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Territorial Rights of Liberal Democratic States: Challenging the Right to Exclude Immigrants

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Introduction

Should liberal democratic states have the right to exclude immigrants from their territories?²⁵ Liberal democratic states are defined as governments preoccupied with enabling human rights and freedoms, pluralism and tolerance, and universal suffrage. This form of government has been spreading rapidly worldwide (Pareck 1992:161; Bollen 1993:1207-8). Nowadays, not only are the United States, Canada, Australia and the Western European countries

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²⁵ Immigrants are defined here as people living outside their birth country. Legally, these persons are labelled permanent residents, temporary residents, refugees or asylum seekers, and irregular immigrants.

considered liberal democratic states, but also Brazil, Ghana, Cape Verde, the Philippines, the Czech Republic, among others (Freedom House's Report 2013). Different liberal democratic states will certainly have varying strategies to achieve these common ends. Some states will promote a liberal market, others by a conservative or social welfare system (Esping-Andersen 2013). These different economic models will indeed have very specific implications when discussing the right to exclude, but such implications will be discussed elsewhere.²⁶ Here, I am occupied rather with the similarities engendered in all types of politically liberal democratic systems: they are all said to be sovereign states and have territorial rights according to this denomination.

Territorial rights have most often been defined as involving at least three elements: (1) the right to jurisdiction; (2) the right to use and control the natural resources within their territories;²⁷ and (3) the right to control the movement of persons and goods across

²⁶ See: Duarte, Melina. "Open Borders and Welfare States: Can't They Really Get Along?" Paper presented at the International Conference on "Ethics, Democracy, and Rights: Contemporary Themes in Ethics and Political Philosophy IV" at the University of Córdoba, Spain, and the PROVIR Closing Conference at the University of Bergen, Norway.

²⁷ For an account on a state's right to use and control the natural resources with global implications, see: Mancilla 2014a. In her work, Mancilla proposes that not only the benefits derived from the countries' exploration of resources should be shared globally, but also the costs caused by natural disasters (Mancilla, 2014b). For others accounts disaggregating this right from the right to jurisdiction, see: Wenar 2008:2-32 and Moore 2012:84-107.

their territories (Ypi 2013: 242-3; Miller 2011: 252-3; Stilz 2011, 573-4; 2009:186; Simmons 2001:306). An initial objection to this division is to say that these three elements are, in fact, inseparable from each other. This is because the right to jurisdiction seems already to imply the right to use and control natural resources as well as the right to control the movement of persons and goods across territories. If they were shown to be truly inseparable from each other, it would be impossible to reject the states' right to exclude immigrants without a substantial restriction of their right to jurisdiction. However, even David Miller, who strongly supports the states' right to exclude immigrants, believes there are good reasons not to reduce the two latter elements to the former. The reasons he gives have to do with the different nature of each element. Whereas the right to jurisdiction is exercised over persons within the states' territories, and whereas the right to use and control the natural resources is exercised over things within such territories, the right to control the movement of persons and goods is exercised over persons and things, but from outside the states' territories (Miller 2011:254). This means that while the former two seek justification in the right the states have to rule everyone and everything physically present in their territories, the justification of the latter lies on the states' claim to determine 'who' and 'what' can be legitimately physically present in such territories. If these elements were then separable from each other, it should be possible

to reject the states' right to exclude immigrants without compromising their right to jurisdiction.

Despite the acknowledgment of the separate nature of these elements, Miller argues that these rights end up by *normally* belonging together (2011:265). This is due to the attachment that people develop over time to a territory through the nurturing of common practices associated with the land (e.g. fishing communities at coastal areas, herding communities in grazing areas). The linkage among these rights seems then to be forged by the appeal to two meanings commonly attributed to *territory*: (1) territory as a meaningful piece of land for the 'rightful' inhabitants; and (2) territory as the physical result of civic boundaries of communities protected by self-governing rights. Such meanings are at the bottom of two key arguments in favour of the right to exclude: (1) supporting the states' exclusive right to determine settlement in their territories; and (2) defending the state's exclusive right to determine membership within such territories. Both arguments result in border control but for slightly different reasons: while the first engages in a material meaning of territory, the second relies in a non-material meaning. In this paper, however, I will argue that such a linkage can no longer be sustained in the context of the contemporary liberal democratic states that have reinvented sovereignty and that we need a new meaning for territory to accompany these changes. My argument contains three

steps that correspond to three sections. In the first section, I will show that contemporary liberal democratic states do not have a distinctive relationship to the particular piece of land they occupy capable of justifying the exclusive right to settlement in that area. In the second section, I will argue that, at the same time, actual members of such states can no longer consistently maintain the right to unilateral coercion capable of restricting the access to membership. Finally, in the third section I will outline an alternative understanding of *territory* that would possibly allow freedom of movement of persons across borders without dismantling the states' right to jurisdiction. The first two steps are the main grounds for the negative foundation of the thesis presented in the third step. I am aware that a full account on the matter still requires a stronger positive defence of freedom of human mobility, which is only briefly outlined here. However, my goal in this article is more modest than to prove my thesis to be robust. Rather, I want to show why the other alternatives are problematic and develop an account that attempts to overcome the problems raised.

Contesting 'territory' as a meaningful piece of land capable of justifying the exclusive right to settlement

As we saw in the previous section, the linkage among the (at least) three elements constituting states' territorial rights is done by

Miller through a nationalistic account of territorial rights. That means, an account that confers special meaning to the relationship between peoples (understood as cultural groups such as nations or indigenous peoples) and their territory of settlement. Such meaning is said to be significant enough to turn these peoples into the primary bearers of territorial rights. These primary right-bearers, when represented by states, transfer to the states their jurisdictional rights. The states then become responsible to promote and protect such rights of the people and are authorised to restrict foreign settlement based on that.

Alternatively, to this nationalist account, which is essentially past-oriented, is the Kantian account on territorial rights defended by Anna Stilz (2009). Both accounts have at least two advantages over competing positions: first, contrary to the so-called general-rights theories, they attempt to explain the requisite connection between states and a particular piece of land capable of justifying the exercise of jurisdiction and enforcement of power in this determined place; and second, they offer an alternative to Lockean theories of territorial rights based on individual property rights (e.g. Nine 2008).

In her Kantian account of territorial rights, Stilz argues that the connection between a state and a particular piece of land is given through the mediation of individuals forming a *people*. Differently from Miller's conception, *people* does not refer to cultural

groups such as nations or indigenous peoples, but to individuals as right-bearers residing on a territory. Such individuals, while holders of rights of occupancy over a determined piece of land and legitimately represented by the states, transfer these rights to the states. The transference of the individual rights of occupancy into instituted territorial rights would be rightfully done under three conditions: (1) when the state is capable of implementing an efficient system of property law which confers public meaning to private property within the claimed territory; (2) when the individuals themselves have a say in determining the system of law; (3) and when the state is not a usurper (Stilz 2011:574). The need to meet these three conditions gives the advantage of making states' territorial claims dependent on the legitimate representation of individuals with rights to occupancy in a determined territory. This means that the pact can be broken once a state loses the support of individuals, since the consent to act in the name of the people is given through the states' ability to represent the people's interest. Territorial rights are then based on legitimacy of representation. But, at this point, the justification of the states' territorial rights relies on the requisite assumption that, prior to states, individuals acquire rights of occupancy over a determined territory. Taking this into account, Stilz then has to define the conditions under which individuals themselves acquire these rights. She mentions that individuals have a right of occupancy: (1) when they reside, or have

previously resided, in a determined territory; (2) when their legal residency is fundamental to the development of their conception of a good life; (3) and when their residency is not imposed by them on others (Stilz 2011:585).

Miller (2011:256) criticises her position for being essentially present-oriented undermining the relevance of history in the definition of states' territorial rights. According to him, Stilz is concerned with whether a state claimant of territorial rights currently meets some standards of legitimacy, but leaves the past completely out of the picture. I criticize her for the same reason, but for a very different purpose. I agree with Miller that history plays an important role in the determination of states' territorial rights, but unlike him, I argue that this role is contextual and that the current context does not support the exclusion of immigrants based on an alleged exclusive right to settlement. Indeed, the actual border configuration is very much shaped by history. Why Norway or other states, for example, have territorial rights over the territory they currently occupy and not over, say, the Swedish territory? This is an historical question that demands an account on historical contingencies as wars, asymmetrical power relationships, contracts, luck and hazard, and many other types of accidents. Stilz ignores this dimension because, according to her, looking closer at the history of transactions involving territory, few states, if any, would come up 'clean' in the criterion of legitimacy. However, this does

not seem to be a reason to actually ignore the historical dimension as much as a reason to weaken the claims states currently associate with “probably” illegitimate territorial rights. Thus, instead of undermining these contingencies, as Stilz does, I argue that because history does matter, a meaningful philosophical account of territorial borders should essentially consider the present border configuration for what it is, i.e. the result of historical accidents. In this sense, as it would be objectionable to leave these contingencies aside, it would also be objectionable to logically grant a kind of necessity to the actual border configuration, which has come about through historic outcomes, as Miller does. State borders are a fact now, but under different conditions, historical outcomes have given us different realities where the ultimate power was not centralised in states, but in cities, provinces, villages, or empires (Sassen 2006). Given that, we see that the connection between a state and a particular piece of land should, in principle, be viewed as contingent.

Now, we have to investigate whether these contingencies, even if possibly illegitimated, are a sufficient condition to make the connection between a state and a particular piece of land relevant enough to ground territorial rights that support the exclusive right to settlement. To do this I will not, because of methodological limitations, analyse the history of specific states or nations. I would not know how far back in history to go in order to find support for

an original claim to land, neither know how the past would support a valid claim today when the conditions have changed. Rather, I will argue that the contingencies that are relevant to our times, in the context of the emergence of contemporary liberal democratic states, are no longer capable of justifying the exclusive right to settlement. This is because such states have already established a new set of values, which are no longer consistent with the old meaning of sovereignty implying ultimate power over a particular territory. The concept of sovereignty has been reinvented by such states and their territorial rights must change accordingly.

Biersteker affirms that different types of states do engage different meanings of sovereignty and are associated with different conceptions of territoriality over time and place (2002:158). This means that even if from the general perspective of international law, states are recognized as sovereign irrespective of the values they stand for, and in this specific sense, liberal democratic states are as sovereign as totalitarian states such as North Korea and Saudi Arabia, there is an extreme difference between the ways these two types of states conceive sovereignty. While in liberal democratic states there is a tacit agreement to mutually interfere in each other's domestic affairs irrespective of membership to a supranational body, in the totalitarian states, sovereignty still means pure non-interference. Thus, when not generalising, we see that the concept of sovereignty does change according to the values defended by

different types of states. This means that we cannot pretend to capture one meaning of sovereignty that will be valid for all types of states all the time. Therefore, I will here attempt to grasp this reinvented concept of sovereignty that is proper to liberal democratic states and that does not correspond to the general and ambiguous meaning. As such definition is still being shaped according to transnational and global changes, I will try to advance the analysis by contrasting it with what it is not, i.e. by contrasting the reinvented sovereignty with the classic conception of sovereignty as defined by David Held (2002:3-5).

Held defines classic sovereignty as the regime of a state that “reigns freely in the constitution of political and economic relations” (2002:1). This means that there is no “final and absolute authority above and beyond the (classic) sovereign state” (2002:3).²⁸ In such a classic conception of sovereignty, territorial rights were thought to be unavoidably geographic, meaning that the states’ jurisdictional rights were necessarily exercised over a defined territory. Therefore, preventing freedom of mobility of persons and things across territories was seen as an essential component of state sovereignty. However, the sovereignty of contemporary liberal

²⁸ Held uses the distinction among the three models of sovereignty (classic, liberal international, and cosmopolitan) as ideal types or heuristic devices for his inquiry. He is aware that even when one of these models can be said to predominate in a given time, features and elements from other models can also be found (2002:2).

democratic is no longer merely attached, though still rooted, to a geographic conception of state jurisdiction. Rather we see that today, a state's jurisdiction can surpass its physical borders internationally and also be limited domestically. Internationally, sovereignty can be exercised virtually (Agnew 2005) as in the case of the currency value attached to the US dollar, the relationship between buyers and sellers in the global market, the spread of culture and technology worldwide along with copyrights and patents, as well as jurisprudence, extraterritorial legal enforcement, and others. Domestically, jurisdiction might not always correspond 1:1 to the states' physical borders. Catalonia, the Basque Country, and Galicia, although in unfinished processes of becoming independent, are examples of autonomous communities co-existing inside Spain's geographical borders. If the situation of these autonomous communities was, however, assessed under the old lens of sovereignty based on the exercise of power over a particular piece of land, their mere existence seeking autonomy would be considered violations of the state's territory and, consequently, of its sovereignty. To protect state sovereignty in this sense, these autonomous communities would have to be eliminated either by dismemberment or by cultivated integration. However, the existence of these communities with overlapping jurisdictions as well as the development of supranational bodies shows that sovereignty is no longer restricted to the states' borders. This is to

say that territory, in a geographical sense, and jurisdiction do not actually match as idealised. Therefore, it becomes difficult to defend the position that the right to exclusive settlement in a determined geographic area can be supported by a connection to the states' right to jurisdiction. The right to exclude would have to be then defended by reference to itself. The problem with such a defence is that, standing by itself, the right to exclude is not consistent with the values liberal democracies are currently committed to.

When, for example, liberal democracies commit themselves to the promotion and protection of human rights and freedoms, this commitment already exceeds the scope of the states. This is because human rights and freedoms are supposed to be individual rights extended to every person irrespective of place of residency. It is, indeed, not morally acceptable to say that insiders are entitled to human rights and freedoms at the expense of outsiders. In this sense, sovereignty cannot mean the admission to disregard outsiders' rights and freedoms, but somehow a compliance to this value. At the same time, when liberal democratic states aspire to promote and protect pluralism and tolerance, a kind of sovereignty based on the states' right to exclude for cultural reasons also loses its grounding. Sovereignty would, in this respect, be better achieved by the capacity of the states to manage conflicting and overlapping culturally distinct groups within their territories. Immigration could not be accused to disrupt this task or challenge sovereignty, but it

would rather bring the opportunity to the states to practice it. Lastly, when liberal democratic states are committed to universal suffrage based on inclusive democratic values, i.e. those capable of connecting together different territorial units that share overlapping memberships (see Bauböck 2016), it becomes difficult to consistently sustain the states' right to exclude based on the special demands of a particular demos claiming exclusive democratic rule over a certain territory.

Thus, given that states' territorial rights are the result of contingencies and that, in the context of liberal democratic states, the arising contingencies are related to the reinvention of the concept of sovereignty—that no longer applies exclusively or entirely to the states' geographical territory, but rather consists in a compliance to certain universal values—it seems that the territorial rights of liberal democratic states should, as a matter of consistency, no longer be equipped with the right to exclude based on exclusivity of settlement. This argument is not claiming 'necessity' in any sense, but an assessment of consistency between the values liberal democratic states stand for and the ways they propose to act. I am aware that this argument of consistency is vulnerable in the sense that when faced with the choice of either revising their values or having to reject the states' right to exclude, one could choose the former. However, I do not think that revising our embedded values is an easy task and its revision is, in this sense, no less 'idealised'

than open borders.²⁹ From the perspective of a different form of government, these values can indeed be contestable, and I do not want to argue that any contemporary state should defend the same values.³⁰ However, from an inner perspective, liberal democracies have reframed their sovereignty as conditional on compliance to these values and it is difficult to imagine a denial of these values without thinking of a major setback of civility.

Contesting ‘territory’ as the physical result of civic boundaries justifying the exclusive right to membership

In the previous section, I showed that the justification for exclusion of immigrants from states’ territories can no longer rely on the assumption that states have a relevant relationship to a particular piece of land that is capable of granting them the exclusive right to settlement in that area. The actual border configuration is the result of contingencies and conventions that are no longer consistent with the rigid institutions of a classical sovereign model. However, it can still be argued that, even though the states’ right to exclude cannot be grounded on the exclusive right to settle in a particular territory, it could be grounded on the exclusive right to membership. In this sense, states’ territorial borders are not said to have a value *per se*,

²⁹ Thanks to K. Lippert-Rasmussen for questioning me on this issue.

³⁰ Thanks to A. Vitikainen for drawing my attention to this point.

but rather as the physical result of boundaries developed by groups unified by affinities over time. Opening the borders would then undermine the right of members to control these boundaries, which would potentially destroy their sense of community and their distinctiveness. This counter-argument has usually been powerful enough to support border control by shifting the discourse from a material standpoint to the collateral restriction demanded by democracy and membership.

Particularists, defenders of this view, usually recognise that there are universal commitments extended to non-members (e.g. Walzer 2008, 146-7; Benhabib 2004, 211) that might even lead us to keep the idea of open borders in the horizon, but that these universal commitments are presented as secondary when compared to the commitments toward and among members. These authors operate within the liberal democratic framework, but they identify a tension between liberalism and democracy that, according to them, cannot be surpassed. Benhabib's solution consists, for example, in remedying this tension through constant demands for more flexible immigration policies based on consistent and transparent application and eligibility procedures (Benhabib 2004, 140). She proposes transforming the existing territorial borders into boundaries, i.e. in non-militarised and porous frontiers. However, as territorial borders are justified according to her by the defence of the right to group self-determination of a bounded demos, the

transformation of borders into boundaries would not mean that individuals would be free to move since the groups would still have the right to protect these boundaries.³¹

In this context, it appears that a fulfilled liberal democracy is unachievable because the universal commitments of liberalism conflict with the particular necessities of democracy. Consequently, although they can agree with a comprehensive liberalism that requires the exercise of individual autonomy irrespective of group membership, self-determination is unilaterally interpreted as a right pre-bounded groups have to self-rule. This means that group self-determination appears prior to individual autonomy. I want to challenge this view in this section by highlighting some ways in which the tension between liberalism and democracy can be resolved. The solution will require the expansion of the right to membership beyond national citizenship.

In «Democratic Theory and Border Coercion», Arash Abizadeh demonstrated that liberalism and democracy are, in fact, consistent with each other when democracy is understood as it should be, i.e. as popular sovereignty (Abizadeh 2008: 38). Under this perspective, the normative core of liberalism and democratic theory converge by conceiving *human beings as inherently free and equals*, i.e. by conceiving individuals as equality entitled to personal autonomy (Abizadeh

³¹ I have discussed this issue in more detail in Duarte 2014.

2008:39). In the Razian sense employed by Abizadeh, personal autonomy means the possibility of individuals to control their own destiny, pursue their own projects and create their own moral world. A person is autonomous if three conditions are met: (1) she is able to pursue personal projects; (2) she has a reasonable range of options in life; and (3) she is not coerced to the will of another. Unilateral coercion would then violate these conditions. Thus, in order to avoid violation of one's personal autonomy, the demos, i.e. the populace of a democracy, must, according to Abizadeh, be originally unbounded. This is because a conception of a bounded demos necessarily leads democratic theory to unacceptable internal and external conceptual contradictions. Internally, political power is only legitimated by the people's will, but the holders of this will are not themselves democratically grouped. Externally, popular sovereignty demands that legitimate power requires that the subjects participate in the shaping of the laws and rules they are supposed to follow, but a bounded demos would give the members the illegitimate coercive power to rule non-members (Abizadeh 2008, 47). Following the unbounded conception of the demos, a state could exclude immigrants from its territories if, and only if, the immigrants themselves could participate in this decision-making. Abizadeh therefore argues that in order to enable this bilateral decision-making process, cosmopolitan institutions would be required. But, since we currently lack these types of institutions

on a large-scale, states cannot pretend to justify the exclusion of immigrants.

This argument is supported by the understanding that in liberal democratic theory coercion, i.e. the infringement of one's autonomy, must be minimised and applied only when it can be justified by all persons subjected to it.³² As the coercion involved in border control is not only exercised over members, but also over immigrants, would-be migrants, and settled members of other states, the states, as agents of coercive acts or threats (Abizadeh 2010), owe them all some kind of justification. Thus, if states are to maintain their prerogative to control their borders and rightly exclude immigrants from their territories, they must be able to properly justify this coercion by considering the non-members' voice on the issue. As this justification cannot currently be met, owing to the lack of proper institutions, contemporary liberal democratic states should not be authorised to exclude immigrants from their territories.³³

Abizadeh's argument is brilliant, although not flawless. He is successful (1) when exposing the contradictions of conceiving

³² The consent is expressed through the procedural legitimacy of representation.

³³ This argument is very like Robert Goodin's and Carol Gould's defence to the principle of affected interests (See Goodin, 2007; Gould, 2004). To Ludvig Beckman, the coercion principle, such as the one defended by Abizadeh, is the legal correlate of the affected interests' principle (Beckman 2009, 47).

democracy as consisting in a bounded demos and pointing out the need to think otherwise; (2) when showing that liberalism and democracy are not necessarily opposed to each other when it comes to borders, i.e. that liberalism and democracy can be compatible and consistent with each other through a mutual view of personal autonomy extended to all human beings; and (3) when defending the position that coercion must be justified by the consultation/participation of all its subjects. With this, Abizadeh shows precisely what makes the exclusive right to membership unacceptable: the unilateral aspect involved in the determination of membership.

The problem of Abizadeh's argument arises when the diffuseness of an unbounded or global demos makes the democratic process unachievable and ultimately inimical to democracy. The demos, to be unbounded, would mean not only that the participation of non-members should be included in the democratic process, but that the demos would change every time according to the focus of coercion. If immigration policies are obvious cases where the demos should be expanded to non-members, such an expansion is less evident in cases of other policies that, though not ruling on border control, do affect non-members (e.g. policies that will result in an increase of CO₂ emissions to the atmosphere). This would imply that before any decision is taken, it would be necessary to establish who is subjected, or likely to be subjected, to the

coercion to be inflicted, in order to form the demos. The problem is then how to determine who is subjected to coercion. Who should determine it and how could this determination be democratic? Should we have a voting system to determine who is able to vote? Consequently, in fact, to determine the subjects of coercion might be an impossible task. Even having primary targets, no policy is free from unintended consequences. Furthermore, policies decided right now might not subject members of this generation but their offspring to coercion. Should they be allowed to decide for their descendants? Would those more affected have more power to decide? These are complex questions that show that in fact, it seems that even mutable demos might actually never match with those really affected by coercion. There would still be a violation of personal autonomy if people subjected to coercion are not included in the demos, as well as if those not coerced are included in the demos. In an attempt to solve these issues, Abizadeh appeals to the idea of a demos that, bound by the principle of individual equality and freedom, encompasses all of humanity. By doing that, however, Abizadeh is unable to set some limits of membership and define a cosmopolitan demos.

Sarah Song argues that the coercion principle fails to take into account that democracy is more than a set of mere procedures. To her, democracy is also a set of values and principles (Song 2012, 41). Thus, to globally expand the conditions for democratic

decision-making would not capture this other dimensions of democracy. In order to safely ensure democratic values and principles such as equality and solidarity, the particular institution of the state would be needed. According to her, the «state secures substantive conditions of democracy and establishes dear links between representatives and their constituents» (Song 2012, 58). Cosmopolitan institutions are, from this perspective, seen as unable to establish these conditions as successfully when compared to states. Cosmopolitan institutions—understood as a world state and not world government³⁴—have, according to her, at least three problems that make them normatively undesirable: the risk of degeneration of the system; the incapacity of preserving social and cultural pluralism; and the possible lack of effectiveness of global management (Song 2012, 61-2). In this context of opposition, states appear to be the fundamental instrument of democracy. This leads Song to reject the unbounded conception of the demos argued by Abizadeh. Humanity would, according to her, require a rule of exclusion to be able to ground democratic legitimacy. This indicates that, although inclusive, Abizadeh’s solution may set the bar too high and may be unable to provide the reconciliation between liberalism and democracy that he expects. He does not take into

³⁴ Unlike a world government, the world state would be compatible with differentiated political borders and jurisdictions. See Abizadeh 2008, 49; Song 2012, 60.

account that popular sovereignty ultimately means that the people's common will is the supreme authority, which requires the existence of a people and this requires differentiated membership and stable boundaries (Rousseau 2001, Bk.II, Ch. VIII-X, 83-91).

This means that though offering reasons strong enough to reject the pre-bounded views of the demos, Abizadeh's unbounded account may not be able to build a positive alternative and reconcile liberalism and democracy. He shows that *territory* cannot be the result of civic boundaries capable of restricting the right to membership, but seems to be unable to set the limits for the expansion of membership beyond state border, undermining what unifies the demos beyond universal procedures. Song's criticism that democracy is not a mere procedure but a set of values and principles is well founded and should certainly be taken into account when redefining the meaning of *territory*. At the same time, her view leads us back to the same problems ably demonstrated by Abizadeh. The debate needs to be advanced. The challenge seems to be in finding an alternative that does not rely either on a bounded or unbounded demos.

Supporting 'territory' as a matrix, i.e. as a set of conditions that provides a system for individual self-development

In the previous section, we saw that particularists, defining territory as the physical result of civic boundaries, encounter a contradiction

between liberalism and democracy that cannot, according to them, be solved when it comes to border issues. This means that, although the idea of open borders should be on the back of our minds as a demand of liberalism, the demos should be bounded as a limitation of democracy. Abizadeh, on the other hand, shows that this contradiction can be avoided if democracy is understood as popular sovereignty. As such, instead of being contradictory, liberalism and democracy would be connected together by a common view on human beings as equally entitled to personal autonomy. Membership, in the latter case, is not to be determined by territory, but it transcends it to encompass all humanity. This proposal, however, does not seem to solve such a contradiction because it is apparently unable to set a limit for the cosmopolitan demos when supporting an unbounded demos. The problem with that is that it undermines factors that unify the demos together beyond democratic universal procedures. My proposal is to argue that this reconciliation between liberalism and democracy can be achieved by conceiving the demos as being what I call «non-pre-bounded». This means that the demos would still be limited, i.e. composed by defined members with certain rights to group self-determination, as is argued in the bounded conception of the demos, but simultaneously, what defines membership and who can be a member should not depend on the state's decision, but rather on the persons' autonomy as it would be in the unbounded conception

of the demos. State borders would still exist as the limiting condition for the formation of the demos (fulfilling the particularists demands of democracy), but individuals, as equally entitled to personal autonomy would enjoy freedom of mobility and membership across state borders (fulfilling the universalist demand of liberalism). Individuals are, in this sense, always members of a state, but they are free to move and to become a member of the state of their choosing. Analogous to this is the functioning of a train line. The line has a determined trajectory, but the passengers on board are constantly changing.³⁵

In Table 1, the many differences among these three conceptions of the demos are systematised. It shows that variations occur according to the composition and formation of the demos, its scope or reach, the membership determination, the border configuration, the type of coercion involved, the conception of *territory* involved, and the feasibility under current conditions.³⁶

Under the bounded conception, it can be seen that the demos is, first, essentially formed by citizens and then partially expanded to legal residents. The demos is formed mainly by chance (e.g. birth), and then expanded by rights in specific cases. Although, in most countries, legal residents still have limited participation in the

³⁵ I thank A. Mancilla for clarifying my thoughts by providing me this analogy.

³⁶ See Table 1 below.

shaping of the laws they are subject to—mainly restricted to the local level³⁷ – its scope ranges from radically exclusionary to exclusionary, since outsiders are not entitled to any justification beyond some transparency in membership application procedures. As membership is uniquely conferred by states and by the people they represent, it requires a system of border control where unilateral coercion is accepted. It relies, as we saw, on a conception of territory consisting in the physical result of the civic boundaries. Its feasibility under the current conditions is uncontested because it is based on the functioning of our actual institutions.

In the unbounded view, on the other hand, the demos is composed by members and non-members and formed by the observance to the right to personal autonomy. Its scope is seen as radically inclusionary. Although inclusion is a desirable outcome of democracy, its radical amplitude produces undesirable consequences to democracy to the point of making it impractical and even impossible. Membership is conferred not by the states, but by cosmopolitan institutions responsible. As opening or closing state borders will depend on the subject's will, unilateral coercion from the state's members becomes unacceptable. The conception of *territory* is transcendent to the state borders to encompass all

³⁷ In most countries, legal residents still cannot vote and be eligible for public office at the national level. See Bauböck 2005.

humanity. Although we already have some cosmopolitan institutions, its feasibility is said to be compromised because it depends on the establishment of these institutions on a large scale, again producing the undesirable effects of instituting a world state besides political uncertainty.

Finally, in the «non-pre-bounded» model, the demos is still composed of state members, but these state members are not reduced to citizens or legal residents. They are the cosmopolitan citizens who become members of a particular state through the exercise of their own choice:³⁸ the choice either to reiterate the choice once made for them, e.g. proud citizens; the choice to revise their own choices in different moments of life, e.g. legal residents; or the choice to change what was once determined for them and to acquire new affiliations that better correspond to their conception of good life, e.g. denial of previous affiliations. The point is that although their affiliation to a determined state depends on their own choices, their inclusion in some state is today shown to be required, since the states are the current institutions responsible for distributing and enforcing rights and duties. The scope of the demos is then not radically inclusionary as the one mutably including all subjects of coercion, nor (radically) exclusionary as the one

³⁸ I have developed this notion of cosmopolitan citizenship more fully in the third chapter «State Membership: Contesting Naturalisation as the Access Door to Electoral Rights at the State Level».

restricted to citizens and legal residents. *Its scope is inclusionary in that it is self-exclusionary.*³⁹ In this sense, a member of state A, for example, can decide to become a member of state B. Her action of inclusion in B would self-exclude her from A when dual state membership is not possible.⁴⁰ This will make membership determined not by others, but by the self. At the same time, exclusive membership and individual autonomy would, through the exercise of choice, be preserved, thus, finally reconciling democracy and liberalism. Each person could freely decide which train to board. If they decide to get on board one train, this very decision would cause their exclusion from another train, but the exercise of choice is what enables equal entitlement to personal autonomy for every human being while still having a limited demos. The individuals themselves, as cosmopolitan citizens, would be entitled to choose to be members of a particular state and define their own membership status. This aspect empowering choice was lacking from the former two conceptions of membership and with this the

³⁹ Idea developed in the first chapter of this thesis.

⁴⁰ This matter is always complicated because it involves the discussion of the very delicate issue of dual citizenship that some current states accept and others do not. The success of the example depends, however, on the restriction of dual state membership. This restriction does not imply, of course, that multiple memberships in other levels are not possible. Dual state membership, however, does not seem to bring justice and political equality to native-born and foreigners at the same time. Rather, it gives advantages to foreigners who can simultaneously have benefits in more than one state. Considering this, together with López-Guerra (2005, 288), I tend to reject this possibility.

capacity of enrolling responsibility and accountability from membership. State borders would still exist, and the institutions among them would still differ, so the concerns against a world state are not applicable. The demos are still limited and self-contained at the state level, so the concerns against a cosmopolitan demos are also not applicable. However, the existing state borders would be open for individuals to settle and become members. Territory would then limit membership without implying the right to exclude. It would be better understood as *a matrix, i.e. a set of conditions that provides a system for individual self-development*. Furthermore, its feasibility is still disputable because although it is based on existing states and cosmopolitan institutions, the innovative use of these institutions has no precedent. It can be speculated that we would have a more just world with open borders where people are politically equal, but also a much more unjust world where people are drastically socially unequal. The practical implications must still be studied.⁴¹ Nonetheless, from a theoretical standpoint, the feasibility of this model basically depends more on the good will to accept the advances already made in the liberal democratic theory in order to eliminate the shadow of a classic conception of state

⁴¹ See chapter 4 of this thesis considering the practical implications related to the right to freedom of membership to a welfare state.

sovereignty and to transform the current states into truly contemporary institutions.

It can still be objected that my position does not constitute a reasonable compromise between the universal demands of liberalism and the particularistic demands of democracy since it would still deprive the demos of the right to exclude. In this sense, it can seem like, as Abizadeh, I am setting the bar too high and compromising on reconciliation between liberalism and democracy. However, one should note that the limiting condition of democracy requiring a bounded demos does not necessarily imply a fulfilment through the right to exclude. In fact, as we saw in the first section of this chapter, the right to exclude is rather obsolete and inconsistent with the contemporary liberal democratic values. This is to say that my proposal concedes that democracy does require a unified people and that this people should be protected by the right to self-determination. This is a compromise from one side. However, when combining it with liberalism, the people are not formed by parochial relations (e.g. by an ethnic, cultural or societal aggregation of individuals), nor diluted into all humanity. This is the compromise from the other side. The people are then formed by the co-existence⁴² of free and equal individuals in a territory conceptualised

⁴² Co-existence in this sense will be referred as domicile in the chapter 3 of this thesis.

as a matrix. The people of a matrix would still determine themselves by being in charge of setting the conditions that provides a system for their development, but group self-determination is a tool for individual self-development and not the opposite.

Table 1. Synthesis of the three conceptions of the demos: bounded, unbounded and non-pre-bounded

	Bounded Demos	Unbounded Demos	Non-pre-bounded Demos
Demos composition	State members, i.e. citizens and/or legal residents.	Members and non-members - global demos.	State members, i.e. cosmopolitan citizens who choose to be a member of a particular state.
Demos formation	Mainly by chance (birth), but also by rights in some specific cases.	By right.	By choice.
Scope	Radically exclusionary (restricted to the citizens) or exclusionary (restricted to the legal residents).	Radically inclusionary.	Inclusionary (based on self-inflicted exclusion).
Membership determination	By the states and their actual members.	By cosmopolitan institutions.	By cosmopolitan citizens.

	Bounded Demos	Unbounded Demos	Non-pre-bounded Demos
Border configuration	Controlled state borders.	Open or closed boundaries, depending on the members and non-members decision.	Open state borders.
Coercion	Unilaterally exercised by the states underlining group self-determination.	Justified by all subjects of coercion underlining individual autonomy.	Self-inflicted by all subjects of coercion balancing individual autonomy and group self-determination.
Territory	Physical result of civic boundaries.	Transcending state borders to encompass all humanity.	Territory as a matrix, i.e. a set of conditions that provides a system for self-development.
Feasibility under current conditions	Practically feasible today based on using the existing institutions of states.	Practically unfeasible today. Depending on the implementation of cosmopolitan institutions on a large-scale.	Possibly practically feasible today when based on existing institutions (states and cosmopolitan institutions), but depending on their unprecedented usage.

Conclusion and Perspectives

In this article, I have argued that, according to the new developments of liberal democratic theory, contemporary liberal democratic states should no longer have the right to exclude immigrants from their territories. Although control of movement of persons across borders has been considered an essential element of

states' territorial rights, the revision of the territorial rights of emerging liberal democratic states is urged in light of the new conception of sovereignty, which is neither essentially geographic, nor does it require a pre-bounded demos.

In the first part of the argument, I showed that states do not have a relevant connection to a particular piece of land capable of justifying an exclusive right to settlement. I argued that the relationship between the states and the particular piece of land they currently occupy is the result of a series of historical contingencies. However, although these past contingencies were enough to produce the actual border configuration, in the face of the new set of values that we are committed to, they are no longer enough to justify the exclusive right to settlement in these territories. It is true that, until recently, sovereignty meant the dominion over a determined territory, and this corresponded to the states' right to exclude persons from these territories. However, we saw, sovereignty is being reinvented according to a new set of values that supports the enabling of individual rights and freedoms, of pluralism and tolerance, and of universal suffrage.

In the second part of my argument, I shifted the focus from the impossibility of justifying a state's exclusive right to settlement to the impossibility of justifying the state members exclusive right to membership. This shift was necessary because many liberal democratic theorists, although accepting that the territorial borders

do not have a value *per se*, argue that states need to keep the right to define the demos in order to protect their civic boundaries. However, Arash Abizadeh exposed how contradictory the concept of democracy is when requiring a pre-bounded demos, and proposed replacing it with the alternative conception consisting of an unbounded demos. From this latter perspective, states could exclude immigrants from their territories if, and only if, the immigrants themselves were able to participate in this decision. The unbounded conception of the demos proved, however, to be vulnerable to serious criticisms such as the practical limitation of conceiving a demos not only formed by members and non-members, but also having its constitution changing constantly according to diverse focuses of coercion. The debate was advanced with the proposition of a «non-pre-bounded» demos, i.e. a demos that is still composed of defined members, but where membership is not determined by a state's unilateral decision. Rather, membership is determined by the individual choice of free and equal persons.

References

- Agnew, John. 2005. «Territoriality and State Authority in Contemporary World Politics». *Annals of the Association of American Geographers*, 95: 437-61.
- Abizadeh, Arash. 2008. «Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders». *Political Theory*, 36: 37-65.

- «Democratic Legitimacy and State Coercion: A Reply to David Miller». 2010. *Political Theory*, 38: 121-30.
- Bauböck, Rainer. 2005. «Expansive Citizenship: Voting Beyond Territory and Membership». *Political Science and Politics*, 38: 683-7.
- __. 2016. “Why liberal nationalism does not resolve the progressive’s trilemma: Comment on Will Kymlicka’s article: “Solidarity in Diverse Societies”, *Comparative Migration Studies*, 4/10. DOI: 10.1186/s40878-016-0031-1.
- Beckman, Ludvig. 2009. *The Frontiers of Democracy: The Right to Vote and Its Limits*. London: Palgrave MacMillan.
- __. «Is Residence Special? Democracy in the Age of Migration and Human Mobility». 2012. In Ludvig Beckman and Eva Erman, eds., *Territories of Citizenship*. Chippenham and Eastbourne: Palgrave MacMillan, 18-39.
- Benhabib, Seyla. 2004. *The Rights of Others: Aliens, Residents, and Citizens*. Cambridge: Cambridge University Press.
- Biersteker, Thomas J. 2002. «State, Sovereignty and Territory». In Carlsnaes, Walter, Tomas Risse and Beth A. Simmons, eds., *Handbook [181] of International Relations*. Los Angeles, London, New Delhi, Singapore, Washington DC: Sage, 157-174.
- Bollen, Kenneth. 1993. «Liberal Democracy: Validity and Method, Factors in Cross-National Measures». *American Journal of Political Science*, 37:1207-1230.
- Duarte, Melina. 2014. «Right to Hospitality, Right to Membership: A Critical Review of Kant’s and Benhabib’s Cosmopolitan Accounts on Immigration and Borders». In Alnes J. H. and M. Toscano, eds., *Varieties of Liberalism*. Newcastle: Cambridge Scholars Publishing, 204-22.

- Esping-Andersen, Gøsta. 2013. *The Three Worlds of Welfare Capitalism*. Cambridge: Polity Press.
- Freedom House. 2013. Report accessed August 2014 at:
<http://www.freedomhouse.org/sites/default/files/FIW%202013%20Booklet.pdf>
- Goodin, Robert. 2007. «Enfranchising All Affected Interests, and Its Alternatives». *Philosophy and Public Affairs*, 5: 40-68.
- Gould, Carol. 2004. *Globalizing Democracy and Human Rights*. Cambridge: Cambridge University Press.
- Held, David. 2002. «Law of States, Law of Peoples: Three Models of Sovereignty». *Legal Theory*, 8: 1-44.
- IMI Policy. 2011. Global «Megatrends» for Future International Migration. In *Briefing*, 9, September.
- Jacobson, David. 1997. *Rights Across Borders: Immigration and the Decline of Citizenship*. London: John Hopkins University Press.
- López-Guerra, Claudio. 2005. «Should Expatriates Vote?» *Journal of Political Philosophy*, 13: 216-34.
- Mancilla, Alejandra. 2014a. «The Environmental Turn in Territorial Rights». *Critical Review of International Social and Political Philosophy*. DOI: 10.1080/13698230.2013.868981.
- _____. 2014b. «The Volcanic Asymmetry or the Question of Permanent Sovereignty over Natural Disasters». *Journal of Political Philosophy*. DOI: 10.1111/jopp.12038.
- Miller, David. 2011. «Territorial Rights: Concept and Justification». *Political Studies*, 60: 252-68.
- Moore, Margaret. 2012. «Natural Resources, Territorial Right and Global Justice», *Political Theory*, February, 2012, vol. 40, no. 1, pp. 84-107.

- Parekh, Bhikhu. 1991. «The Cultural Particularity of Liberal Democracy». *Political Studies*, 40: 160-175.
- Rousseau, Jean-Jacques. 2001. *Du Contrat Social*. Paris: Flammarion.
- Sassen, Saskia. 2006. *Territory, Authority, Rights: From Medieval to Global Assemblages*. Princeton, NJ: Princeton University Press [182].
- Simmons, John A. 2001. «On the Territorial Rights of States». *Philosophical Issues*, 11: 300-26.
- Song, Sarah. 2012. «The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State». *International Theory*, 4: 39-68.
- . «Democracy and Non-citizen Voting Rights». 2009. *Citizenship Studies*, 13: 607-20.
- Stilz, Anna. 2011. «Nations, States, and Territory». *Ethics*, 121: 572-601.
- . 2009. «Why Do States Have Territorial Rights?». *International Theory*, 1: 185-213.
- Walzer, Michael. 2008. «The Distribution of Membership». In Pogge, T. and D. Moellendorf, eds., *Global Justice: Seminal Essays, Global Responsibilities*. St. Paul: Paragon House, 145-77.
- Wenar, Leif. 2008. «Property Rights and Resource Curse». *Philosophy & Public Affairs*, 36/1:2-32. DOI: 10.1111/j.1088-4963.2008.00122.x
- Ypi, Lea. 2013. «Territorial Rights and Exclusion». *Philosophy Compass*, 8: 241-53 [183].