 2013; Benhabib 2004; Wellman and Philip 2011; Miller 2016; Seglow 2005) the systematic inquiries into the specificities of migrant children and youth remain strikingly absent (Josefsson, 2012, 2016a, 2016b). This oversight persists despite the fact that the group constitutes about one-third of asylum seekers in the world and protest movements for years have been contesting global and national governance of rights protection for young

people, not only in the domain of migration but also around issues such as climate change, gun violence, and labour (Fridays for Future 2019; Holzscheiter, Josefsson, and Sandin 2019; Liebel 2015; March for our lives 2019).

Driven by these observations, this article sets out to analyse the controversies around the rights of non-citizen children with the help of discourse ethics, in particular relying on Seyla Benhabib's concepts of *reciprocity* and *democratic iterations*. This approach contributes to the discussion about the theoretical and normative foundations of children's rights, global child migration, and more specifically the urgent political matter of non-citizen children claiming their right to stay. In this context, the 'right to stay' is referred to as a moral claim to remain in the country in which the non-citizen in question is residing. This claim is directed to the recipient state and is grounded in a refusal to accept the justification for deportation and can be based on a diverse set of reasons and substantial arguments such as time residing in the country, a person's poor state of health, the respect of intimate relationships or private life, risks associated with being expelled to another country or a person's membership in a local community (Carens 2010; Josefsson 2017b; Lenard 2015). While some of the most dominant discourse ethical approaches that address human rights have paid considerable attention to the justification of human rights and the role of the public sphere in general, these approaches have not been discussed in relation to children or in the context of non-citizen children as rights subjects, which today, as noted above, constitute a significant part of the global population (Benhabib 2013, 2004; Forst 2010; Baynes 2009, 1). In addition, Benhabib's discourse theory does not systematically or comprehensively address children as rights holders. Nevertheless, her writing on human rights in a global era, political membership, migration, and justificatory processes in the public sphere offers a relevant starting point for this particular issue and highlights where more work is needed (Benhabib 1992, 2004, 2011, 2013). Furthermore, the discourse ethical approach advanced here, with its focus on public contestations, justifications, and a 'non-reductionist' conception of children and childhood, takes a different theoretical route than some other contemporary 'statist,' liberal, and cosmopolitan approaches to children's rights and child migration. Instead of relying on any specific substantial principle or essence of human (and children's) nature, rather, it takes its normative foundation in social interactions, discursive dialogues and plural conceptions of children and childhood. In this paper, Sweden is used to illustrate the larger pertinent legal and political challenges of modern democracies as they try to tackle global child migration.

The first section presents some fundamental elements of Benhabib's discourse theory. The next section examines how the claims to rights of non-citizen children spark reciprocal dialogues of justification and suggests that the relationship between non-citizen children and the state is best characterized as asymmetrical. I continue by arguing that the principle of *reciprocity* and the concept of *democratic iterations* can offer a productive political theoretical and normative framework for children's rights in the context of immigration control. I end by summarizing the main conclusions of the article and discussing some practical implications that a discourse ethical approach could have for how democratic states approach the rights of non-citizen children.

Seyla Benhabib's discourse ethics

Benhabib's discourse theoretic account of human rights is an example of the contemporary approaches to human rights following the tradition of Habermas discourse ethics (Benhabib 1992, 2004, 2011, 2013). As with the 'political conceptions' of Human Rights, discourse ethics views conceptual and normative foundations of human rights as grounded in moral and political discourse among reasonable persons rather than in 'natural' or 'foundational rights' derived from a pre-social or pre-political order and belonging to humans as such (Forst 2010, 2013; Baynes 2009, 1–2; Beitz 2011; Cruft et al. 2015; Habermas 1994, 1996; Ingram 2009, 193). Although there are differences between the discourse ethical and political conceptions of human rights, both conceptions emphasize that for laws and policies to be legitimate they should be publicly justifiable to citizens on the basis of mutually acceptable reasons and they should be based on a principle of reciprocity (Benhabib 2013; Forst 2010; Lindahl 2013, 227; Rawls 1997).

Benhabib provides a model of moral conversation among members of an ethical community in a post meta-physical age that responds to what she acknowledges as a 'justification deficit' in human rights discourse. This discourse is characterized by the 'disturbing fact that, while the global culture and institutionalization of human rights' have gained considerable traction, 'the nature of the justification for claims about the existence of human rights remains obscure' (Benhabib 2013, 38; Forst 2010; Lindahl 2013, 227; Rawls 1997). A basic premise of her discourse ethical model is that "only those norms and institutional arrangements are valid which can be agreed to by all concerned under special argumentation situations named discourses" (Benhabib 2004, 13). Benhabib develops a political theory about political membership and human rights that can also accommodate the fact that citizenship no longer can be viewed as a unitary and stable given 'which bundle[s] together residence upon a single territory with the subjection of a single administration' (Ibid, 178). She argues that this 'disaggregation of citizenship' is an inescapable aspect of globalization, which 'permits individuals to develop and sustain multiple allegiances and networks across nation-state boundaries, in inter- as well as transnational contexts' (Ibid).

In her account of human rights, two aspects are fundamental: *universal moral respect* and the *principle of reciprocity* (Benhabib 1992, 2011, 2013). Universal moral respect of each person, according to Benhabib, means that 'I must respect your capacity to agree or disagree with me on the basis of reasons the validity of which you accept or reject' (Benhabib 2013, 39). To illustrate this idea, she offers a reinterpretation of Hanna Arendt's famous concept of 'the right to have rights' understood as 'the claim of each human person to be recognized as a moral being worthy of equal concern and equally entitled to be protected as a legal personality by his or her own polity, as well as the world community'; that is, the moral basis for human rights is 'the respect of the human person as an autonomous agent who possesses a right to justification' (Benhabib 2011, 62).

Universal moral respect is closely related to the principle of reciprocity and a justificatory process where 'I can justify to you with good reasons that you and I should respect each other's reciprocal claim.' (Ibid) In this respect, Benhabib draws on a Kantian and Habermasian tradition (Ibid) of moral constructivism but argues for a shift from what 'each can will to be valid for all' via a thought-experiment (e.g. Kant) to justificatory processes

through ‘which you and I in dialogue must convince each other of the validity of certain norms’ (Benhabib 2013, 39). The shift away from reason giving via a thought experiment, to a justificatory process based on communicative freedom between ‘all human beings who are potential or actual speakers of a natural language’, will, as I argue below, be key to how we discuss the human rights of non-citizen children (Ibid). Benhabib suggests a distinction between the *right to have rights* (universal moral respect shared by all human beings) and the *schedule of rights* (a specific list of human rights that needs to be determined within the political community of the sovereign state). She argues that endorsing a cosmopolitan right does not mean imposing a specific schedule of rights to all people (Benhabib 2004, 74, 140). The specification of rights should instead take place through *democratic iterations* in a global public sphere where mediations are conducted between commitments to universal human rights, on the one hand, and the right of states to self-determination, on the other hand. By democratic iterations, she means ‘... complex processes of public argument, deliberation, and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions, as well as in the associations of civil society’ (Benhabib 2011, 129). Therefore, it is through such democratic iterations that the universal moral respect and the principle of reciprocity take shape as specific human rights.

When it comes to children as subjects of human rights, as will be discussed below, Benhabib has not systematically elaborated in what way they fit into her theoretical matrix based on reciprocity and democratic iterations. In the following sections, Benhabib’s discourse ethics will be used as a starting point to discuss the rights of non-citizen children. First, her discourse ethics will be used to help elucidate the claims of non-citizen children against the state that today in fact give rise to *reciprocal dialogues* and to help clarify the exchange of reasons taking place between different actors in the public sphere and those of the state. Next, I will discuss how these dialogues are best characterized as asymmetrical. In the last sections, I argue that the principles of *reciprocity* and *democratic iterations* offer a productive normative framework to increase democratic legitimacy and respond to some of the critical challenges that the rights of non-citizen children bring to the fore.

Rights claims of non-citizen children, reciprocal dialogues, and asymmetrical reciprocity

Let’s for a moment go back to Hakob, Hasmik, and Hadille. Their cases illustrate a recurrent refusal on the part of children themselves and surrounding actors to accept the justifications provided by state authorities for the denial of residence permits. While non-citizen children themselves are excluded from taking political action using traditional democratic political instruments such as party politics and electoral voting, their claims are instead backed by extra-parliamentary actions such as protests, petitions, hunger strikes, and media mobilization (Josefsson 2017b). Similar patterns of political mobilization and organization of anti-deportation campaigns are evident also in other countries (Rosenberger, Stern, and Merhaut 2018; Ataç, Rygiel, and Stierl 2016). The schoolmates and other concerned citizens require the authorities to justify their decision not to grant residence permits. In the eyes of the community, Hakop and Hasmik belong to ‘us,’ and, as such, are to be regarded as members on equal terms with their

schoolmates, although they are not yet citizens of the nation-state. They are considered members of a community where the boundaries are drawn differently than those for the demos of the nation-state. The claimants to rights demand what Benhabib would call a *moral respect to justification*. Through political pressure and mediations in the public sphere, the claims force the state to publicly justify its actions and allow for *reciprocal dialogues*, encouraging the exchange of reasons between non-citizen children, concerned citizens, and the state.

However, when it comes to children as political actors and claimants of rights, the question of justification and reason-giving is not so obvious. That is, children in contemporary political theory and in actual democracies to large extent are theoretically, formally, and in practice regarded as ‘citizens to be’ or ‘unfinished adults’ without the developed capabilities of reason and autonomy (James and Prout 1997; Josefsson 2016b, 34ff; Wall 2012). According to Benhabib, universal moral respect requires the ability to take the standpoint of the other. Making use of Kant’s idea of reflective judgement and Arendt’s concept of enlarged thought, she claims that universal moral respect ‘requires for its successful exercise the ability to take the standpoint of the other’ and that ‘the more we are able to think from the perspective of others, all the more we can make vivid to ourselves the narrative histories of others involved’ (Benhabib 1992, 137). Equality, reversibility of perspectives, and taking the standpoint of the other are central to how she describes the social function of reciprocal dialogues and the ideal to reach a common agreement (Benhabib 2004, 32; Lindahl 2009, 426 ff). But in what way does this apply to children? Can or should we think along the same lines for this group as for adults when it comes to questions of reciprocal dialogues, equality, reversibility of perspectives, and taking the standpoint of others? Are children capable and competent enough to take the standpoints of others in a reasonable sense and are adults capable of taking the perspectives of children? When it comes to the reciprocal relationship between non-citizen children and the state, Benhabib’s egalitarian and symmetric approach to reciprocity appears to be somewhat problematic because of the group’s formal and practical exclusion from some of the central political instruments of modern democracies (e.g. party politics, voting rights and holding public positions) and recurrent marginalization in the public sphere as well as because of non-citizen children’s particular moral and political subjectivity. Instead, in line with political theorists such as Iris Marion Young and Hans Lindahl, I suggest that the group’s relationship with the state and key actors of modern democracies is better characterized as asymmetrical (Young 1997; Lindahl 2009).

At a structural level, the asymmetrical relationship between the non-citizen child and the state is constituted by the fact that they, *qua aliens* and *qua children*, are making claims from the outside or at the margins of the normative order (which can be either moral, legal, or political) under the government to which they are subject. As Lindahl points out, structural asymmetry is always set by a *prior closure* about who counts as members of society and who does not (Lindahl 2013, 236). Commenting on the traditional liberal account of reciprocity, Lindahl contends that ‘In effect, the initial boundaries that determine what counts, in Rawls’s terms, as “fair terms of cooperation” and “reasonable conceptions of justice” are not and cannot themselves be the outcome of deliberation guided by the principle of reciprocity. [...] On the contrary, non-deliberative closure must already have taken place to get deliberation going’ (Ibid). In

the case of non-citizen children, this is demonstrated by the fact that as aliens they are migrating into a normative order under which they are subject but where the terms for the normative order were set by a prior closure by the citizens of the recipient state and where they face a line of different formal and practical obstacles before they can participate in a reciprocal relationship with the state and surrounding society on same terms as citizens. Moreover, as children, this group is born or situated into a normative order where they are subject to terms that were set by prior closure of previous generations and will take some time before they become adults, meeting the requirements of full citizenship. Thus, even if the claims of non-citizen children evoke reciprocal dialogues, the conditions and premises under which they enter into dialogue with the state are on a structural level set by the boundaries of the political community and the asymmetrical relations between them and the state.

At the level of legal and political decision-making and public deliberations about the rights of non-citizen children, the question of reversibility of standpoints causes another dimension to arise related to the asymmetrical character of reciprocity. One of the common disputes in the asylum process concerns how and by whom the meaning given to the best interest of the child is to be determined and what weight it ought to be given in relation to other interests (Andersson 2012; Giner 2007; Josefsson 2017a, 2017b; Lundberg 2011; Eastmond and Ascher 2011; Schiratzki 2000). Research on children in the asylum process demonstrate for example that even though the United Nations Convention on the Rights of the Child is taken into account in decision-making, in practice children's interests are used by the state, not only to protect non-citizen children, but also to undercut their rights and enforce immigration control (Josefsson 2017a; Lind 2019). In these cases, the meanings and weight given to the best interest of non-citizen children are controlled by state authorities but strongly rejected by non-citizen children and fellow citizens (Josefsson 2017b). And just as philosophers, political scientists, and childhood scholars before have observed some of the practical and analytical challenges to represent the best interest of the child in relation to other actors and interests, the asylum process highlights the inescapable power dimensions in regard to who is in the authoritative position to interpret the best interest of the child and under what forms to make a legitimate claim to represent the child's interest (Archard 2015; Archard and Skivenes 2009; Archard and Mcleod 2002; Brighouse and Swift 2014; Holzscheiter 2016; Holzscheiter, Josefsson, and Sandin 2019; Josefsson 2016a).

The meaning and weight given to the best interest of the child and the rights of the non-citizen child is accordingly not something that is easily derived and implemented from some doctrine but becomes a struggle for the power to define, represent, and enforce claims within the legal system and the public sphere as well as between them (Josefsson 2016a, 2017a, 2017b). Although reciprocal dialogues are sparked by making public claims, in many cases they are not, as Benhabib suggests, characterized by reversibility of standpoint and agreement, but are also frequently characterized by the refusal of reasons provided by different parties and by disagreements. To take the standpoint of the child or represent the child in the reason-giving process or to 'make vivid to ourselves the narrative histories of others involved' (Benhabib 1992, 137) whether in court or in public debate, is consequently, as previously noted by childhood, feminist, and radical democratic scholars, not one act of 'the simple

transmission of a pre-constituted interest' (Laclau 1996, 98; Disch 2015; Holzscheiter 2016). Rather, it is the outcome of a deliberative process where the rights of non-citizen children are formulated in discursive dialogues between different actors such as professionals, governmental officials, NGOs, guardians, foster parents and the children themselves. Actors that all are embedded in critical power relations that speak to some of the theoretical and practical concerns with statist philosophical arguments in support of the protection of non-citizen children from expulsion based on 'effective paternalism,' and as will be argued below, point to the need of making room for institutional reflexivity in order to put to the test those institutions and actors claiming to represent children's interests (Ferracioli 2018).

Reciprocity as a normative foundation for the rights of non-citizen children

According to Benhabib, at a fundamental level, all humans possess a right to justification, and all those whose interests are affected by policies and norms should have a say in practical discourses as equals (Benhabib 2004, 113). Although the human rights of migrants and the (discretionary) right of states to exclude immigrants have remained largely ambiguous and hotly debated among political and legal scholars for years (Bader 2005; Benhabib 2004, 2011; Bosniak 2008; Carens 1987, 2013; Miller 1993, 2011, 2016; Wellman and Philip 2011, Schotl 2012, Lindahl 2011, 2013.),² Benhabib keeps coming back to the moral right to justification, which also applies to non-citizens by virtue of their being human beings. To determine the discursive scope regarding who should be included in these dialogues, in line with some other familiar democratic theorists, she leans on the idea of 'affected interests' (Benhabib 2004, 13). Affected interests imply that all those affected should have a say about the policy to which they are subject, which consequently can also include non-citizens (Beckman 2008; Abizadeh 2008). That is, in relation to traditional 'liberal conceptions' of rights, she has a more expansive approach in terms of to whom the state owes its justification and who should be included in the discourse (Benhabib 2004, 13).

The form of cosmopolitanism Benhabib proposes, however, does not mean imposing a set of universal rights on all people, but rather the determination of a specific schedule of rights that should take place within the nation-state through acts of democratic iterations that also stretch beyond the boundaries of the nation-state to a global public sphere (Benhabib 2011, 129). Accordingly, those non-citizen children who are subjects or affected by a state policy, are, according to Benhabib, not entitled to a specific set of substantial universal rights, but rather a universal moral respect and a right to justification. Therefore, for a policy to be legitimate, it needs to be adjusted to non-citizen children. It should strive to include in the discursive dialogues those claims from citizens and non-citizens, adults as well as children, in order to generate the norm that 'you and I' must convince one another in dialogue, what Benhabib regards as 'general rules of action' (Benhabib 2013).

When it comes to the scope of the discursive dialogues, the discourse model presupposes a rationality of the person involved in the dialogue that does not seem

²The debate about the rights of non-citizens and the state's right to immigration control has been extensive within political theory over the last decades.

to be a problem when it comes to ‘competent adult’ non-citizens. But what about very young children, as illustrated in the case of two-year-old Haddile, or older children with more competence, as in the case of Hakob and Hasmik? Which children are capable of acting as rational agents or being able to ‘take the standpoint of the other?’ Consequently, who should be included in the justificatory process and are owed a justification? And if children (and other non-rational agents incapable of speech and action and taking the perspectives of others) are not to be included in discourse, how are their rights to be conceptualized?

To address these questions, it is first necessary to state that children can hardly be reduced into one homogenous category of human beings nor can childhood be characterized by certain pre-given characteristics, competences, or inherent trajectories, at least from an empirical and conceptual point of view (James and James 2004; James, Jenks, and Allanen 1998; Lee 2001; Wells 2014).³ Although such assumptions are well anchored in today’s research about children and childhood, and have been so for decades, still today there is a tendency among philosophers with interest in childhood and migration, to universalize conceptions of children and childhood and to base philosophical arguments on a ‘reductionist’ conception of children as particularly vulnerable, dependent, and lacking autonomy, agency, or competence (Ferracioli 2018; Lister 2018; Schweiger 2019; Yong 2016). But while particular vulnerability, dependency, and lack of autonomy and agency are certainly true characteristics for some groups of migrant children in some contexts, research on child migration (and children and childhood more generally) suggests a much more complex, nuanced, and heterogenous ontology and epistemology of children is at play as children can also be resilient, independent, autonomous, and agentic (Ensor and Goździak 2010; Laoire et al. 2011; Schweiger 2019, 53; Veale and Dona 2014). In a corresponding way, as adults and human beings more generally can be both vulnerable and resilient, dependent and independent, non-autonomous and autonomous, incompetent and competent, so can children, and in sometimes ambiguous ways, which have consequences for how we conceptualize their rights (Josefsson 2017b; Lee 2001).

When it comes to Hakob, Hasmik, and their classmates, they seem to be able to meet Benhabib’s criteria of being rational agents by having a ‘capacity to agree or disagree with me on the basis of reasons the validity of which you accept or reject’ or by taking the standpoint of the others, at least to the extent that most adults would meet such criteria. This is despite the fact that they are children in a legal sense.

What then about very young children, such as two-year-old Haddile, who apparently would have difficulty meeting a conventional criteria of rationality or competence to make well-reasoned judgments? Given Benhabib’s emphasis on rational agency for participating in dialogues, it seems as if she has difficulty offering a ground on which very young children with limited rationality or competence could be involved in reciprocal dialogues on full terms. Benhabib has very briefly commented on children’s participation in discursive dialogues in

³The conceptual and theoretical discussion about the plural ontologies and epistemologies of childhoods have been extensive in the field of Childhood studies for decades (See, e.g. James and James 2004; James, Jenks, and Allanen 1998; Lee 2001; Wall 2010). There can be good reasons to formulate normative values about what constitutes a good childhood or to use analytical categories of children and childhood for scientific purposes and to put forth a philosophical argument. But for a philosophical argument that is based on the premise of a specific conception of children or intrinsic/universal value of childhood, to be sound, it must be made clear from where such premise is derived, how it stands in relation to competing conceptions and values and what relevance such premise has to the issue being addressed.

a couple of footnotes by alluding to body gestures, behaviour, facial expressions, mimicry, and sounds as possible ways to include children in dialogues. Her argument appears, however, to be a cursory treatment of the questions and a position all too difficult to reconcile with her theoretical foundation in equality, reversibility, and acting as a rational agent (Benhabib 2013, 41). This points, I suggest, to a blind spot in her work with regard to this group of children. Against the backdrop that children constitute about one-third of the world population and Benhabib (like the vast majority of political theorists) only devotes a couple of footnotes to the issue, we have good reasons to explore this issue further. The cases of Haddille and others like her show the potential of proxies who advance claims and reasons for why a child ought to have a right to stay and thus why the regulating principles should be changed. Instead of Haddille herself being the prime participant in the exchange of reasons, her foster parents and, in other cases, biological parents, professionals, or legal guardians serve this role. Perhaps this is also the way in which the principle of reciprocity can play a normative role in this context by means of reciprocal dialogues through proxy. Still, questions about children's claims, interests, and representation will be faced with the challenges that come with the power relations; however, when the children's own ability to participate is lacking, those persons who are closely and socially involved in the life of the child would play a crucial role.⁴

If we accept the idea that non-citizen children such as Hakop and Hasmik should be participants in a reciprocal dialogue about the policies they are subject to, as aliens and as children, and, if we accept the concept that younger children, such as Haddille, should be participants in such dialogues through proxies, then the question is where and how such dialogues can and ought to take place. Considering the way in which most states are organized today, it is evident that there are few opportunities for non-citizen children to participate. For this group, opportunities for voting, being elected to public office, or engaging in political parties are strictly limited. Considering such an order, public deliberations could be a way to exchange reasons that also involve those who have limited or no access to conventional citizenship, a concept explored below.

The normative productivity of democratic iterations

When the case of Haddille began to attract the attention of the media in 2012, it was the beginning of a long process of decision-making by state authorities at different levels that lasted several years and involved media reporting, petitions, protests, and public claims demanding the state grant residence permit to Haddille. In the first decision after the public outrage, the Swedish Migration Agency decided to give Haddille a temporary two-year residence permit, and 3 years later, in 2015, she was granted a permanent residence permit on the grounds of exceptionally distressing circumstances (*Särskilt ömmande omständigheter*) (Aftonbladet July 6, 2015). Clearly, the public claims seem to have had an effect. In this case, no

⁴This position, that children with adequate capacities should be included in the reciprocal dialogues about the laws under which they are subject, and children that lack these competencies ought to be included through proxies is broadly in analogy with the argument of John Wall for an extended right of children to vote. Wall rejects a line of classical arguments found in the philosophical literature on the restriction of children to vote and argues that none but the very youngest of children can justly be denied suffrage on the basis of competence, knowledge, or independence and no young person possessing suffrage would cause more harm than good to themselves, adults, or societies; "If democracy is the experiment of including 'the people' in governance, then it is undemocratic to exclude the third of the people who happen to be under 18 years of age without significantly more compelling reasons for doing so" (Wall 2014, 118). See also Schrag (2002).

particular law was changed as a consequence of public outcry and deliberations, but rather other circumstances and new interpretations of the legal provisions available were taken into account by the decision-makers. However, several other similar cases that have drawn considerable public attention and criticism of the state have not resulted in the granting of residence permits. Instead, official statements by representatives of the migration authorities have clarified that certain kinds of claims have no validity when considering the granting of residence permits under Swedish law (Josefsson 2017b). In other cases, political mobilization for a long period has resulted in legislative changes.

The public protests, like those concerning Haddile, caused what in Benhabib's terms could be referred to as *democratic iterations* that have led to 'complex processes of public argument, deliberation, and exchange' of reasons in legal and political institutions as well as in the public sphere. What the cases of Haddile and Hakob and Hasmik further demonstrate is that the contesting and contextualization and the invoking and revoking of claims to universal rights are not confined to citizens of the sovereign state, but take place beyond the boundaries of formal citizenship to those children that are found outside the demos of the nation-state, but who are nonetheless subject to the law. I discuss how Benhabib's concept of democratic iterations can fill three important functions with regard to the challenges non-citizen children encounter when claiming their rights in contemporary democracies.

First, the analysis and cultivation of democratic iterations can fill an important function by enabling *reflexivity* as a way to increase the democratic legitimacy and to respond to the 'gap' between state policy and legal norms concerning the rights of non-citizen children and the public contestation of these rights as asserted by citizens. Lisa Disch, placing reflexivity at the centre of democratic theory, suggests that reflexivity is the crucial measure of democratic legitimacy. Disch argues that democratic legitimacy is not primarily about democracies being in congruence with a constituency, but rather democratic legitimacy is about having the means to test representation. It is only through representation that a 'people comes to be as a political agent, one capable of putting forward a demand.' (Benhabib 2011, 104). Moreover, Disch suggests that the most important task of democracies is to enable reflexivity and shift focus to the process that puts into play claims about preferences and representation (Disch 2011, 102 ff.). Reflexivity, according to Disch, refers to a system capacity of democratic societies and is 'the measure according to which a representation process can be judged as more or less democratic insofar as it does more or less to mobilize both express and implicit objections from the represented.' (Ibid, 111). Through the creation of a system of interlocking sites of opinion formation and decision-making, representation can be put to the test and increase the likelihood that policies are well reasoned. Consequently, emphasizing the cultivation of democratic iterations and public contestation of democratic decision-making concerning the rights of non-citizen children, the conditions can improve for making people, to paraphrase Benhabib, not only the subject, but the author of its laws, increasing democratic legitimacy. The focus on democratic iterations thus allows us to morally conceptualize and identify rights for non-citizen children at a normative philosophical level of analysis in order to argue for them to be recognized as legal or political entitlements (Benhabib 2013, 40). For example regarding specific schedules of rights for this group or how a legal provision such as the best interest of the child can or ought to be determined and given weight in decision-making.

Second, democratic iterations have the potential to respond to the disaggregation of citizenship that comes with global migration. The rights claims of non-citizen children and children's struggles to gain recognition clearly elucidate the fact that there is no perfect

overlap (and probably never has been) between the circle of those who stand under the authority of the law and those who are ‘full members’ of the demos (Benhabib 2004, 20). In this regard, democratic iterations can be a means through which laws can be critically scrutinized and their justifications reviewed, not only by those who formally constitute the citizenry and have full political rights but also by those who are affected by the laws as people living at the margins of the demos and lacking political rights. As pointed out in the beginning of this article, the rights of non-citizen children *qua aliens* are one of the pertinent challenges that an approach engaging non-citizen children’s rights must consider. The democratic iterations can thus be a strategy to respond to the disaggregation of citizenship by offering an expanded form of membership.

Third, democratic iterations can play a critical role in the rights claims of non-citizen children *qua children* by including children in the democratic process. The potential to increase the democratic legitimacy through democratic iterations and public reflexivity will accordingly not be directed only towards citizens and adult non-citizens, but also towards children. The case of Hakob and Hasmik demonstrates how children and adolescents can play an important role by creating dialogues and forcing state authorities to justify their decisions through participation in democratic iterations. Similarly, the case of Hadille illustrates the role that other actors can play as proxies to advance the claims of children. From a political theoretical perspective, the question of children and democratic representation has been largely marginalized by contemporary theorists, and the debate still suffers from a critical scrutiny of the fact that children have been lumped together as a homogenous group: all those under 18 and per definition have been excluded from ‘full’ participation because of a particular age (Dahl 1998, 79; Fraser and Honneth 2003, 45; Schrag 2002). While waiting for reforms in children’s participation in the traditional democratic institutions (e.g. voting rights, holding public office, and access to party politics), the cultivation and inclusion of children’s voices in discursive dialogues by means of direct participation or the use of proxies seem to be possible ways of responding to the challenge of the rights of non-citizen children and democratic legitimacy.

Concluding remarks

I started this article from the observation that in the wake of denials of residence permits to non-citizen children by states of the global north, local communities, anti-deportation campaigns, and children themselves have been engaged in political mobilization and public contestations of state authorities. The controversies reveal, I suggest, three pertinent challenges: a gap between morality and law; a disaggregation of citizenship; and a difficulty of contemporary democracies to deal with the status of the child as entitled with a set of universal rights. While the most common response by scholars engaged with the rights of non-citizen children have been to use international treaties such as the UNCRC or the ECHR as analytical framework, I propose that discourse ethics and the concepts of reciprocity and democratic iterations can provide a productive analytical framework and respond to some of the challenges that the controversies reveal and to enhance democratic legitimacy.

When a legalistic approach to the rights of non-citizen children looks for normative guidance in what has previously been politically and legally agreed upon through international treaties or as institutionalized in positive law, the discourse ethical

approach suggested in this article finds its normative sources instead in social interaction, discursive dialogues, and democratic reflexivity where norms are identified and where rights claims evoke new possibilities to potentially be included in the law. This is not the same as to say that all individual interests and claims by non-citizen children that make their way to the public sphere ought to be recognized by law and offer ground for residence permits. Rather, this emphasizes that democratic iterations can put democratic procedures and representation of non-citizen children to the test and pave the way for more well-reasoned arguments, including those claims that have gained recognition through discursive dialogues but have been excluded from law. A discourse ethical approach as presented here would demand of the state to owe its justifications not only to its adult citizens but also to non-citizen children *quo alien* and *quo children* as well as to find new ways of including this group in discourse.

What I suggest therefore also differs from some contemporary philosophical approaches that recently have addressed some of the pressing ethical issues of child migration. It differs by not restricting the normative analysis of these issues with departure in any specific substantial value, interest or conception of children and childhood, such as migrant children's vulnerability and age (Schweiger 2019), their dependency of intimate relationships (Yong 2016), or their time spent in the country (Carens 2010). This does not mean that a discourse ethical approach cannot use such starting points to formulate central arguments about the rights of non-citizen children; rather it means that the normative sources and substantial arguments are derived not from a single principle or doctrine but from social interactions, discursive dialogues and reason-giving processes among human beings that open up for multiple ways of conceptualizing non-citizen children's rights. This imply accordingly an attentiveness to the constantly changing contexts of migration and where public justification, contestation and struggle is put at the centre.

A discourse ethics that builds on reciprocity and democratic iterations can have several practical consequences for how democratic states approach the rights of non-citizen children. One way to go would be to seriously examine what cultural, structural and institutional changes can be made to facilitate reciprocal relationships between non-citizen children and state authorities through the transformation of already established institutions and through the building of new ones. One example would be to initiate a reform towards a more inclusive electoral system by lowering voting and eligibility ages and allowing for non-citizens to vote in and be eligible for local, regional, and national elections as much as possible. This would potentially pave the way for improving the reciprocal exchange between the group of non-citizen children and state authorities and put democratic representation to the test. Such a reform of the electoral system could also, as has been suggested by others, include a careful consideration of in what way and according what procedures those non-citizen children without the competence or ability to vote can be given their own right to vote but exercised by a guardian proxy until they can exercise the vote themselves (Wall 2014). Another example would be to find ways to open up and make key public and political institutions such as political parties, civil society organizations, interests groups, and opinion and editorial pages more accessible, responsive and accountable to the group of non-citizen children. This accessibility could be done by changing terms of entry criterias, finding new procedures for political representation and through dedicated work to change societal norms.

In connection to this and of at least equal importance would be to cultivate democratic iterations and public contestations, for example, through what Disch refers to as the building of a system of interlocking sites of opinion formation and decision-making where non-citizen children are also represented. This type of change could potentially be a rich source from which legislators and government officials might increase the legitimacy of policy making and where institutional reflexivity can be fostered. In such an endeavour for a political theory to be relevant, a central task will certainly be to offer critique and open up new avenues for subjectivities and inclusivity in contemporary political theoretical debates. It will be critical to offer both new horizons and more concrete alternatives for the reconstruction and transformation of democratic institutions that make these institutions more responsive, accountable, and legitimate to non-citizen children.

Disclosure statement

No potential conflict of interest was reported by the author.

ORCID

Jonathan Josefsson  <http://orcid.org/0000-0003-3446-9723>

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