

The Boundaries of the Demos:

Should immigrants be included in the *demos* and, if yes, under which terms?

MSc Thesis Political Science: Political Legitimacy and Justice

Chiara Domestici

Student no.: s2036975

Supervisor: Dr. van Apeldoorn

Second reader: Dr. Vrousalis

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1. Introduction

What makes a German national¹ a citizen of Germany? Is it that she shares the German national culture or that she is part of the German political community? Is it her German blood? As the links between membership and territory are becoming less transparent, these questions have a renewed relevance. The internationalization of the market economy and looser restriction on immigration ease and encourage the mobility of people across boundaries. In turn, these social changes have affected perceptions on political membership and on the boundaries of the political community or *demos*, as well as they have produced new dynamics of belonging that transcend the traditional idea of the nation-state. Still, states retain the task of allocating political membership under the premise that they are *sovereign*, that is, they wield the ultimate right to decide who can be a citizen within their jurisdiction – *who belongs* (Carens 2013, p. 22). In the context of immigration, however, democratic states' wide reliance on *ius sanguinis laws* (right by blood), *ius soli laws* (right by soil), or a mixture of both to distribute political membership often produces results that seem at odds with the very idea of democracy – rule by the people and for the people.

The expansion of *ius soli laws* in some cases to include the children of immigrant residents, and the relaxation of naturalization rules in others, recognize that there is something troubling about the political exclusion of long-term immigrant residents in a state. On the other hand, these efforts have been far outweighed by those taken to include descendants of emigrants or a state's expats *iure sanguinis*, regardless of their links to the political community (Dumbrava 2015, p. 1). That means that someone might have political rights somewhere without ever having set foot there, or without even speaking the state's language. What this shows is a continued reluctance to abandon the principle of ethnic membership altogether, as *all states* have, besides their other citizenship laws, some form of *ius sanguinis* (Joppke 2003, p. 443). Not surprisingly, some have argued that even today, citizenship practices conflate *ethnos*, i.e. ethnic nation, and *demos* (Habermas 1998, p. 33; Benhabib 2004, p. 61).

In the philosophical debate that has ensued from what Baubock (2009) calls “the mismatch between territorial and membership boundaries” most theorists agree that the *demos* neither is nor should be ethnically constituted. However, they disagree on how or if it should be

¹ Here I use national as citizen

bounded. *Liberal nationalists* argue that the *demos* is bounded by a pre-political nation, that is, a community of shared language, culture or ancestry (e.g. Tamir 1993; Kymlicka 1996; Miller 2000). This argument has taken different forms, but all share a deep distrust of transnational forms of citizenship. *Post-nationalists* such as Habermas (1998) have challenged this view, arguing that the relationship between nation and *demos* is contingent rather than necessary. Other *cosmopolitans* have come with principles other than nationality to guide political inclusion (e.g. Abizadeh 2008; Baubock 2009; Carens 2013). Abizadeh (2008, 2012), for example, criticizes that *liberal nationalists* and *democratic theorists* derive legitimacy from a pre-political nation in the case of the former, and a pre-political will in the case of the latter. Instead, Abizadeh argues, there are “no pre-political grounds for constituting the legitimate boundaries of the *demos*” (2012, p. 868) – thus, the *demos* must in principle be *unbounded*. Others such as Carens (1983, 2013) defend the primacy of human rights and thus criticize the *citizen/alien* distinction altogether. There should be political communities, but these should be open to whomever wants to join them (Carens 1983).

In this thesis, I will explore these different sides of the debate to answer the question of what the justification for immigrants’ political inclusion in the *demos* are, and their implications on (a) *boundaries* (b) and *sovereignty*. By political inclusion I mean inclusion into the body of citizens who enjoy *political rights* – the rights that ensure their *equal* political participation in public discussion and decision-making of a polity (e.g. voting). The reason why such political inclusion is important is because, as Habermas (1998) argues, *political* and *private* rights, the latter being basic individual freedoms, presuppose each other. The ability to have a say in the decisions of the polity where one lives is a way of protecting and participating in the context where she exercises her private rights and chooses how to live. Political rights in one’s country of national origin cannot substitute political rights in one’s home country. A person is an ongoing subject to the laws of her home country, and thus this is where she should be able to exercise her *political autonomy* – her right to *self-rule*. Moreover, there is the issue of legitimacy: a state’s decisions that have not been deliberated by all subjected to them cannot be deemed legitimate (Habermas 1998; Abizadeh 2008).

Following these two concerns – about political inclusion and the boundaries of such inclusion – this thesis is divided as follows. First, I attend to the theories of two very different liberal nationalists – Will Kymlicka (1996, 2001) and David Miller (2000) – and discuss some of their shortcomings by contrasting their views with Habermas’ (1998). Secondly, I explore

Abizadeh's principle of *democratic legitimacy* and the *unbounded demos thesis*. Abizadeh defends that not only immigrants but also foreigners should be included in the decision-making process because both are coerced by political power (the *all-subjected principle*). I consider whether such a principle is over-inclusive by taking *political power*, instead of the more concrete *laws* of a polity, as the force that makes individuals "subjects". In chapter three, I explore two last principles of democratic inclusion, which see the *demos* not just as a regime of rule but also as a community of *belonging*: the *stakeholder principle* (Baubock 2009) and the *social membership principle* (Carens 2013). I ask how these principles and the way they bound the *demos* affect political participation.

2. A reply to liberal nationalists

In response to criticisms of the traditional nation-state model by cosmopolitans, liberal nationalists have defended national identities for mainly three reasons: (1) the *nation* or a *national consciousness* creates favorable conditions for liberal democracy such as trust and solidarity (Tamir 1993, Miller 2000); (2) collective self-determination takes place within nations; and (3) the nation is the relevant context where individual freedom takes place (Kymlicka 1996). In this chapter, I will show the shortcomings of each of these arguments by contrasting them with Habermas' discussion in *The Inclusion of the Other* (1998). In this work, among other topics, Habermas argues that the relationship between democratic politics and national identity may be contingent rather than necessary (p. 132). In the context of diversity and migration, it may be morally and practically fitting to sever this link (*Ibid.*).

David Miller (2000) or Yael Tamir (1995) have argued that attempts to disarticulate *nationality* from *political membership* fail to grasp the conditions under which liberal democracies have been able to flourish. Their arguments run as follows. First, the rise of a shared identity or culture, even if the product of nation-building projects by the state, was able to bring about favorable conditions for liberal democracy such as trust and solidarity (Tamir 1995, p. 72; Miller 2000, p. 88). Second, historically, democratic states developed hand in hand with revolutionary understandings of *nations* as distinct peoples with the right to *self-determination*, that is, to choose their own destiny (see Tamir 1995, pp. 65-67; Miller 2000, p. 27). This defense of the nation-state is best expressed in Miller's claim that a "national community must be (in aspiration if not yet in fact) a political community" (Miller 2000, p. 30). This way, nation-states must draw the boundaries of membership, and nationality functions both as "a source of identity and as a source of obligation" (*Ibid.*, p. 28).

Nationality as the Source of Social Integration

Post-nationalists such as Habermas do not refute that national identity has had a historically instrumental role. With the rise of secularization, it replaced divine right as the source of legitimacy for the state (Habermas 1998, ch.4 section II p. 15). Also, nationality was able to create new forms of social integration in the context of pluralism (*Ibid.*, p. 16). Moreover, the shift towards popular sovereignty and the rise of civil and human rights, Habermas argues, had to be supplemented with a powerful common narrative capable of transforming "subjects" into citizens "that feel responsible for one another" (*Ibid.*, p. 19). However, this

development is built around a paradox or, as Habermas describes it, is “Janus-faced” (1998, ch.4 section III, p. 23), because the exclusivity of national identities is at odds with the universalism of an “egalitarian legal community” such as the democratic state (*Ibid.*).

The self-assertion of the nation has also produced exclusionary policies based on race and ethnicity. Such examples include “massive denaturalizations against unwanted minorities” (Benhabib 2004, p. 54), or “ethnically selective immigration policies and ethnically closed citizenship laws” in the late 19th and early 20th century (Scott 1998, pp. 87-100, cited in Joppke 2003, 437). These examples show that despite its historical functions, a naturalistic, pre-political, conception of national identity has often produced unjust and undemocratic policies. Thus, we cannot limit the discussion to the descriptive question of whether nationality enables trust and solidarity among nationals or not (especially when such trust is based on ethnic/cultural ties rather than coexistence). Our concern here is normative: in which ways does the “Janus-faced” nation preclude democratic ends today?

Nations Have the Right to Self-Determination

Democratic states today do not engage in race or ethnic-based exclusionary policies, or not explicitly. Even if *ius sanguinis* distributes citizenship according to ethnic ties, there are other ways of acquiring political membership. Moreover, this could not be denied to someone because of their ethnicity or race. However, democratic states still manage to maintain or prolong the political exclusion of immigrants within their territory through different mechanisms (e.g. naturalization tests – including civic, cultural and (or) language tests). Clearly, tests that ask questions that nationals themselves cannot answer are unfair. However, the bigger question is whether states have the ultimate right to impose these tests in the first place, or democratic principles limit what can be asked of immigrants (Carens 2013, p. 45).

This brings me to liberal nationalists’ second claim about *self-determination*. In *On Nationality* (2000), Miller defends states’ right to determine the terms of immigrants’ integration on the basis of a nation’s right to *self-determination*. This entails the nation’s capability to dictate matters of political admission and exclusion in order to protect its specificity. Such claim has also been advocated by republican theorists such as Walzer (1983). Miller argues that “states [...] naturally restrict its [citizenship’s] possession to those who identify themselves with the nation and are carriers of the *right cultural identity* [italics added]” (Miller 2000, pp. 88-89). Now, because Miller clearly defends the cultural – not

ethnic – nation, he also contends that as long as immigrants adopt “the essential elements of the national character”, immigration need not pose major problems (Miller 2000, p. 30). Indeed, later in his writings, he focuses more on the political character of these elements than on their cultural content (Miller 2016, p. 138) – possibly because the distinction between politics and culture is not clear in his theory, as he sees the latter as pillar of the former.

However, it is precisely the total merging of politics and national culture in liberal nationalists’ narrative that conflates the meaning of *democratic self-determination* with that of the *self-determination of the cultural nation*. On the one hand, Miller (2000) defends that nationality is, in Renan’s (1998) phrase, a “daily plebiscite” – subject to revision by members of the community, and thus not incompatible with the changes produced by immigration. On the other, he places a strong caveat to the acquisition of political rights that runs afoul of an *open and inclusive* nationality: carrying the “right cultural identity” (2000, pp. 88-89). For one, we can ask whether it is possible to arrive at an agreed upon understanding of cultural identity. Indeed, many have argued that because the boundaries of the cultural nation are obscure, this often descends into the “ethnic nation” (e.g. Benhabib 2000; Joppke 2003; Abizadeh 2012, p. 867) – and the use of *ius sanguinis* proves the point. Still, we may insist that there is such a thing as a cultural identity or, as Miller (2000) argues, that this depends on members’ belief that there is. However, liberal nationalists argue that it is based on “effortless secure belonging”, not on achievement (Margalitz and Raz 1990: 447-9 in Kymlicka 1996, p. 89) – which problematizes the logic of naturalization tests altogether.

The problem for liberal nationalists, then, is reconciling their *liberalism*, expressed in the apparent capability of the nation to subject itself to revision, and their *nationalism*, which is built around the idea of historical continuity and the particularism of the *nation*. Precisely because the nation is understood as being a “pervasive” or “all-encompassing” culture, it is difficult to see how it can easily be revised from the outside by liberal principles. Such revision requires the difficult task that members of the culture adopt a reflexive and critical position about what otherwise is their “primary focus of self-identification” (Kymlicka 1996, p. 89). For these reasons, Miller’s account of *popular sovereignty* arguably takes the form of – even if unintendedly – what Habermas calls *national self-determination*. The latter is the “right of national independence for the sake of the collective self-realization of a cultural form of life” (Habermas 1998, ch.5 p. 46). According to Habermas, *national self-determination* must be distinguished from *democratic self-determination*:

[...] It [democratic self-determination] has the inclusive meaning of self-legislation which involves all citizens equally. It is inclusive in that such a political order keeps itself open to the equal protection of those who suffer discrimination and to the integration of the marginalized, but without imprisoning them in the uniformity of a homogenized ethnic community (Habermas 1998, p. 23)

The difference lies in understanding self-determination as the right of the nation to maintain its cultural integrity, or self-determination as the right of citizens to govern themselves. According to Habermas, the latter has two implications for immigrants' integration. First, because it is rooted in the principle of *self-legislation*, when seeking political rights, immigrants under a state's jurisdiction can only be reasonably expected to subscribe to the polity's constitutional principles. This is reasonable because all other citizens must also accept them, even if implicitly, by virtue of their legal subjection (Habermas 1998, ch.8 section V pp 57-65). Second, because of the inclusive character of *democratic self-determination*, the state can only promote a political culture whose elements are abstract enough for members of very different cultural backgrounds to support them (this must exclude fundamentalist or extremist groups, but this is an issue that I will not engage with here) (*Ibid.*). This way, a *political culture* is expressed through a state's "constitutional principles", which become a "concrete universal" in the sense that they contextualize universal moral principles in particular polities who can interpret them (Habermas 1998, ch.4 p. 30)². "Constitutional patriotism", as Habermas calls it, can serve the integrative function which national identity can no longer fulfill (*Ibid.*).

National Cultures as the Source of Autonomy

Habermas' picture is compelling, but it must answer to another worry by liberal nationalists – namely, that national culture is an enabling condition for democracy because it is the source of individual autonomy. From this perspective, the view that we can abstract politics from its cultural background is unrealistic and unhelpful. Will Kymlicka has put forward this argument in *Multicultural Citizenship* (1995). Here, he presents a more nuanced picture of

² Habermas distinguishes between *ethics* and *morality* – a distinction which must be understood in the context of his more general *discourse theory*. Morality can be understood as the universal principles that all would accept in a "reasonable discourse" – according to the discourse principle (D) – whereas ethics are the particular ways in which a people(s) interpret those general principles at different points in time (Habermas 1998, p. 8)

national identities than Miller's, as Kymlicka acknowledges the historical achievements of nation-building projects, but also criticizes the way in which they have disempowered national minorities. Thus, he reformulates the meaning of *nation* as the context in which individuals exercise their autonomy – defined as their capacity to choose and revise their ends. Nations enable autonomy by providing individuals a wide range of meaningful choices on how to lead their lives. More specifically, Kymlicka defines nations as *societal cultures* (Kymlicka 1996, p. 80) which “possess a set of institutions, operate in a common language, and cover both private and public life” (1996, p. 211). This way, in his account, as in Miller's, collective self-determination takes place in the context of national cultures (2003, p. 291) – ideally, within national minorities, but Kymlicka admits that it is unrealistic “to grant all national minorities their own state” (2001, p. 234).

Parting from this concern about national minorities, Kymlicka defends that group-differentiated rights should be established to protect their culture and their ability to have a say in the policies that affect them. In relation to immigrants, he recognizes that they are also in many ways disadvantaged in the political process but does not grant them the status of national minorities with the right to self-determination. This is because, so the argument goes, immigrants often voluntarily migrate, are willing to integrate into the majority nation and are too territorially dispersed (Kymlicka 2002, pp. 352-355). Thus, he distinguishes between three types of rights: (1) *self-government rights* for national minorities (e.g. in the form of a federal state); (2) *polyethnic rights* to protect “certain practices associated with particular ethnic or religious groups”, that must nonetheless remain within the constraints of a polity's constitution; and (3) *special representation rights* to guarantee the political participation of underrepresented groups (including immigrants) (1996, p. 7). Thus, in addition to protecting individuals' autonomy, group-differentiated rights should promote “relations of equality (non-dominance) between groups” (Kymlicka 2002, pp. 341-342).

Kymlicka is more sensitive to the case of immigrants than Miller is. Kymlicka's main goal seems about preventing that one cultural group (often the majority nation) controls others, so that all can retain some degree of independence. Indeed, he defends that immigrants “can demand fairer terms of integration” (Kymlicka 2002, p. 354) and the state must in turn provide them. This way, the “common institutions” into which immigrants integrate must “provide the same degree of respect, recognition, and accommodation of the identities and practices of immigrants as they traditionally have of the identities and practices of the

majority group” (Kymlicka 2002, p. 355). At first glance, this thin version of national identity and national integration – capable of accommodating different cultural and ethnic groups (2002, p. 362) – seems not all that different from Habermas’ description of *political culture*. Still, for Kymlicka, accommodating different cultures is not enough – *political culture* may serve to hold groups together within a state but is not adequate to address the claims of national cultures themselves. Instead, they must be able to “engage in their own nation-building projects” so that they can remain a “distinct societal culture” (Kymlicka 2002, p. 362).

The question is whether there is a tension between, on the one hand, protecting the distinctiveness of national cultures and, on the other, ensuring fair terms of integration for immigrants, and I argue that there is. In his later work *Politics in the Vernacular* (2001), Kymlicka discusses that national minorities who want to protect their national identity may see immigration as a threat, because immigrants tend to integrate into the majority nation and do not understand the struggles of the minority (2001, p. 276). Therefore, national cultures should have the right to control the density of immigration and its terms. However, he also contends that immigration and national minorities clash less today as “both majority and minority nations are moving towards a conception of national identity which is post-ethnic and multicultural” (Kymlicka 2001, p. 283). This last claim resonates again with Habermas’ discussion of a *political culture* and begets the question of whether in this multicultural context it is necessary to protect national cultures (Kymlicka believes that yes, because their claims remain unresolved). However, the main issue that I see with this argument is, how can we ensure that immigrants and national minorities (or all individuals) hold an equal standing when the protection of national minorities or cultures seems of first-order importance? Does the protection of national cultures risk the equality of all individuals?

In order to answer this question, I will use Habermas’ discussion of *autonomy* – which I will continue to use throughout this paper. Habermas defends two forms of autonomy: the *private autonomy* of individuals based on basic rights and the *public autonomy* of citizens based on political rights (which enable citizens to be the authors of the laws that govern them). Private and public autonomy “mutually presuppose each other” in that in order to be able to lead a life of one’s choice, one must also be able to protect the context in which that choice(s) takes place through her public autonomy. Simultaneously, a person must be autonomous and independent to use their public autonomy (Habermas 1998, ch.8 section IV, p. 12). Thus,

contrary to *liberal cosmopolitans* such as Carens (2013), Habermas does not see human rights as an external constraint to but as an enabling condition of *popular sovereignty*. This version of sovereignty denies that polities wield inherent legitimacy. Instead, only when they serve as a medium to express the citizens' wills can they be deemed legitimate. The role of the democratic state, or of its law, is thus to protect these two forms of *autonomy* rather than guaranteeing the survival of specific cultural forms:

“Cultural heritages and the forms of life articulated in them normally reproduce themselves by convincing those whose personality structures they shape, that is, by motivating them to appropriate productively and continue the traditions. The constitutional state can make this hermeneutic achievement of the cultural reproduction of the life world possible, but it cannot guarantee it. *For to guarantee survival would necessarily rob the members of the very freedom to say yes or no that is necessary if they are to appropriate and preserve their cultural heritage* [italics added]” (Habermas 1998, ch.8 section IV, p. 42).

Habermas thus defends that the constitutional state can protect the context where cultural reproduction takes place by safeguarding the *political* and *private autonomy* of its members. However, it cannot guarantee the integrity of specific cultural heritages because this would instead deprive individuals of the very autonomy that enables them to choose how cultural reproduction takes place (e.g. whether they should preserve certain traditions or want to abandon them instead). I think that this vision of the relationship between *private* and *public autonomy* is better able to protect the interests of all – including not just national minorities but also immigrants – for the reasons I expound below.

Certainly, for many individuals, national cultures are an important part of their identity, but I doubt that it is everyone's “primary focus of identification” or that “only through having access to a societal culture people have access to a range of meaningful options” (Kymlicka 1998, p. 83). And as I have already discussed, cultural boundaries are difficult to delineate, as all cultures are in some way “hybrid” (Abizadeh 2012, p. 871). That is, individuals belong to different cultural groups that sometimes overlap. Moreover, national culture may provide an individual with meaningful choices, as well as other groups do, but it may also inhibit it. For example, a gay person living in a place where homosexuality is not tolerated is not forsaking but exercising her autonomy by leaving it. Also, an immigrant who has spent a long time

outside her home country may feel neither fully attached to her national culture nor to her host country's culture, but that does not mean that she cannot be autonomous in other ways. Not only can she be autonomous, the political regime *should* protect her *private* autonomy, and also become the medium of expression of her *political autonomy*.

I want to end this discussion by pointing that Kymlicka is right in that it is difficult to place institutions and political processes in a state outside their cultural background. Moreover, it is important to reflect on the struggles of national minorities and other ethnic and cultural groups. The question at hand is whether protecting specific cultural forms promotes equality among groups (and among the individuals in them), or in some ways inhibits it. For example, while Kymlicka defends fair terms of integration for immigrants, he also contends that national minorities should dictate those terms to protect themselves. However, in practice, this goal may require imposing onerous conditions on immigrants' political inclusion.

Here again there is a genuine tension between *national self-determination*, or the right to national independence, and *democratic self-determination*, the right of individuals within a specific jurisdiction to be authors of the laws that govern them, irrespective of their cultural allegiances. In the end, protecting the good of political membership is, I think, of greater importance than protecting the good of cultural membership (which should depend on individuals' use of their *private autonomy*). More so if Abizadeh (2012) is right in that the latter might unintendedly descend into protecting ethnicity, simply because demarcating the boundaries of culture is a difficult if not impossible task. In sum, the *demos* cannot be bounded by a pre-political *nation*.

3. Abizadeh on *democratic legitimacy*

Embracing the principle of *democratic self-determination* that Habermas (1998) defends entails that individuals must be the authors of the laws that govern them. Thus, long-term immigrants in a state's jurisdiction should be included in the *demos* (this would exclude transients or tourists). However, there is one question left unanswered: does *political autonomy* presuppose the boundedness of the *demos*? Indeed, one question that has received much attention in recent decades in political theory is how to democratically arrive at the *demos*, what Whelan (1983) first referred to as the *democratic boundary problem* (see also, for example, Dahl 1987; Goodin 2007). The problem is that we cannot arrive at the *demos* through democratic methods, as we would first have to decide who should vote on this issue, which leads to the problem of infinite regression. Still, democratic theorists have sought for other principles to assess the *democratic legitimacy* of political community and their boundaries. If legitimacy does not derive from a pre-political nation we must find it elsewhere. In this chapter, I will explore Abizadeh's (2008, 2012) vision of *democratic legitimacy* (based on equality and participation), and contrast it with Habermas' *popular sovereignty*, introduced in the last chapter, to analyze their respective implications for (a) boundaries and (b) political participation.

In two recent works, Abizadeh (2008, 2012) challenges the *bounded demos thesis* because it runs afoul of democracy's constitutive principle of *self-rule*. The problem is what Abizadeh calls the "self-referential theory of political legitimacy" (2012, p. 867): both *cultural nationalism* and *democratic theory* derive legitimacy by appealing to a pre-political people (*Ibid.*). Cultural nationalism does so by accepting the legitimacy of a pre-political *nation*, and democratic theory by accepting the legitimacy of the *demos* without justifying its formation first, or by relying on the hypothetical *social contract*. However, the formation of civic boundaries is an exercise of political power that inevitably creates *members* and *non-members*. This begets an "externality problem" because the will of these *non-members* has not been accounted for in the creation of differentiated jurisdictions – despite the fact that they are politically coerced when the *member/non-member* distinction is created. Thus, a bounded *demos* cannot be democratically justified to exist prior to its political constitution. The *demos* must in principle be unbounded (2008, p. 47; 2012, pp. 876-877).

Abizadeh skillfully rejects the *bounded demos thesis* outside the liberal cosmopolitan debate on human rights (e.g. Carens 2013) and within democratic theory. Despite the *democratic boundary problem*, he contends that democratic theory has the tools to inquire into how to legitimize the exercise of *de facto* political power (Abizadeh 2012, pp. 879-880). This is how he develops the *all-subjected principle*, which can be summarized as follows:

P.1. All states involve some form of *coercion*, in the form of:

Coercive acts: “directly and preemptively deprive persons of some options that she would otherwise have had” (p. 40)

Coercive threats: threats of undertaking an action that will prevent a person from choosing one course of action that the otherwise might have chosen (40)

P.2. Coercion imposes restrictions on an individuals’ autonomy³

P.3. Autonomy should only be forgone, or partly forgone, in exchange for political participation (this is the way in which the state *justifies* political power).

Therefore, the state must justify its use of coercion *to all those over whom it is exercised*. And because coercion is exercised over members and non-members by virtue of constituting those borders and creating this distinction, it should be justified to both (Abizadeh 2008, p. 47).

Abizadeh thus rejects *unilateral state sovereignty* thesis which sees “admission and exclusion” as the “deepest meaning of self-determination” (2008, p. 44) and replaces it with *popular sovereignty*. (Note that this does not exclude the *existence* of borders, but only insofar as they have been previously justified to nonmembers by allowing them to participate in their creation). Two new principles of democratic legitimacy thus come into light:

Participation: All persons subjected to coercion must be able to “actually participate in the political processes that determine how power is exercised” (p. 41);

Freedom/equality: The terms of this participation must be consistent with their freedom and equality (Ibid.)

³ Abizadeh takes Joseph Raz’s definition of *autonomy*: that people are able “to control their own destiny”. For this, three conditions must be met: “the person (1) has the appropriate mental capacities to formulate personal projects and pursue them, (2) enjoys an adequate range of valuable options, and (3) is independent, that is, free from subjection to the will of another through coercion or manipulation” (Abizadeh 2008, p. 40).

This conceptualization of *democratic legitimacy* resonates with Habermas' principle of *popular sovereignty*⁴. Both are grounded on individuals' capability of forming their "will" through democratic procedures and institutions, instead of on the inherited legitimacy of an imagined pre-political will or nation (see Habermas 1998 ch.5 section I, p. 19; Abizadeh 2008, p. 42). Both seem to defend the same form of deliberative democracy. However, Abizadeh is still critical of Habermas because the latter yields to the *bounded demos thesis* by ultimately deriving legitimacy from political deliberation, democratic procedures, and the *laws* that articulates them – that is, without first asking whether the *collective* whose will is articulated through these procedures has been legitimately constituted (Abizadeh 2012, p. 868). Note, however, that even though Habermas defends the idea of a collective bounded by shared constitutional principles (even if the boundaries are the result of arbitrary outcomes) the very name of his work *The Inclusion of the Other* (1998) reflects the openness of such community. Indeed, in its preface, Habermas defends the idea of a "we" which has "permeable boundaries" and "resist all substantive determination" (Habermas 1998, p. 2).

For Habermas, then, the question of the legitimacy of boundaries remains open (Habermas ch.5 section II, p. 24). However, he also assumes that the exercise of democratic political power presupposes distinct *demos* in order to (a) "institutionally articulate a collective will"; and (b) "generate some form of solidarity" (recall Habermas' *constitutional patriotism*) (Abizadeh 2012, p. 878). Recall also that in Habermas' theory the state has no inherent legitimacy; it is just *a* structure (not the only) through which universal moralism can be realized in the form of a "concrete universal" (he also speaks of the possibilities of a *global demos*). For Abizadeh, however, without the "constitutive features of procedures and processes that instantiate democratic self-rule" – including the justification of the medium through which this is exercised, or of the boundaries that define its extent – there can be "no procedural democratic legitimization at all" (Abizadeh 2012, p. 878). That is, Abizadeh argues that we must not confound the conditions under which democratic legitimacy is feasible, with the constitutive features of democratic legitimacy itself. Such features must include the *self-rule* of all those not just under the *legal obligations* of the state but more generally *politically coerced* by it (*Ibid.*).

⁴ In "On the Demos and Its Kin: Nationalism, Democracy, and the Boundary Problem" (2012), Abizadeh rejects the term "popular sovereignty". He writes: "I agree with Yack (2001) that it [popular sovereignty] invariably connotes a prepolitical ground of legitimate authority" (see Abizadeh 2012 footnote 32, p. 880).

Clearly, both authors' theories justify the inclusion of immigrants in the *demos*, but Abizadeh's *all subjection principle* includes foreigners outside the state as well. The question is whether such extension of political participation is problematic for *democratic self-determination* by making the problem of boundaries indeterminate. In other words, there might be strong justifications for grounding subjection on something *concrete* such as a polity's *constitutional law* (in the Habermasian sense, see footnote 2) rather than on coercive political power. Political coercion is too complex and might lead to a "radically inclusive principle" (Song 2012), especially in the context of globalization. If our main concern is with ensuring equal political participation of all whom share the same legal obligations or are willing to share them (and mine is), there might be reasons to concede that boundaries are ultimately arbitrary but as long as they serve that purpose there is no compelling reason to contest them (Habermas 1998, ch.5 section II, p. 31). Yet this also implies that they must remain permeable (Habermas 1998, p. 2).

To explore this worry let us dwell into the implications on political participation in Abizadeh's theory. First, these implications are not completely clear, as he does not describe them extensively. However, in the conclusion of "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders" (2008), Abizadeh argues that different degrees of *coercion* might require different degrees of participation in the democratic process. For example, foreigners for whom entry to a state is of little value have the weakest rights of participation within that state, while foreigners for whom entry is of great value should have greater rights (Abizadeh 2008, pp. 54-55). Yet basing political participation on "degrees of coercion" begets three questions: (1) can such differentiated rights actually uphold the principle of *equality*? (2) does Abizadeh truly overcome the problem of infinite regress in legitimacy discourses? and (3) if we base political participation on the degree of coercion, who can legitimately interpret how coercion affects autonomy?

First, differentiated participatory rights of the kind that the *all-subjected* principle requires involves a shift from a horizontal understanding of *equality*, where all individuals in the *demos* (even if this is contingent) have equal rights, toward a vertical understanding of it contingent on the degree of coercion. Sarah Song (2012) is one among other theorists skeptical about such vision. Song argues that the *demos* should be bounded by the state because relying on "episodic, constantly changing demois" (pp. 56-57) cannot sustain constitutive principles of democracy such as stability or political equality. Not only this, but

such a system would simply be infeasible. Instead, a “system of public law establishes a common view of the rights of individuals, and it has the coercive means to enforce that view” (Song 2012, p. 58). While Song’s argument is compelling, it is not necessary to commit to the claim that the state is best able to produce *political equality* to remain skeptical about vertical forms of political participation. More so when this is not necessarily tied to legal obligations, but to the much more contestable principle of *political coercion* (what constitutes *coercion* is a whole other debate). The problem is that Abizadeh admittedly does not develop a theory of *political equality*, but this is necessary for the completeness of his argument.

Secondly, the distribution of differentiated rights requires a coercive institution in the first place, which is one reason why Abizadeh does not simply dismiss the state. Still, we might argue that the border between Spain and France is illegitimate and that *members* and *nonmembers* should participate in redrawing it. However, we still need an institution to establish how participatory rights in such task are to be distributed, and to enforce them. But how can it be established whether such institution is legitimate or not? Even if we derive differentiated *demos* from a *global demos* (Abizadeh 2008, p. 49, p. 54), surely there would be people who end up in a *demos* that was not of their first order preference, or not even of their preference. The problem is that Abizadeh is right in that we *must* part from the *de facto* exercise of political power to determine participation. Yet if we start by questioning whether the boundaries where such exercise takes place are legitimate, we must also ask whether the source of power that protects, interprets, and infringes upon autonomy is. But such requirement once again leads to the problem of infinite regress, unless we derive differentiated *demos* from a *global demos* which as I just argued is unfeasible. The problem of infinite regress might simply be unavoidable in *legitimacy* discourses.

Third, there is the issue of interpreting autonomy and the value of people’s choices. How can we be sure that the distribution of differentiated rights will be fair? Or that one option is more valuable to person A than to person B? This might be obvious in some cases, but not in all. The autonomy principle *by itself*, for example, supports cases where potential immigrants should have greater participatory rights than some residents within a state. Imagine, person A living in a poor country where her options are very limited, and person B living in another where her options are ampler, yet she is not politically represented. If we take the relationship between *coercive political power* and *private autonomy* as the biggest determinant for participation, then person A should have a right to greater participation so that she can

migrate to the country of person B. However, such resolution, I argue, would fail to account for the relationship between *authorship* and *subjection*. The point is that being subject to the same constitutional principles not only creates some sense of solidarity (Habermas 1998), it also establishes a clear relationship between legal obligations and “legal authorship” in the Habermasian sense, that bounds all *equally*. Given that Abizadeh does not specify the terms of political participation, the *all-subjection principle* does not equal to but must be supplemented with the principle of *self-government*. This is necessary to ensure that the two pillars of his principle of democratic legitimacy (participation and equality) are realized.

Abizadeh makes a strong case for why political power coerces beyond boundaries, in contrast to theorists such as Miller (2010)⁵. This is a powerful justification for the creation of more accountable transnational democratic institutions and for moving toward more porous borders. Yet this approach is different from expanding participation to *all* foreigners. Because of (a) feasibility concerns, (b) to preserve democratic equality, and (c) the difficulties of avoiding the problem of infinite regress in legitimacy discourses, it is reasonable to start the legitimization process at procedures themselves. Of course, this entails that how the *demos* is bounded must be open to change whenever the protection of *private* and *public autonomy* is jeopardized. Thus, the point is that even though boundaries are contingent, that they serve the *end of democratic self-determination* is more important than that their formation is legitimized. *Participation* and *equality* should still function as principles to assess the legitimacy of political communities, but they may be better served if contingent on *legal*, not political, subjection – as the latter ultimately requires the inclusion of members and non-members, i.e. *all*. (This would not cancel out transnational forms of membership such as the European Union, but it would require that this had a political constitution.)

Indeed, such legal formulation of the *all-subjected principle* has been proposed by López-Guerra. He supports Robert Dahl’s (1989) *principle of full inclusion*, which establishes that: “the demos must include all adult members of the association except transients and persons proved to be mentally defective” (Dahl 1989, p. 129). However, he interprets this principle to also mean the exclusion of expatriates, because long-term expatriates are no longer subject to

⁵ In “Why Immigration Controls are Not Coercive: A Reply to Abizadeh” (2010), Miller criticizes Abizadeh’s thesis by distinguishing between prevention and actual coercion. He argues that preventing someone from entering a border does not undermine their autonomy because she still has a wide range of choices available to her. I do not focus here on whether prevention is indeed an instance of coercion or not. Instead, my critique adds that taking potential coercion as a principle of inclusion is problematic for an account of *democratic equality*.

a state's laws⁶. The *principle of full inclusion* seeks to prevent what Walzer has called "citizen tyranny" (1983, p. 55), in which even *within* the state the distinction between foreigner/citizen prevails – something "no democratic state can tolerate" (Walzer 1983, p. 61). Note that Abizadeh rejects this legal interpretation of the *all-subjection principle* because he argues that states could deny political rights to individuals by, for example, declaring a group in a state's jurisdiction non-legal persons (Abizadeh 2012, see footnote 25, p. 878).

I think that this is an unfair reading of the legal version of the *all-subjected* principle. Abizadeh seems to think that this equals the *unilateral state sovereignty* which he rejects in his earlier article. Recall that unilateral state sovereignty presumes the independent legitimacy of the laws of the state regardless of their moral implications. This vision of state sovereignty is not what López-Guerra defends, however. His reading of the *all-subjection principle* relies on the assumption that collectively binding decisions are legitimate *only* if they uphold liberal and democratic principles (López-Guerra 2005, p. 221). In other words, to base participation on legal subjection we must first ask whether the institutions and procedures in a particular state protect the *private* and *public autonomy* (or "political liberty" (*Ibid.*)) of all whom they subject by virtue of their presence in that jurisdiction – which would include illegal migrants and guest-workers (*Ibid.*).

In short, the legal version of the *all-subjected principle* is that "no person subject to the binding decisions of a democratic regime should be denied political rights" (De Guerra 2005, p. 221). From this view, the "externality problem" as described by Abizadeh may show the ways in which a state acts unjustly (by restricting the autonomy of individuals outside the *demos*). However, according to the legal conception, if the political regime grants all individuals within its jurisdiction political rights, it cannot be said to be acting undemocratically (López de Guerra 2005, p. 223). That such jurisdiction is a matter of accident does not mean that it cannot be legitimate, lest we are indeterminately burdened with the problem of *boundaries* – unless we simply grant that there should be a *global demos*, but such possibility leaves out the question of inclusion altogether.

⁶ For a defense of why expatriates are subject to the state's laws, see Owen (2011).

4. Joseph Carens and Rainer Bauböck on the logics of belonging

So far, I have attended to the debate between liberal nationalists and post-nationalists regarding the integration of immigrants – and answered *yes* to the question of whether immigrants should be integrated in the *demos* according to the democratic principle of *self-rule*. I have also inquired into the debate within democratic theory about what form self-rule should take to uphold a *principle of democratic legitimacy* where this is not grounded on a pre-political will or nation. Although Abizadeh sheds light on how political power coerces individuals beyond its jurisdiction, I have suggested that (a) it is impossible to justify every instance (including past instances, e.g. boundaries) of political power; and (b) the end of *self-democratic self-determination* may require instead that democratic and liberal principles are realized within bounded communities (not the state *per se*, nor does this mean that there cannot be overlapping or transnational memberships). These boundaries are therefore contingent and secondary to the end itself.

However, another set of cosmopolitans have criticized the *all-subjected principle* for deriving legitimacy from the *de facto* exercise of political authority (Bauböck 2009a, pp. 480-481), and assuming that the political community is just a “regime of rule” instead of a community of *belonging* (Owen 2011, p. 648). These are fair criticisms and resonate with my earlier concern about infinite regression in *legitimacy* discourses. Moreover, they point to an interesting question: should inclusion be based only on political/legal terms, or according to something more transcendental such as simply *belonging* somewhere? Imagine an immigrant that moved somewhere at age twenty to work and does not speak the language of her host country because she does not need to use it in her workplace or among her friends. Should that person be able to have political rights in her country of origin, where, let us suppose, she cares more about what happens, or in her host country with which she maintains only an instrumental relationship? In this chapter, I shall explore these questions through the lenses of Carens (1983, 2013) and Bauböck (2009), but ultimately argue that the principle of *self-rule* is better suited to prevent illegitimate exclusion. Moreover, these principles cannot escape the *arbitrary demos problem* (Owen 2011) either.

The Social Membership Principle

In “Aliens and Citizens: The Case for Open Borders” (1987), Carens criticizes the *citizen* and *alien* distinction by appealing to human rights (p. 251). Not that this means that there cannot

be political communities, but these cannot restrict migration because of the fundamental primacy of individual liberties. After all, citizenship is a reflection of privilege in the sense that those who are born in rich societies have much ampler opportunities than those born in poor ones (Carens 1987, p. 252). Later in the *The Ethics of Immigration* (2013), Carens discusses how the state should not just be regarded as a coercive body, but also as a home that “structures, secures and promotes an individual’s relationships with other human beings, including her family” (2013, p. 23). In a way, the state should function *as* a family. If a couple adopted a child, we would not think that they should treat that child differently than their natural born children. The same way, when states take individuals in, it is unfair to relegate them to a second-class position. Not only is this unfair from a human rights’ stance, it also denies a social reality by assuming that everyone’s original nation is their home (Carens 2013, p. 102). In short, the *social membership principle* establishes that individuals are entitled to political rights by virtue of *belonging* to, or having social ties in, a community.

According to this principle, then, if I was born in a country and then moved at age twenty to another, I should be able to have political rights in both places because I have social ties in both. Thus, the *social membership principle* can justify membership *iure sanguinis* and *dual nationality* (Carens 2013, p. 33). This is an interesting point because it acknowledges that when some immigrants migrate they are not necessarily interested in acquiring political rights (they may feel that they prefer to retain ties in their home country). However, the principle of *self-rule* that I have put forward throughout this paper demands that if immigrants live permanently somewhere, they should eventually be able to have political rights there so that they are both politically and privately autonomous (the question of the number of years after which this should take place, I leave open). We can also expect that if someone is a permanent resident in a place, they will eventually learn that place’s language and develop a sense of belonging there. If they do not, the problem may be that there are not enough avenues for immigrants to integrate in that place. On the other hand, this idea is implicit in Carens’ claim that we cannot always assume one’s place of national origin a “home”.

Still, the *social membership* principle blurs the distinction between *political* and *social* membership. Surely, children of emigrants would want to maintain ties to their parents’ country. But if these children never lived there, then their political inclusion is not justified. Indeed, a person might have social ties in state H because she goes on vacation there every summer. She has friends and a house and cares deeply about what happens there. Does that

justify that she should hold political rights there? Clearly not. In this context, I agree with Baubock that the *social membership principle* begs the question of why “other networks across borders, such as business connections, should not also be regarded as forms of societal membership” (Baubock 2009, p. 482 in Owen 2011, p. 651). Note that Carens acknowledges that “citizenship in one’s parents’ country of origin is not an adequate substitute for citizenship in the country where one lives” (Carens 2013, p. 38). Moreover, claims to dual nationality inexorably vary from case to case (depending on the child’s social ties to her parents’ country) (p. 29). Still, the principle of popular sovereignty that I have been defending demands full inclusion within *demoi*, rather than the projection of national citizenship abroad – which is the form that *ius sanguinis* ultimately takes.

Pointing to the *right of belonging* is indeed important for further justifying the inclusion of immigrants. It may also be helpful in unclear cases: for example, if someone is constantly moving from place to place, maybe she should have the right to participate where *she feels that she belongs* – because we expect political membership to grant some degree of stability (Song 2012), which she would not have if her political rights depended on constantly changing jurisdictions. However, while the fact of migration may be a strong argument for the creation of transnational regimes *accountable to their subjects*, as a guiding principle *social membership* lacks force. First, it does not pay enough attention to the relationship between *private* and *public autonomy* – as it allows an individual to be a political member where she does not live by virtue of having social ties there. Secondly, there is the problem of discretion: ultimately, the task of deciding who belongs or not would have to be in the hands of political regimes – and we cannot ensure that the results would be just. The principle of *self-rule* (that individuals must be authors of the laws that addresses them) is the more concrete way of ensuring that regimes are accountable to their subjects.

The stakeholder principle

Does Baubock’s *stakeholder principle* overcome the shortcomings of the *social membership principle*? Yes and no. The *stakeholder principle* establishes that membership depends on whether an individual’s rights depend “on protection by a particular polity” and her well-being is “tied to the common good of that polity” (Baubock 2005, p. 686). On the one hand, as Owen argues, the *stakeholder principle* appeals directly to political ties (Owen 2011, p. 650) and, in that sense, is able to set apart political membership from other statuses. On the other, the *stakeholder principle* still allows dual nationality and citizenship *iure sanguinis*, as

individuals might have stakes in their parents' countries. Thus, while it appeals to political ties, it sees these mostly in terms of the state's function of protecting individuals' rights. The differences between Baubock and Carens' theories are actually quite thin.

Baubock criticizes the *social membership principle* because the latter ultimately relies on Westphalian sovereignty. That is, it accepts the sovereignty of nation-states, even if it allows multiple memberships. Baubock argues that the *social membership principle* derives "claims to political membership from factual societal membership", but then refers to "given political boundaries in order to define societies in the first place" (Baubock 2009, p. 482). But is this not also the case with the *stakeholder principle*? The stakeholder principle ultimately specifies that political inclusion is contingent on (1) an individual's *dependency* to a community for the protection of her basic rights and on (2) whether she is an ongoing subject to that community's political authority (Baubock 2009, p. 479). Therefore, it must also rely on existing political communities as it makes inclusion contingent on some of its actual functions. Moreover, considerations on the value of *stakes* must also ultimately depend on that political authority.

As with the other transnational principles that I have discussed, the *stakeholder principle* also derives legitimacy from *de facto* political power. Owen points to an example of this: Baubock argues that the democratic state has the right to decide whether expatriates should vote or not and the conditions attached to their political inclusion (2007, pp. 2426-2427 in Owen 2011, p. 658). Thus, Baubock turns to the authority of the state to determine which stakeholders should be given national voting rights (Owen 2011, p. 658). Owen describes this as the *arbitrary demos problem* and attempts to solve it by appealing to a non-arbitrary principle, arriving at this conclusion: since "constitutional laws that specify the entitlements and obligations of citizens" bind all citizens *irrespective of residence status*, then non-resident and resident citizens should be included to decide matters such as expatriate voting (Owen 2011, p. 659).

Such a principle ultimately allows for different "political entitlements for resident and non-resident stakeholders" (*Ibid.*). However, Owen's answer seems less of a solution than an indication that, as I have been arguing throughout this paper, *demos* are *arbitrary* (in addition to my concern about different political entitlements developed in the last chapter). If we refer to constitutional laws to *democratically* determine political inclusion yet are concerned with

democratic boundary problem as Owen is, we still have to justify why such principles apply to citizens (be they residents or not) from country Y and not country Z. That is, why those laws bound that specific group of people in the first place. Therefore, we are obliged to return to the *democratic boundary problem*. This is not a problem if we evade the question of boundaries altogether and focus on the legitimacy of institutions. However, like the *social membership principle*, the *stakeholder principle* relies on something nonconcrete and discretionary such as *stakes* to evaluate legitimacy – that does not quite match up to the legal version of the *all-subjection principle*. Moreover, once again, we might question whether conceding nationality *iure sanguinis* is justified. On the other hand, some may argue that as long as individuals also have political rights where they live, *dual nationality* or nationality *iure sanguinis* need not be a problem – and I leave that question open.

5. Conclusion

The basic democratic principle of *self-rule* demands that immigrants are included in the *demos*, irrespective of immigrants' cultural or national allegiances. Indeed, if we subscribe to a principle of *democratic self-determination* such as that described by Habermas, we can conclude that: (1) national identity cannot be the basis for accessing political rights (certainly a practice such as *ius sanguinis* cannot be justified); and (1) immigrants should have access to *equal political rights* so that their public (and private) autonomy is protected. However, the question of immigrants' political inclusion needs to be supplemented with that of where the boundaries of the *demos* lie.

On the one hand, Abizadeh (2008, 2012) rightly points out that both liberal nationalists and, very often, democratic theorists derive legitimacy from an imagined pre-political will or nation. Instead, both him and Habermas (1998) defend a deliberative conception of democracy where individuals arrive at a political will through public discussion and debate. Yet for Abizadeh, according to the *all-subjection principle*, the participants in such discussion must include members and non-members, because political regimes coerce both – even if in different degrees. However, I have discussed that there are several difficulties with this view. Despite feasibility concerns about its practical application, the strongest justification for accepting the *bounded demos* thesis is not that it has independent legitimacy but that it enables democratic legitimacy. The principle of nationality is unjustly exclusionary, but Abizadeh's *all subjected principle* is over-inclusive. Accepting that *demos* are arbitrary might be a “conceptual defeat”, but accepting such defeat is necessary for reorienting efforts toward making actual political regimes accountable to their subjects. Of course, this also implies that these regimes should be flexible to fulfil this end.

I explored two other principles to see whether the *demos* is just a regime of rule, or also a community of belonging. Despite their intentions, both the *social membership principle* (Carens 2013), and the *stakeholder principle* (Baubock 2009) also ultimately derive legitimacy from the *de facto* exercise of political power, which points that the *demos* is, more than anything, a regime of rule. Yet appropriately actualized, it can be the expression of political autonomy as well. Once again, the arbitrary *demos* problem need not be a problem in itself – if we contend, as I have, that we can start the “legitimization process” at procedures and institutions (and the way these protect public and private autonomy). Instead, the

problem with these principles is that they make the relationship between *citizens* and the *political regime* nonconcrete by appealing to *social ties* or *stakes*.

Of course, the question of citizenship in the context of immigration is extremely complex and there are many questions left unanswered. I have not discussed here whether there should be different principles of inclusion for illegal migrants, immigrants, and guest-workers (although, like Carens (2013), I think there should not). Moreover, there might be possibilities for establishing Abizadeh's *all-subjection* principle, or even a *global demos*, but I think further research needs to be done on their practical implications on political participation. I have also left the question of *dual nationality* open. Nonetheless, I have tried to point out why the political exclusion of immigrants within a state is unjust, while arguing that is difficult to move beyond the *bounded demos thesis*. The problem is not that there are *arbitrary demoi*, but how to make them accountable to *all* individuals subject to their laws. I want to end noting that questions of belonging are pervasive, and that normative discourses on political membership that move beyond *national identity* and have a democratic ethos should continue to inform realistic approaches to citizenship.

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