The Legitimacy of the Demos: Who Should Be Included in the Demos and on What Grounds?

Antoinette Scherz

University of Zürich | Department of Philosophy | scherz@philos.uzh.ch

Despite being fundamental to democracy, the normative concept of the people, i.e. the demos, is highly unclear. This article clarifies the legitimacy of the demos' boundaries by structuring the debate into three strains of justification: first, normative membership principles; second, its democratic functionality and the necessity of cohesion for this essential function; and third, a procedural understanding of the demos. It will be shown that normative principles can only justify its expansion towards the ideal of an unbounded demos. On the other hand, the democratic function of the demos can be understood as a criterion for its restriction. This, however, is only possible on the basis of an existing polity and not for the initial constitution of the demos. Consequently, a legitimate demos has to take both inclusionary and exclusionary tendencies into account. These tendencies need to be weighed against each other in the democratic process, which leads to a fundamentally procedural understanding of the legitimacy of the demos.

Introduction: The Demos as a Normative Concept[1]

Democracy as the government of the people refers fundamentally to the idea of a people, i.e. a demos, for its legitimation.[2] However, as Jennings famously stated: "The people cannot decide until someone decides who are the people" (Jennings 1956, 56). This implies that democracy as self-legislation and self-constitution is always connected to the drawing of boundaries (Besson 2006). The initial constitution of the *demos* in democratic terms is highly problematic and is therefore often referred to as the "boundary problem" (Dahl 1970; Whelan 1983; Franck 1992; Gould 2006; Abizadeh 2008; Miller 2009; List and König-Archibugi 2010; Cheneval 2011). The problem is that democracy always needs a specified body of members to participate in the democratic process of decision-making. However, for the initial founding decision of the demos, its boundaries are not yet established and it is therefore unclear who should take part in the decision-making. This means that the determination of the boundaries of the self-governing unit can

itself never occur in a democratic procedure because this would presuppose the existence of this very unit. Nevertheless, democracy needs a clearly delimited demos in order to make decisions. Therefore, the question arises of how a demos can be constituted in a legitimate way.[3] Previously, this issue was rarely discussed in political theory since most authors argued that questions concerning the constitution of the demos escape democratic possibilities (Dahl 1989; Whelan 1983). Due to increasing migration and globalisation, however, this question has gained importance (Näsström 2007; Goodin 2007; Abizadeh 2008; Miller 2009; List and König-Archibugi 2010).

The legitimacy of the demos is highly relevant to democratic theory as a self-referential theory in which political power is legitimised in reference to the individuals over whom it is exercised (Abizadeh 2012). The legitimacy of the demos lies at the heart of democratic theory for two main reasons. First, the legitimacy of claims made in the name of the people depends not only on the decision-making process, but also on the subject making the decision. So if the legitimacy of the demos is questionable, the legitimacy of democratic decision-making is also undermined. Second, the legitimacy of the demos affects its right to exclude others. If the composition of the demos is arbitrary, its right to the self-determination of its members might not be valid. Hence, the demos as a collective subject is of crucial importance for the legitimacy of democracy itself. However, the conception of the demos' legitimacy suffers from a dramatic lack of clarity. Empirically, it is not a problem to identify the particular citizens of a state who constitute the demos. Yet the broader conceptual and specifically the normative dimensions of the concept of the demos are vague.

---

2 In the following, I will understand the term "people" as a political people of a polity, equivalent to "demos."

---

3 When speaking of the constitution of the demos, I do not mean the historical events but mainly the theoretical possibility of its legitimate constitution.

This paper aims to clarify these conceptual and normative dimensions. Essentially, the question guiding this paper is: who should be included in the demos? This means addressing the demos not only as the basis, but also as the object, of legitimacy. The main contribution of this paper is then to provide a comprehensive understanding of the legitimacy of the demos. As a starting point, I examine whether the demos can be constituted democratically and what "democratic" can mean in this context. In so doing, this paper structures the debate over the legitimacy of the demos and provides a systematic evaluation of different accounts.

The criteria of legitimacy should answer both who should be included in the demos and in which cases exclusion can be legitimised. I will show that three different accounts or criteria of the legitimacy of the demos can be identified in the literature: first, according to normative principles; second, as a functional democratic unit; and third, through a reconstitution process. Accordingly, in the first part of this paper I will consider different *normative membership principles* of the demos. Such membership criteria include the all-affected principle, all-subjected principle, the principle of voluntary association and the unbounded demos thesis. It will be demonstrated that these normative principles cannot define a delimited demos as they are either based on an existing demos or they criticise every restriction of the demos in the name of more inclusion. The normative principles can thus only legitimise the expansion but not the restriction of the demos. Since restriction remains necessary for democratic decision-making – the key function of the demos – this democratic functionality of the demos should itself serve as a delimitation criterion, as I will outline in the second part. Regarding this *democratic function of the demos,* I will evaluate which function the demos is expected to fulfil and what quality a collective subject requires in order to do so. In order to answer these questions, I will review different accounts of demos cohesion or identity and evaluate their compatibility with democratic principles. If the function of the demos is used as a restriction criterion, the kind of cohesion assumed to be necessary for it has to be examined from a normative point of view.

These two opposing tendencies of inclusion and exclusion faced by the demos have also been discussed by Miller (2009). However, he does not elaborate on the normativity of different kinds of cohesion as bases for exclusion. Furthermore, it needs to be specifically considered that these two tendencies are not constitution principles for the first foundation of the demos, but can only be enacted in a procedural manner. This leads to a *procedural* understanding of the legitimacy of the demos, which I will discuss in the third part. Since the demos cannot be founded in an initially legitimate way, the demos should not be understood as a substantial singularity but rather as procedurally defined and justified. This means that it has to be reconstituted and examined over and over again in the democratic process.

I Normative Membership Principles

Generally speaking, the demos can be defined as the political subject of a polity, constituted by its members, who participate or have the right to participate in political decision-making (Aristotle 1985, 87; 1275a20). In this sense, the demos is defined as the individuals having participation rights. The demos is sometimes also equated with full membership or citizenship in a

polity. However, citizenship is commonly understood as containing four different elements: status, rights, political engagement and identity (e.g. Bosniak 2006). Some authors understand status and rights as one aspect (e.g. Cohen 1999; Carens 2000) but there is nevertheless consensus in the literature about which elements constitute citizenship. The legal status of citizenship defines the members of a political community and ascribes rights and duties. The rights of citizenship entail civil, political and social rights (e.g. Marshall 1950). Active citizenship can be understood as the republican ideal which requires civic virtues for self-government.[4] Citizenship can further be understood as an affective element of identification with a shared identity.[5] While these four elements are not mutually exclusive aspects of one large conceptual whole of citizenship with different legal, psychological and behavioural perspectives (Bosniak 2006, 20), they are dependent on each other in different ways. For example, the legal aspect secures the active political participation aspect and vice versa. The relevant aspect of citizenship for the definition of the demos as the political subject of a polity is political rights, since they formally guarantee participation in political decision-making. These political rights are of course part of full citizenship, however they are not to be taken as equivalent since the status of citizenship can also occur without political rights (for example, in the case of children, citizens residing abroad or convicts) and, in some states, political rights can be acquired without full citizenship.[6] In the following, I will refer to the demos as defined through participation rights. The importance of identity or cohesion for the demos will be discussed in the second part of this paper.

The definition of the demos through rights of political participation leads primarily to a descriptive understanding of the demos. Such an understanding would designate the group of individuals who have decision-making rights as the demos. However, in authoritarian forms of polities, for example, the right of political participation might be so restricted that the demos merges with the government. Even though it is possible in an authoritarian polity to detect the group with decision-making rights, we would hardly call it a legitimate demos because it does not fulfil any participatory normative standard.[7] Besides these descriptive elements, the demos also has a normative aspect. For example, if the majority of the adult population has no opportunity to participate in political decision-making and the deciding group is a small elite, we would not call this elite the demos.[8] We would still refer to the citizens as the basis of legitimation and, in this sense, as the demos, even if they do not have any rights of participation. In other words, there is a descriptive understanding of the demos which answers only the question of who actually has participatory rights in a

4 For a discussion of the relevance of civic virtues for the liberal state, see Galston (1991).

5 For a discussion about the relationship between group rights and citizenship, see Kymlicka and Norman (2000).

6 This focus on political rights is not meant to neglect the importance of civic and social rights and active participation for the effective use of political rights.

7 This should not imply that democracy would be reached through extensive participation rights alone, but that the normativity of the demos does not allow an authoritarian regime to be qualified as a legitimate demos, even if this could be achieved from the descriptive point of view.

8 It is true that in representative democracies citizens cannot participate in every political decision; but since they can elect their representative, they have political rights to be sovereign in the sense of the demos.

polity, and a normative understanding of the demos which justifies or questions the distribution of political rights and, in this sense, the borders of the polities themselves.

This normative aspect of the demos is specifically relevant to democracy. Democracy always requires a subject, a body of people in its process of collective equal decision-making. This means that the extension of participation rights is normatively linked to the principle of equality, which forbids the restriction of the demos to a small elite that rules over the others. It therefore makes sense to speak of a demos first and foremost as the subject of democracy. Or, as López-Guerra puts it, it is not just the democratic procedures that are determinative, but also "who governs or, alternatively, who holds ultimate power over those who govern" (López-Guerra 2005, 218). The normative question of the demos' composition is therefore specifically relevant to democracies: who has to be included in the demos for it to be the basis of legitimate decision-making? This question addresses not only internal inclusion, which has historically been marked by the extension of political rights to several groups such as women or Afro-Americans, but also the external delimitation of the demos.

The boundary problem of democratic theory is that the initial definition of the demos' boundaries can never occur in a procedural democratic way. As Whelan puts it, the boundaries of the self-governing unit have to be determined because, unlike individuals and humanity, which are naturally defined, groups of collective government are not (Whelan 1983, 15). So the issue of the boundary problem is a question of membership and, as such, distinct from territorial concerns (e.g. Goodin 2007). Whelan (1983) famously stated that democratic theory cannot offer an answer to this problem without circularity. However, he also argues that the determination of political membership is itself a political decision, perhaps the most fundamental one, and therefore democratic theory cannot simply take the matter for granted (Whelan 1983, 16). In contrast, Schumpeter (2006) considers the question of the constitution of the demos to be trivial because boundaries set by political communities should simply be accepted. Hence, for him, the boundary problem is in fact unanswerable in democratic theory.

Dahl differentiates the question of the constitution of the demos further as he notes that the domain (people included in the demos) and the scope (competences of the polity) are interrelated and therefore cannot be determined independently of each other. Even though he recognises that the problem of proper domain and scope cannot be solved from within democratic theory, the question of who should be included in the demos remains one of its most fundamental issues (Dahl 1989, 207–209). Others have pointed out that democracy cannot be reduced to decision-making procedures, but is defined by a distinctive normative ideal which may also influence the determination of a democratically legitimate demos (López-Guerra 2005, 221; Miller 2009, 204; Arrhenius 2005).

In this first part, I will discuss different normative principles which define the legitimate composition of the demos and evaluate whether they provide an answer to the boundary problem. First, the so-called "all-affected-interests" principle is specifically discussed and is dismissed as a constitutive principle but acknowledged as a critical standard for the demos. Second, interpretations of the all-affected principle like the all-subjected principle, which presupposes the existence of a political unit, is examined. Third, the concept of voluntary association is

reviewed with regard to its ability to give guidance for the boundary problem. Finally, the option of an unbounded demos, defined by open deliberative participation, is discussed. I assess these normative principles according to the criteria of 1) non-circularity, 2) non-redundancy, 3) political equality and 4) functionality. Political equality serves as an approximation to the democratic ideal (Cheneval 2011, 64). Functionality as the ability of the demos to take democratic decisions is only applied as a minimal restriction. Other options for reconstituting the demos which rely on an already existing demos or polity will be discussed in the third part of the paper.

a) All-Affected-Interests Principle

A principle often referred to for constituting the demos normatively is the all-affected-interests principle. Essentially, this principle claims that the demos is legitimately constituted if those who are affected by the outcome of a decision have a say in the decision-making. Membership defined by this principle is established for specific decisions on the basis of the prospective impact of that decision. Dahl's formulation of the principle states that "everyone who is affected by the decisions of a government should have the right to participate in that government" (Dahl 1970, 64). Generally, this principle seems to capture the self-government aspect of democracy very well.[9] However, if the demos were determined for every decision, this would lead to a fluctuating demos, which would be problematic for democratic decision-making. Looking at the specific interpretations of this principle, it becomes clear that there are even more problems linked to it and that none of these interpretations can resolve the boundary-problem. I will follow the distinction of 1) actually affected 2) proportion of affectedness and 3) possibly affected, which can be found in the literature (e.g. Goodin 2007; Cheneval 2011).

First, the demos could be constituted according to the *proportion of affectedness*. However, this version leads to different constituencies of voters for each decision, hence the principle in this form is not useful for the constitution of a stable demos, functional for democracy (Whelan 1983, 17). Even more problematic is the fact that the attribution of participation rights according to the degree of affectedness undercuts political equality (Gould 2004, 176; Miller 2009, 217). Moreover, the problem would simply be relocated to the definition of who decides on the proportion of affectedness.

Second, if the principle can be applied to the people *actually affected* by a decision, the decision has to be made before its outcome and who it affects can be determined. However, in order to make a decision, the group of decision-makers has to be designated. So a problem of circularity arises because deciding who should be included in the demos is dependent on knowing which outcome will occur (Whelan 1983, 17; Gould 2004, 177; Goodin 2007, 52–53; Cheneval 2011, 65; Miller 2009, 215). This has also been understood as an indeterminacy problem due to the interaction between the domain of the demos and the scope of issues (Dahl 1989, 195; Miller 2009, 215–16). Owen (2012, 131–33) tries to disprove the inconsistency of the actual affected interpretation by showing that it cannot only be understood as dependent on the outcome. Actual affectedness should rather be comprehended as being affected by a choice

---

9 See Owen (2012) for a convincing critique of Nozick's (1974, 269) dismissal of the intuitiveness of the all-affected principle.

from a range of options, not dependent on the implementation of a specific option. With reference to Goodin (2007), he argues that the outcome understanding is too narrow because it only considers the course of action that is taken rather than the whole range of options and, furthermore, that this implausibly sets the status quo as a baseline. I agree with Owen that the choice interpretation is more plausible.[10] However, as he points out, it is also incapable of defining the constituency of the demos. This is only possible in a two-stage resolution (Owen 2012).

Third, the principle can refer to all of the people *possibly affected*. According to the expansive possibilist reading, all those possibly affected should have a say in the decision-making. However, this means that the demos should include all possibly affected in all possible worlds (Goodin 2007, 59–62; Cheneval 2011, 66–68). This reading would mean that "(at least in principle) we should give virtually everyone a vote on virtually everything virtually everywhere in the world" (Goodin 2007, 64). Clearly, this leads to an infinity problem, which is not only about the practical possibility of global elections, but also theoretically problematic since future generations also need to be taken into account but cannot vote yet (Tännsjö 2007). According to the principle that ought implies can, the expansion of the demos to future generations is not necessary as it is simply impossible. Therefore, the inclusion of future generations is not required. Yet, since a territorial unrestricted demos is theoretically possible this is what is demanded by the principle. In summary, it can therefore be concluded that the understanding of the all-affected principle as all possibly affected is the most plausible interpretation, but that it demands global inclusion.

b) All-Subjected, All-Coerced and Interlinked Interests
Besides the discussed interpretations of the all-affected principle, there are three other readings of interest which further specify the relevant manner of being affected. Affected can be understood first, as *being subjected* to the laws of the polity in question; second, as *being coerced* by the binding decision of the government; and third, as having *interlinked interests* at stake. I will argue that all of these understandings presuppose a political structure that includes decision-making procedures (democratic or not) and then call for the adaption of who has political rights. To make the demos more inclusionary does not answer the question of how this political structure and with it the boundaries of the demos should be constituted in the first place. Furthermore, these principles might be biased by their starting point.

The first understanding of being affected as *being subjected* to the laws of a specific polity always presupposes an already existing state. It is very important to discuss the distribution of voting rights or the naturalisation of permanent residents. For example, there is an interesting discussion regarding whether residence is a sufficient or even necessary condition for subjection (López-Guerra 2005; Owen 2011). For this discussion, the all-subjected principle is indeed crucial. Nevertheless, it does not give guidance on how to legitimately

determine the initial boundaries of a demos. Rather, it only indicates how to correct inclusion, because it presupposes an already existing polity.

A second interpretation comes, for example, from Miller, who interprets relevant affectedness as being under the *coercion* of the government. It is often argued that subjection to laws has to be justified to those subjected because it involves the possibility of coercion for their enforcement. However, in Miller's view, it is not the use of force per se but the fact that coercion – as opposed to prevention, which might also be coercive in its means but only rules out one particular action – restricts an individual to a particular course of action and therefore interferes with their autonomy. This is the case for the state since, in modern democracies, "the web of laws is sufficiently directive that virtually everyone will be intermittently subject to coercion" (Miller 2009, 222). Therefore, Miller's interpretation of coercion can be understood to apply to those who are permanently subjected to the binding laws of a polity. As a matter of fact the all-subjected and all-coerced principle concur in this interpretation.

Abizadeh (2010) has criticised Miller's conception of coercion because, in his opinion, unilateral border control, which Miller sees as a case of prevention, also coerces potential migrants outside the borders. According to Abizadeh, the distinction between prevention and coercion does not suffice since prevention-threats are also a form of coercion if they threaten to use physical force. Therefore, the relevant principle here is being *subjected to coercion*. This is especially important for state coercion as it involves the threat of overwhelming physical force (Abizadeh 2010, 126). In this understanding, a government also coerces individuals who have not yet entered the territory of their state. This is not the case for other readings of the subjected or coerced principle. Abizadeh argues that potential migrants who are hindered from entering a country are entitled to a democratic justification for their exclusion.[11] This results in a critique of the state sovereignty view on the basis of an unbounded demos. Abizadeh's understanding of affectedness as coercion does not coincide with being subjected since the coercion that a state exercises can also affect individuals outside of its jurisdiction. It therefore leads to the conclusion that the demos is generally unbounded, a concept I will discuss in detail in section 1d.

These principles with the exception of Abizadeh's understanding of being subjected request what I would call internal integration. They aim for the adaption of inclusion in the political structure (generally a state with a specific territory and jurisdiction) but do not question it more generally. This is problematic in the sense that the unquestioned territorial borders are both normatively arbitrary and often in question as they are defined through war and power struggles in the course of history (e.g. Whelan 1983, 19–24; Arrhenius 2005). Since they depend on an existing political structure as their starting point the all-subjected and the all-coerced principles are not a criterion for the initial definition of the demos. Nevertheless, these principles can be understood as correcting the inclusion of those who can

---

10 Nevertheless, the problem remains that one would need to know the set of options available, which is again dependent on who can participate in the decision-making. Furthermore, Owen argues that, only plausible options have to be considered (Owen 2012, 133). However, it remains unclear to me how the plausibility of the options can be defined if it is still to be decided for whom the decision should be plausible.

11 Miller argues that Abizadeh's understanding of coercion does not always invade autonomy. In his view, prevention differs from coercion in the range of alternative options that are still available. As coercion does not leave other courses of action open, it always interferes with autonomy and therefore requires democratic justification, i.e. inclusion in the demos, whereas prevention only requires justification (Miller 2010).

participate in the decision-making of an already given people, like Dahl's principle of inclusion (Dahl 1989, 119). I will come back to this reconstitution of the demos in the third part of this paper.

Third, the all-affected interest principle can refer to *interlinked interests* (Goodin 2007, 47). This would mean that a demos is legitimately constituted by individuals whose interests are intertwined. This concept has also been called the "common world condition," which means "that in the common world, all or nearly all the fundamental interests of each person are implicated and so each person has roughly equal stakes in the shape of the common world" (Christiano 2008, 81).[12] However, this understanding faces difficulties similar to those of the all-subjected principle because the question still remains, how does this common world come about? In my opinion, political structures are necessary for its formation. This means that an already existing polity and a system of law to which individuals are subject would likely induce a common world, but then the state is again presupposed, this time through its institutions. Another example of interlinked interests is Gould's concept of "common activity." Here, a number of individuals unite to reach a given purpose. In this group, "rights of democratic participation arise from the rights to self-determination in the context of common or joint activities" (Gould 2004, 175). For Gould, the basis for this understanding is that "people should be equally free to control the conditions of their own activity," which establishes a right of participation (Gould 2004, 175). This understanding of the principle does, however, not define the constitution of the demos but demands more generally participatory decision-making.

Since all of the discussed versions of being affected a political structure, none of them are a constitutional principle for the demos that defines where its borders (and with it, those of the state) should be drawn. They rather correct the internal political inclusion inside an existing polity.

c) Voluntary Association
An alternative to the all-affected principle for defining a legitimate demos could be a model based on mutual recognition which thus forms the demos as a voluntary association. For example, Whelan discusses the idea of consent as another ideal of democracy. However, this concept of a voluntary association founded through consent results in open and fluid boundaries that are unsuitable for a demos as the basis of a democratic state (Whelan 1983, 26). On the other hand, he draws attention to the problem of insufficient mobility in the international realm, which would make it practically impossible to establish such a consent principle. This empirical fact cannot be ignored but, in my opinion, the problem of consent theory lies at the more fundamental theoretical level.

There are two ways to understand the creation of the demos through consent: either in only one decision or through serial consents. In the first case, the demos would be formed in one decision at one moment in which all individuals who accept each other constitute a people. Alternatively, some individuals would

agree to form a demos and afterwards more could join if accepted by all members. In the first scenario, the main problem is that it presupposes the boundaries of the group which can actually consent, or it leads again to an infinity problem, as everyone should be able to enter the demos. Furthermore, two procedural paradoxes arise. The paradox of self-exclusion means that if person A excludes person B, B would also exclude A, and so both would be excluded. Therefore everyone would have to accept everyone else in order to not be excluded. Another paradox is the exclusion of the individuals who have accepted all others. This seems intuitively problematic as it restricts the autonomy of this individual for the benefit of the others. In any case, an option for the excluded individuals outside of the new demos must be available. This is highly problematic in the case of political peoples who make claims for a state territory; as for the excluded, a non-state territory would be necessary.

The serial option is unproblematic regarding the first point of criticism because there is no closed group needed in this ongoing process. Furthermore, the paradox of self-exclusion is not relevant here. However, the second paradox, the one concerning the exclusion of individuals who have accepted all others, is more severe. On the one hand, the newcomer has to accept all members if he wants to become a part of the demos but only one disagreeing member is enough to exclude the newcomer. So an even more drastic inequality is generated between the members, who can never be excluded from the demos once they are part of it, and the newcomers.[13] This is specifically problematic in the context of the formation of a demos since it is a political people, not just a club. Exclusion from states is much more severe and must therefore be justified to those excluded. The analogy of clubs and states made, for example, by Walzer (1983, 39–41), ignores this difference between private and public. In the latter, equal treatment should prevail over the freedom of association (Carens 1987, 267). Finally, both concepts are highly problematic from a democratic point of view because they allow for undemocratic criteria of exclusion: the individuals who are already within the demos can exclude others on absurd grounds. Evidently, neither version of consent as the foundation of the demos is compatible with the standard of equality.

d) Unbounded Demos or the All-affected Principle as a Critical Standard
Even though Whelan regards a fluid, open demos as inappropriate for democracy, I will use this section to discuss the advantages and disadvantages of an unbounded demos. This concept is used in the theory of deliberation, in which the legitimating power of the political processes is highly determined by the circumstances of communication and the development of decisions. Habermas distinguishes between the development of a political opinion in the public sphere and decision-making in the institutionalised administration (Habermas 2001a). The task of the public consists in developing discursive arguments in a deliberative process and thereby discovering and forming common interests, needs and values. He claims that in deliberative politics, the ideal procedure of subjectless communication is the normative ideal underpinning both the consultative meetings of parliamentary bodies and the

---

12 The principle could also be understood to mean that democratic decision-making is appropriate only in groups with interlinked interests. In this case it outlines a condition for democratic decision-making, not a constitution principle of the people. I will come back to this in section 3b.

---

13 In common naturalisation procedures, it is of course not the case that one disagreeing member is enough to deny someone citizenship. However, this does not dissolve the inequality generated between the two sides.

communication networks of the public sphere. Accordingly, the subject of the legal community disappears in subjectless forms of communication (Habermas 1998, 251). Establishing the epistemic value of democratic deliberation cannot be bound to a delimited citizenship; it has to allow for openness.

Abizadeh's (2008) "unbounded demos thesis" applies this concept generally to the ultimate reference point of democratic legitimacy which can, in his opinion, only be an unbounded demos. Abizadeh argues that the discussion about borders is not to be understood as a conflict between liberal principles of individual freedom and the democratic principle of collective self-determination; rather, bounded democratic sovereignty, based on a delimited demos, is incoherent. First, the demos cannot be constituted in accordance with democratic principles and, second, the question of boundaries always poses a problem of externalities by coercing both the included and the excluded sides. In this understanding, the demos of democracies is generally unbounded and therefore boundaries have to be justified to foreigners as well as to citizens (Abizadeh 2008, 44–48).[14] Also according to Besson, the deterritorialisation of democracy and the demos is necessary since territorial democracies cannot solve the affected interests problem (Besson 2006, 195).

Nevertheless, the problem remains that an unbounded demos is not a performative demos because it cannot act. Democratic decisions are not possible as is not clear who has a say in the decision-making. This problem is also visible in liberal theory in the inherent tension between universal principles and a closed state. Liberal democracy as devised by Rawls on the one hand aspires to a transcending element for its universal legitimation and, on the other hand, presupposes a society as a closed system (Rawls 1971, 7, 229). Such a finite society cannot be legitimised by universal liberal principles. In contrast, the original position refers to the capability of human beings to reason and to put themselves into another's position, thus transcending every closed group. In this sense, it refers to an unbounded deliberative demos. It is the ability to provide reasons that makes everybody part of the deliberative demos (Cheneval 2006, 162–72). This deliberative demos is conceptually unbounded, because the purpose of deliberation is to discuss all reasons, not to exclude them, and the ability to give reasons does not depend on the affectedness. To bring these two aspects of liberal theory together, Cheneval (2006) argues in favour of an understanding of the liberal demos with a dual form. "The political decision-making and voting *demos* is embedded in the deliberative *demos* and only both together form the liberal democratic *demos*" (Cheneval 2006, 159–60). According to Cheneval, these two concepts of the demos are essentially non-coextensive. The unbounded demos is a deliberative ideal but it fails to constitute a performative demos. Liberal democracies require a clearly defined demos for democratic decision-making. If a demos is not clearly defined, votes and elections are impossible as it is unclear who has a vote.

The analysis of the normative principles which seek to define the demos shows that none of the discussed principles can be understood as a constitutional principle determining a legitimate demos. The all-affected principle is not appropriate for restricting a demos. It should also be noted that the all-affected principle does not necessarily constitute membership rights, but

it might nevertheless determine a right to participation in deliberation, decision-making or compensation for negative effects (Goodin 2007, 64–68; Cheneval 2011, 68–69). However, the all-affected principle in its expansive possibilist reading can be understood as a critical ideal, questioning the legitimacy of all demoi and demanding more inclusion (e.g. Cheneval 2011, 67–69). This interpretation of the all-affected principle as a critical principle corresponds to the concept of an open unbounded demos.

The discussed readings of being affected, like the all-subjected principle, only correct the inclusion in a presupposed polity. I will come back to the idea of the reconstitution of the demos in the third part of this paper. For the moment, it can be concluded that the normative principles discussed in this part can be understood as inclusion principles, either demanding more internal inclusion of an existing demos or criticising it in the sense of an unreachable ideal. Given that a bounded demos remains necessary for democratic decision-making, I will discuss what the democratic performance of a demos is, and whether it demands a specific kind of cohesion, in the next part of the paper.

II Democratic Function of the Demos: What Kind of Cohesion Is Required?

In the literature, the demos is not understood as the simple connection of individuals who happen to be members of a political community. It is especially characterised through a performative aspect, meaning the ability of democratic decision-making. In this second part, I will discuss how the democratic function of the demos can be understood as a restricting criterion and which kind of cohesion is necessary for the demos to fulfil this function. I will refer to cohesion not in terms of externally attributed characteristics, but as a synonym for affectivity, or a feeling of belonging together, shared by the members. Cohesion can of course be motivated by certain characteristics held in common by the different members. However, since cohesion as such and not pre-political existing attributes is regarded as the important aspect for a demos, different kinds of cohesion could be relevant in defining it. I do not argue here that democracy should rely on a homogenous and singular subject, or that a heterogeneous plurality of citizens is problematic. Rather, I want to explore whether cohesion is in some way required for the demos and if this is of any importance to its constitution.

If the demos is characterised as a performative unit, an "agency based" account of the demos is required. List and König-Archibugi (2010) have elaborated such an account with a focus on functional or performative characteristics. It brings together a 'populist' version, which understands the demos as having a general will, and a 'discursive' version, which requires internal cohesion with participation and interaction in a common public sphere. In their understanding, the function of the demos is "to guide collective decision making and to facilitate coordinated action" (List and König-Archibugi 2010, 87). Warren (2006) considers not only decision-making but also executive processes as necessary for collective agency. In both cases, the demos is defined as a collection of individuals capable of democratic agency, which includes an organisational structure, rules and procedures to make decisions and to take action in a democratic way. However, the account of List and König-Archibugi does not equate the demos to the state, but rather conceives the demos

---

14 Abizadeh does not specify whether this justification implies a right to vote or merely consideration in a deliberation process.

as having the capacity to be incorporated into a state-like agent with institutions. The underlying idea is that the nature of the collective itself does not create a barrier to the development of such institutional structures.

List and König-Achibugi make two suggestions for the identifying characteristics of this kind of collective: first, external cohesion as the ability to support collective decision and, second, internal cohesion as the ability to endorse its collective decisions. External cohesion is, in this view, a coherent collective attitude defined by a democratic criterion as majority (List and König-Archibugi 2010, 94). Internal cohesion is distinguished further in substantive agreement on fundamental matters and meta-agreements on how to conceptualise substantially controversial issues (List and König-Archibugi 2010, 95–97). However, this capacity of democratic agency seems difficult to evaluate if organisational structures are left out, especially since the emergence of a feeling of belonging together and democratic values interact with institutions. List and König-Archibugi recognise that deliberation, civic education and political socialisation promote cohesion (List and König-Archibugi 2010, 103), but their approach remains problematic in that the demos as a democratic agent can be separated from its institutions. I do, however, agree with their assessment that the performance of a demos is evaluated by its democratic agency. As List and König-Archibugi suggest, external and internal cohesion are determinative. Therefore, the question arises whether the demos can – and should – be defined by cohesion and, if so, what kind of cohesion should be relevant.

In the discussion about cohesion binding the demos together, two predominant strains of theory have evolved in the last twenty years: liberal nationalism and political patriotism. Both see a certain kind of cohesion of members as a necessary basis for the functioning of democracies. Yet, the understanding of this cohesion is profoundly different. Liberal nationalism understands the unity of the demos as grounded in a shared pre-political national culture (Kymlicka 1995; Miller 1995) whereas constitutional patriotism dismisses the idea of a pre-political basis and refers to a shared commitment to liberal-democratic principles embodied in the constitution (Müller 2007; Shabani 2006; Habermas 2001b). In the national account, national identity is conceived as being important to individuals and worthy of political protection. The understanding of constitutional patriotism, on the other hand, does not argue for the protection of a national identity but only for fundamental political principles. This means that exclusion has to be justified by general principles of democracy or public order rather than on the basis of culture. Furthermore, nationalist theories consider the nation-state to be the best-suited unit to provide certain important liberal goods, such as distributive justice and deliberation.

In order to determine which kind of cohesion is the relevant one for the demos, I will discuss the concepts of a) national or cultural cohesion, b) cohesion as solidarity and c) constitutional patriotism or political cohesion as the ties which bind the demos together. Under national cohesion, I will mainly address the general national understanding of the demos and not specifically its liberal version. This is because the pre-political foundation remains the same and, even though liberal nationalism reduces illiberal tendencies, the exclusion is still based on the idea of a pre-political nation.

a) National or Cultural Cohesion

In national theories, some kind of collective identity is regarded as a precondition for a legitimate democratic polity. This collective can be understood as being determined by the shared characteristics of the members. According to Whelan, the nationalist understanding starts from nations[15] as given by nature or by history, which then give rise to the claim of independent statehood and self-government (Whelan 1983, 28–29). In this theory, the relation between ethnos and demos or nation and state leads unidirectionally from one to the other.[16] The ethnos is understood as a pre-political unit, defined in racial, ethnic, cultural or religious terms.[17] In contrast, the demos, as political subject, consists of its citizens, meaning it is the political people of a polity. As early as in Aristotle's *Politics*, the demos refers to the citizens, who are defined through active participation in governing (Aristotle 1985, 87 1275a20). In the following, I will discuss whether the definition of the demos according to a pre-political nation gives theoretical guidance for the legitimate constitution of the demos and whether it fulfils liberal-democratic criteria.

Several authors have argued for the necessity of nations as the basis of democracies. For example, Mill states: "Where the sentiment of nationality exists in any force, there is a *prima facie* case for uniting all the members of the nationality under the same government, and a government to themselves apart. This is merely to say that the question of government ought to be decided by the governed" (Mill 1861, 230). Carl Schmitt makes an even stronger claim by identifying a "homogeneous" people, sharing a culture and identity, as a presumption for democracy (Schmitt 1926, 14). Taking this question to the transnational level, Dieter Grimm argues that Europe-wide democracy can only be acceptable with a homogenous European people as a basis (Grimm 1995, 295–96).[18] In this understanding, cohesion is defined in pre-political terms, which then builds the basis for the political unit appropriate for democracy. However, as Whelan points out, the interpretation of nationalism on the grounds of democratic theory – which Mill implies by saying that government should be decided by the governed – is not coherent (Whelan 1983, 29). Either the definition is circular, since who is governed has to be decided before they can decide democratically, or the nation offers a solution for how to set the borders, but then this is not a democratic solution to the boundary problem. In this version, democracy is restricted to the domain of a given people, which itself is not constituted democratically (Whelan 1983, 31).

Another theoretical problem of nationalist theory that Whelan points out is its claim that nations are prior to and independent of states. National identities are often deliberately invented and

15 In the following, "nation" is used to specify a group with a common cultural identity, not necessarily the people of a nation-state.

16 For a more detailed taxonomy of the logic and the scope of identity-formation, see Cederman (2001). I refer to the two understandings of national and political cohesion relatively broadly in the way Cederman (2001) defines "ethno-nationalism" and "post-nationalism."

17 Miller tries to distinguish nationality from both ethnicity and the state (Miller 1988, 656–58). For me, however, the normative significance of nationality seems to be based on one of the two. The collapse into a pre-political basis of legitimation is highly problematic (cf. Abizadeh 2012).

18 However, Grimm dissociates himself from Schmitt's understanding of a people and understands it in social terms. For a specific discussion, see Habermas (1998, 155–61).

promoted by political leaders (Whelan 1983, 33). In this sense, nationality is not naturally given and pre-political but socially and politically constructed, and therefore cannot give prior guidance for the boundaries of political communities. A nation is not a static entity as it is always related to political processes. Even if a constitution of the demos on the basis of naturally and historically given national units using criteria such as language, cultural practice or shared memories were possible, it would be highly problematic as it leads to the political protection of national identities and therefore to the exclusion of others for reasons that are not defendable on the grounds of equality. This means that exclusion is made on politically arbitrary grounds. The constitution of the people in accordance with an already existing nation is therefore illegitimate.

b) Cohesion as Solidarity

Even if the ethno-cultural concept of the nation cannot give guidance for the legitimate boundaries of the demos, it points to something necessary for democracy, which is cohesion as solidarity. The concept of social cohesion or solidarity is crucial for democracy if it is meant to guarantee social justice and deliberation. A feeling of common belonging is conducive to the democratic process: on the one hand for deliberation, which includes listening to others' arguments and taking their position seriously, and, on the other hand, for the acceptance of decisions one did not support (loser consent) and decisions which advantage others (redistribution). This is where liberal nationalism has a strong point. The basic idea of liberal nationalism is to realise the interest in collective identity but also to provide trust, stability and reciprocity, which are necessary in democratic politics (Miller 1995; Kymlicka 1995). The point Mill makes about nationality as a feeling of belonging together seems to be more directed at these favorable conditions of democracy than at a given identity as a precondition. "Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist" (Mill 1861, 230). So a certain amount of solidarity is necessary for the democratic process.

However, it is not necessary that the cohesion connecting the demos is pre-political. It could also be realised through a solidarity that is generated in social networks. Shared interests, interpersonal networks or other forms of integration also have to be recognised as sources of solidarity, indicating that identities can emerge even across borders. If cohesion is not understood as a national identity based on a fixed set of commonalities or shared history, but rather as solidarity, the question arises of how it is created. As Calhoun (2003) points out, social solidarity, which creates a group identity, can be formed on multiple grounds: first, by forms of integration like markets; second, by a shared culture and categorical identities like race, ethnicity, class or nation; and third, by networks through interpersonal relations. He also underlines the importance of public discourse as a source of social solidarity. "Groups are created not just found and the forms of group life are at least potentially open to choice" (Calhoun 2003, 98). This means that institutions and processes such as public discourse can influence solidarity and therefore identity formation in a group. This understanding of identity as solidarity addresses democracy's need for cooperation that is not based on an illusory, fixed and pre-political concept of identity.

This also applies for the solidarity necessary for the demos, which can develop within institutions. For example, Archibugi states: "To think that the *demos* is independent from institutions is equal to thinking that the *demos* could ever be independent from history" (Archibugi 2004, 461). He also suggests an understanding of solidarity which is not primarily based on political terms. He claims that solidarity can extend beyond the borders of nation-states. He sees an expression of a "feeling of belonging to the planet" in the ongoing creation of non-governmental organisations and global movements (Archibugi 2004). Solidarity can create groups across borders according to communalities and interests.

For Habermas (1998), who has analysed the relation between nation and state in detail, the nation-state, which dominates the actual political landscape, combines an imaginary cultural nation and political citizenship. While the state as internal and external sovereign state power, referring to a clearly delimited territory and to all citizens, was used to define the citizens only as subordinate to the political system, the nation referred to a community connected through common ancestry. Through the combination of both nation and state, a new double role of citizenship with a political-legal and cultural aspect resulted. "Democratic participation, as it slowly became established, generated a new level of legally mediated *solidarity* via the status of citizenship while providing the state with a secular source of *legitimation*" (Habermas 1998, 112). This political transformation, which enables political autonomy through an order legitimated in free opinion-formation, would not have been strong enough without the motivating force of the idea of the nation. So the nation-state on the one hand includes a natural pre-political unit which is allowed to defend its independence by force or, on the other hand, is based, in legal terms, on the status of citizen, which leads to public autonomy in a cosmopolitan understanding, compatible with cooperation with others (Habermas 1998, 114). A political understanding of the demos is only based on the latter. However, Calhoun objects to this view saying that it is unlikely that solidarity is purely a matter of choice and that the nation of citizens can replace the cultural nation, as Habermas suggests. In his opinion, the political concept of the person has two weaknesses: first, solidarity outside of political structures is underestimated and, second, it requires too much participation (Calhoun 2003, 100). In order to consider these problems and the responses to them, I will discuss the political concept of cohesion in more detail in the next section.

c) Constitutional Patriotism or Political Cohesion

As addressed above, different authors claim that cohesion, understood as a fluid rather than a fixed concept, might also result from interaction with political structures. The concept of political cohesion tries to preserve the stabilising forces of cohesion which are necessary for democracy, but builds them on the basis of the equal recognition of shared citizenship. Constitutional patriotism shares this interactive understanding of the demos. According to Cronin, it is a "postnational form of political identification and attachment for pluralistic societies" (2003, 3). This identification evolves around the norms, values and procedures of liberal democracy. In the idea of constitutional patriotism as outlined by Habermas and others (Habermas 1998; Habermas 2001b; Cronin 2003; Müller 2007),

the cohesion of the demos relies on a shared sense of democratic values, which are represented in the constitution, rather than on a common history or ethnic origin.

In such a political understanding of the demos, it is possible to decouple nationality and membership in the demos as membership is based on the acceptance of the rights and duties of citizenship (e.g. Weiler, Haltern, and Mayer 1995). The theory of constitutional patriotism puts a specific emphasis on the relationship of citizens institutionalised in the constitution. This is clearly outlined in Utzinger's concept of political identity, which he defines as a specific kind of social collective identity that develops within the framework of social institutions with a politically relevant function (Utzinger 2009, 126). By establishing stable norms and roles, institutions define what sort of behaviour can be expected from other members of society. Political institutions are public bodies determined to regulate certain activities which apply to the whole population. According to Utzinger, it is citizenship that is the basis for identification through three dimensions: *functionally,* it designates full membership in a society; *substantively,* it is a legal status; and *affectively,* it establishes a relation between individual and state, so that a feeling of belonging to the polity develops (Utzinger 2009, 151). Above all, citizenship plays the dominant role in political identification, since identification is functional and citizenship guarantees access to fundamental resources such as security, autonomy and recognition (Utzinger 2009, 158).

Generally, constitutional patriotism describes governmental institutions and the cohesion of the demos as mutually reproductive as opposed to the fixed units of national theories. This seems to be a more accurate understanding of the actual relationship between political institutions and the demos. Another theoretical advantage of the political conception of the demos is that the politically protected cohesion is not a cultural one. This means that the potential exclusionary effects are not in violation of political equality as they are based on democratic political requirements. Furthermore, the conception of political cohesion is not only applicable to multicultural states, but also to the supranational level (Habermas 1998; Shabani 2006; Müller 2007; Lacroix 2009).

However, constitutional patriotism has been criticised for several reasons. First, it has been described as too thin and too abstract of a conception to be accessible for normal citizens and to create any kind of affection. Therefore, it always has to rely on a pre-political nation (Böckenförde 1991). Second, the reference to universal principles does not explain a binding force towards specific constitutions or states. Finally, the conception has been accused of being even more exclusionary than national liberalism because its high degree of abstraction might lead to an elitist effect.

To the first point, Müller (2007) replies that Habermas' description of constitutional patriotism as post-national should be better understood as post-nationalistic because the cultural background of traditions is not neglected but transformed (Cronin 2003). According to Habermas, democracy and human rights have to be acquired against the background of a specific history and culture. Yet – and this is relevant for the second point – in this conception, traditions are subject to a critical public

discussion. It enables the citizens to criticise their institutions, since these never perfectly match the constitutional principles. Furthermore, this constitutional culture is restricted to the political realm. Regarding the third point, the exclusiveness of constitutional patriotism, Müller argues that this does not create a hostile us-them-opposition but establishes an internal reference point for a specific way of treating each other, which refers to political values (Müller 2007, 48). In this sense, it is not the source of strong social solidarity, but of civic cohesion which denotes political trust among citizens and is therefore stabilising. However, as Müller also points out, since constitutional patriotism is always based on an existing polity, it cannot define territorial borders.

In summary, neither the national nor the political understanding of cohesion can be used as a normative criterion to legitimately determine the borders of the demos. The latter is dependent on an existing polity with a constitution and therefore is not a theory to determine membership borders. The former is based on a fixed, pre-politically given identity, which leads to the illiberal exclusion of foreigners as unequals. Or, as Abizadeh (2012) puts it, cultural nationalism necessarily collapses into ethnic nationalism. However, as the democratic function of the demos requires some cohesion, this necessary cohesion can be understood as an exclusion principle for the demos, counteracting the inclusive tendency of the normative principles. Yet, because the legitimacy of this restriction is based on the democratic function of the demos, only a minimal political cohesion, not a thick cultural one, can be defended. As outlined above, political cohesion always presupposes an existing polity. Therefore, political cohesion as a restriction principle cannot be a constitutional principle but is only applicable to existing demoi.

III Procedural Reconstitution of the Demos

As has been shown in the first and second parts of this paper, it is not possible to initially constitute the demos in a legitimate way. Thus, the reconstitution of a presupposed demos remains the only option for a normative substantive concept of the demos. I will hence use this part to discuss the possibility of reconstituting an already existing demos in a legitimate way. To start from a given demos should here not mean giving up the normative demands regarding the demos. This "turn to history," as Näsström calls it, "does not seem to make the demands for legitimacy fade away, and particularly not today" (Näsström 2007, 633).

In the first section, I will outline the concept of a procedural demos (cf. Espejo 2011; Michelman 1999a; Habermas 1996; Hart 1994). In this understanding, the demos is not constituted in a single act, rather it has to be continually developed in the democratic process. This means that the demos is not a substantial singularity based on pre-political grounds. But according to which criteria or principles should the demos be reconstituted? In the second section, I will suggest the all-affected principle and the democratic functionality as the two guiding principles for the legitimate composition of the demos. Nevertheless, these two tendencies of inclusion and exclusion can only be balanced in the democratic process.

a) Procedural Understanding of the Demos

The question of how or under which circumstances the demos gains its legitimacy is taken up by a *procedural* understanding of the demos. Here, the sovereignty of a people refers to the democratic self-legislation process, not to a given people. Since this concept draws heavily on the legal constitution, it has been elaborated in constitutional theory by law scholars (Michelman 1999b; Michelman 1999a; Michelman 1988; Hart 1994). As Hart (1994) puts it, normatively the demos conceived as the sovereign political authority is, at first, based on a constitutional rule. This rule is constructed and re-enacted via the political and social processes which it initiates. Since this account puts the emphasis on the recurrent character of the people through democratic procedures, it can resolve the problem of the initial constitution of the demos, as Espejo (2011, 170–95) has most clearly outlined.

This conception is reflected in Michelman (1999b) and Habermas' (2001b) understanding of constitutional democracy as paradoxical. On the one hand, the constitution fixes the fundamental laws and, in turn, the rights of political participation. On the other hand, it is also important that these rights can be changed and re-interpreted. Therefore, it is the ongoing process and not the people's agreement to the actual text at its initiation that is essential. The people should then be understood as having a recurrent and not a fixed character. For Habermas, the sovereignty of the people emerges in the process of self-legislation through the mutual recognition of the citizens as free and equal in the system of rights. The legitimating force is based on the communication and agreement of all members. In Habermas' account, this does not rely on an actual agreement but a hypothetical one. Human rights and the democratic process are "co-originally" founded in communicative reason and therefore the account avoids falling into constitutional paternalism (Habermas 1996).[19] The highest authority of legislation by the people is based on a legal rule and on the process of its re-enactment. In this sense, the people is at first a hypothesis and its sovereignty is only constituted over the democratic process (Hart 1994, 50–74).

In this conception of dynamic constitutionalism, the demos as a democratic agent can only exist if it has a constitution that specifies who makes up the demos, how the political process is organised and what political participation entails. Espejo, however, criticises the concept of dynamic constitutionalism because it refers back to a unified people either in the past or the future (2011, 99). She defines a people as "an unfolding series of events coordinated by the practices of constituting, governing, and changing a set of institutions" (Espejo 2011, 172). This means that a people has no unified will, but is a series of events.

In this procedural understanding as well, however, there is no defined group that can initially enact the constitution in the name of the people. In regards to the procedural conception, Espejo argues that this is not a problem because if we understand the people as constituted by political events and not as a collection of individuals, it can create and rule itself. In terms of the normative aspect of who should be included, however, Espejo admits that the people as a process is first and foremost a descriptive concept. Nevertheless, she argues that it "can be legitimised from the standpoint of the future" (2011, 176) since the criterion of exclusion can be adapted over time. But this procedural understanding relativizes the normative standing of the people: a sovereign people is not by definition right. In my opinion, this captures the dependence of the legitimacy of the demos on a guarantee of freedom and equality through basic right. This means that for the demos to be a genuinely democratic agent, it needs to constitute itself over and over again. I will discuss which criteria might be relevant to define such a procedural demos as legitimate in the next section.

b) Criteria for the Reconstitution

Goodin critically considers the option of the democratisation or "bootstrapping" of a presupposed demos (2007, 44–46). He argues that if the democratic process itself reconstitutes the demos, it does not matter with which demos we start. Furthermore, he questions whether the democratic process itself leads to the legitimate demos in any case. For example, a demos of men would not necessarily extend membership to women. This is right in that there are no pre-political grounds from which to judge the composition of the demos. Goodin argues that it is not possible to know whether the demos is reconstituted in the right way if it is not clear how to constitute the demos in the first place. In his opinion, it is therefore unclear whether the inclusionary tendency should be judged as an improvement. There would have to be independent normative reasons to assess the reconstitution of the demos but, for him, this leads back to the problem of constituting the demos in the first place, as the ultimate references are the democratic decisions of the demos itself.

I agree with Goodin that understanding the demos as a process does not in itself solve the problem of its normativity. This holds for the procedural understanding of the demos as well because it remains important who can participate in the events that constitute the people. I would therefore argue that the initial demos can never be legitimate. Owen argues that at the first stage of solving the boundary problem the interlinked interest principle defines a pre-political demos "that has the right to determine whether to constitute a structure of impartial governance and, if so, what kind of structure of impartial governance whether, say, to constitute a polity" (Owen 2012, 143). In the second state only those who consent become members of the political demos. As I have discussed in section 1b, the interlinked principle can however not legitimate the constitution of an initial demos because the interlinked interests are in my opinion depend on a political structure. Rather, the fact that no initial demos is legitimate should not be understood as democratically problematic.

For the legitimacy of the demos, it does not make a difference where we start, but rather how the process evolves. There also cannot be a criterion by means of which to judge the initial demos. Näsström, however, draws attention to the difference between democratic and historical contingency. She indicates that while a fully legitimate demos is impossible to achieve, the gap opened up by the boundary problem is of democratic significance as it turns the legitimate constitution of the demos into an issue of ongoing contestation. Näsström states that the "constitution of the people is not a historic event. It is an ongoing claim that we make" (Näsström 2007, 645).

---

19 For the democratic process, some basic conditions of communication seem to be necessary too. But this does not mean that the demos has to be restricted to a single language, as the democratic functionality of Switzerland shows. However, in a dispersed public sphere, the different language groups still need to be connected and mutually accessible.

Yet, can the process be judged by any standards? If one understands democracy not just as a process for decision making but also as an ideal defined through underlying normative values (e.g. Miller 2009; Christiano 2008), democracy cannot be reduced to its procedures. It seems plausible to think of these democratic ideals as freedom and equality. Christiano (2008) calls this public equality and Miller (2009) understands such independent criteria as founded in the democratic ideal of equal participation. On this basis, one can argue that the demos can be criticised and justified on the basis of these ideals. Espejo argues that there are no independent normative standards, but that equality and freedom are always dependent on individual experiences in the democratic process (2011, 188). In my opinion, these standards are not independent of democracy as they define democracy; however, they cannot be justified by or reduced to the democratic procedure. To put it differently, the value of equal individual freedom holds independent of its acceptance in a majority vote. These "independent" ideals are crucial because without them there is no way of judging the demos and it collapses into a purely descriptive term. But one has to keep in mind that this is not possible for the legitimation of the initial demos, but for its reconstitution.

Miller distinguishes two normative tendencies, inclusion and exclusion, relevant for the constitution of the people. In Miller's opinion, the problem with the question of the domain of democracy or the legitimacy of the demos is that democratic theory gives ambivalent answers. On the one hand, radical democracy, which focuses on collective self-determination and on the cohesion of the demos, is drawn to an exclusionary tendency. On the other hand, liberal democracy, in which the outcome is evaluated based on its impact on individuals and groups in- and outside of its constituency, is drawn to an inclusionary tendency. Both schools, however, face inclusionary and exclusionary pressures (Miller, 2009).

Following the analysis of the first two parts of this paper, these tendencies can be understood as the normative pressure of inclusion due to the all-affected principle as the critical standard, and the pressure of exclusion based on the functionality of the demos. I agree with Miller's point that democracy – and with it, the demos – is not just a procedure but is based on a normative ideal. I consider equal freedom to be the guiding ideal of democracy, which translates exactly into these two tendencies. These tendencies can therefore be understood as criteria for the reconstitution of the demos. However, Miller leaves the question of how these criteria should be weighed against each other unanswered.

In order to know how these conflicting pressures should be balanced, it is crucial to discuss which normative value should be assigned to them. First, as was shown in the first part of this paper, the all-affected principle cannot define the initial boundaries of a legitimate demos. As Abizadeh (2012, 874) points out, democratic theory is a self-referential theory of legitimacy which combines the questions of legitimacy and boundaries. Therefore, the demos must be specified for the function of democracy but it is inherently unbounded.[20] The all-affected principle and the thesis that the demos is generally unbounded are equivalent to what I have called the principle of

inclusion. It should be regarded as the main criterion for the critical evaluation of the legitimacy of the demos in its reconstitution. This inclusionary principle demands both internally and externally expanded inclusion in the demos. Internal inclusion means giving participation rights to all adults living permanently in the territory of a state. External inclusion means the protection of all individual interests that are affected by the decisions of the demos whose consequences reach beyond the state.

On the one hand, since we are now discussing the re-constitution of the demos and not its initial foundation, the all-subjected principle can be applied without internal contradiction because we can presuppose a jurisdiction. This means that all subjected to the jurisdiction of a polity should be included in its demos.[21] A strong claim can be made for this internal inclusion. In this case inclusion must, therefore, be granted through equal rights in democratic decision-making, not just through consideration. If this is not the case, the demos can be deemed illegitimate. On the other hand, because the process of legitimation starts from a specific demos, the inclusion principle on its more general level as a critical standard against which to question every demos still has to be considered in the democratic process. In other words, because democratic theory accepts that there is no pre-political foundation of the demos, it has to take into account everyone's claim to be included. As Goodin remarks, any given decision is highly likely to affect the interests of some who are not included in the demos, especially considering the increasing interconnection of territorial units (2007, 62–63). Consequently, this leads to the interpretation of the all-affected principle as a critical standard demanding the extension or opening up of any demos. In this sense, the all-affected principle should be understood as guidance for the critical reconstitution and for the extension of inclusion in either participation or deliberation rights. This does not mean that this standard can ever be fully met, however it can be approximated by adapting the issues that are decided on (scope of decision-making) and the deciding demos (domain of inclusion) to each other.[22] Miller (2009) only accepts the request for internal inclusion but rejects the second more general understanding of the all-affected principle in order to preserve independent demoi. However, this is problematic because it gives up the critical perspective on the demos that is necessary for its reconstitution. Instead, he bases it on a form of nationalism that is not defendable, as I have set out in the second part.

Second, as discussed in the second part, the functionality of the demos to take democratic decisions and the necessary cohesion for this ability can be understood as an exclusion principle. Here, cohesion is understood as an instrumental value necessary for the democratic performance of the demos. However, two constraints apply to this exclusion principle in regards to its normative importance. First, because it is an instrumental concern, it should only be used to restrict inclusion in the demos if the possibility for everyone to exercise democratic participation is threatened. Or, like Carens (1987, 259) following Rawls (1971, 212-13) puts it, such a public security argument should be used exclusively to restrict liberty for the sake of

20 According to Abizadeh (2012), the unbounded demos thesis has two consequences: First, global democratic arrangements are desirable and, second, the legitimacy of boundaries relies ultimately on their justification to members and non-members.

21 What this means in detail has to be elaborated further but it surely includes long-term residents.
22 This adaptation could mean on the one hand, that the decision should be limited so that it only affects those who participate in the decision-making or, on the other hand, that the demos has to be extended if an issue regularly affects people who are not included.

liberty. Second, a fixed ethno-cultural basis of cohesion remains incompatible with political equality. Therefore, only a thin political understanding of cohesion can serve as the basis for the legitimate delimitation of the demos. The general claim of the all-affected principle can only be rejected if it is a clear and immediate threat to the democratic function of the demos, and only on the basis of political cohesion.

A further restriction that counteracts the principle of inclusion is what I have discussed under interlinked interests or what others have called "equal stakes" or "common world" (e.g. Christiano 2006, 86). It states that the appropriateness of democratic decision-making is dependent on a common set of interests. If the way in which a demos affects outsiders is restricted to one specific issue, it might be enough to include the affected in the decision-making concerning this issue and not for the whole range of democratic decisions. The full inclusion of the affected in the demos would actually violate the rights of the members of the demos because they would then be subject to the decisions of others who are not affected by most of the decisions. In general, external inclusion could also be fulfilled through other forms of consideration than equal voting rights (e.g. Miller 2009, 223–24; 2011, 137–39).

However, the hard case that has to be considered is the border regime. Is the restriction of closed borders touching on enough issues in the lives of the excluded to make it a case for full democratic inclusion? This is a difficult decision to make because closed borders are not only coercive but also profoundly influence the lives of the excluded on a wide set of issues. On the other hand, the absolute dissolving of borders would not lead to a functional demoi. Therefore, the implications of the inclusion principle are not as strong as in the internal case but are more demanding then the external case that concerns just one issue. The solution might be either open borders in terms of migration and then political inclusion for long-term residents, or the formation of impartial institutions on the international level. A global democracy, however, is not necessarily required, first of all because it would likely be problematic to the democratic functionality of the demos in terms of citizen participation and, secondly, because forcing democratic states into such a structure would violate the political autonomy of their individual members and jeopardise the only democratic institutions that we have. [23]

Conclusion

Democracy as a decision-making procedure needs a clearly defined demos but, as has been shown, it is not possible to initially constitute the demos in a legitimate way. On the one hand, all normative principles discussed are either based on an already existing demos or lead to an infinity problem and are better understood as a critical standard for the demos' legitimacy. On the other hand, cohesion as a means of determining the demos is only applicable as an exclusion criterion in the sense of political cohesion, which is directed at democratic functionality. So, the reconstitution of a presupposed demos remains the only option for a normative substantive concept of the demos.

This leads to the conclusion that the legitimation of the demos is only possible in the democratic process itself. This means that the legitimacy of the demos has to be critically revised and discussed over and over again. The two principles of inclusion and exclusion can be understood as independent normative standards of equality and freedom, but can of course only be applied in the democratic process itself. There, the principle of inclusion should to be given first priority. It should only be restricted through reasons of democratic functionality, which should only rely on political and not cultural cohesion. This means that the self-constitutional process by which the demos constitutes itself constantly has to include both principles and weigh them against each other. In this sense, a demos is never fully legitimate but, in the best case, striving for legitimacy.

In consequence, the people is not necessarily right in its decisions, not under all circumstances, and especially not in regards to decisions over the exclusion of others. It is particularly limited through human rights and externalities of the decision. However, even if we evaluate the legitimacy of the demos from the ideal of equal freedom for external inclusion, its decisions should still be accepted. What is important is that the understanding of the people as a process and the all-affected principle are taken into account in the democratic process itself. Essentially, the demos has to be aware that its legitimacy is not absolute. This leads to a new understanding of self-determination which is not a unilateral right.

The result seems to be an inconsistency or even contradiction in democratic theory since the legitimacy of democratic decisions is based on the demos while the demos itself has to be constantly legitimised through the democratic process. However, this restriction of the normative status of the people and its conception as essentially procedural should be perceived as an improvement to democratic theory (e.g. Espejo 2011, 182; Abizadeh 2012). Furthermore, it is not, in my opinion, a deficit of democratic theory that the demos cannot be initially defined in a legitimate way. The fact that the basis of democracy itself is subject to scrutiny reveals that democracy is at its core a process and, as Dahl has already noted, that the demos is itself a political question.

References

Abizadeh, Arash. 2008. "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders." *Political Theory* 36 (1) (February): 37–65. doi:10.1177/0090591707310090.

Abizadeh, Arash. 2010. "Democratic Legitimacy and State Coercion: A Reply to David Miller." *Political Theory* 38 (1): 121–130.

Abizadeh, Arash. 2012. "On the Demos and Its Kin: Nationalism, Democracy, and the Boundary Problem." *American Political Science Review* 106 (November): 867–882. doi:10.1017/S0003055412000421.

Archibugi, Daniele. 2004. "Cosmopolitan Democracy and Its Critics: A Review." *European Journal of International Relations* 10 (3) (September 1): 437–473.

---

23 For arguments for and against a global democratic structure on the basis of the legitimacy of the demos, see Abizadeh (2012) and Christiano (2006).

doi:10.1177/1354066104045543.

Aristotle. 1985. *The Politics*. Translated by Lord Carnes. Paperback edition. Chicago: University of Chicago Press.

Arrhenius, Gustaf. 2005. "The Boundary Problem in Democratic Theory." *Democracy Unbound: Basic Explorations I, Stockholm: Filosofiska Institutionen, Stockholms Universitet*: 14–29.

Besson, Samantha. 2006. "Deliberative Demoi-cracy in the European Union: Towards the Deterritorialization of Democracy." In *Deliberative Democracy and Its Discontents*, edited by Samantha Besson and José Luis Martí, 181–214.

Böckenförde, Ernst-Wolfgang. 1991. *State, Society and Liberty: Studies in Political Theory and Constitutional Law*. Berg New York.

Bosniak, Linda S. 2006. *The Citizen and the Alien: Dilemmas of Contemporary Membership*. Princeton University Press.

Calhoun, Craig. 2003. "The Class Consciousness of Frequent Travellers: Toward a Critique of Actually Existing Cosmopolitanism." In *Debating Cosmopolitics*, edited by Daniele Archibugi, 86–116.

Carens, Joseph H. 1987. "Aliens and Citizens: The Case for Open Borders." *The Review of Politics* 49 (02): 251–273.

Carens, Joseph H 2000. *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness*. Oxford University Press.

Cederman, Lars-Erik. 2001. "Nationalism and Bounded Integration: What It Would Take to Construct a European Demos." *European Journal of International Relations* 7 (2) (June): 139–174. doi:10.1177/1354066101007002001.

Cheneval, Francis. 2006. "The People in Deliberative Democracy." In *Deliberative Democracy and Its Discontents*, edited by Samantha Besson and José Luis Martí, 159–179. Aldershot: Ashgate.

Cheneval, Francis. 2011. *The Government of the Peoples: On The Idea and Principles of Multilateral Democracy*. New York: Palgrave Macmillan.

Christiano, Thomas. 2006. "A Democratic Theory of Territory and Some Puzzles About Global Democracy." *Journal of Political Philosophy* 37 (1): 81–107.

Christiano, Thomas. 2008. *The Constitution of Equality: Democratic Authority and Its Limits*. Oxford; New York: Oxford University Press.

Cohen, Jean L. 1999. "Changing Paradigms of Citizenship and the Exclusiveness of the Demos." *International Sociology* 14 (3): 245 –268. doi:10.1177/0268580999014003002.

Cronin, Ciaran. 2003. "Democracy and Collective Identity: In

Defence of Constitutional Patriotism." *European Journal of Philosophy* 11 (1) (April): 1–28. doi:10.1111/1468-0378.00172.

Dahl, Robert A. 1970. *After the Revolution? Authority in a Good Society*. New Haven, CT, and New York: Yale University Press.

Dahl, Robert A.1989. *Democracy and Its Critics*. New Haven: Yale University Press.

Espejo, Paulina Ochoa. 2011. *The Time of Popular Sovereignty: Process and the Democratic State*. Pennsylvania State University Press.

Franck, Thomas M. 1992. "The Emerging Right to Democratic Governance." *The American Journal of International Law* 86 (1): 41–91.

Galston, William A. 1991. *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State*. Cambridge University Press.

Goodin, Robert E. 2007. "Enfranchising All Affected Interests, and Its Alternatives."

Gould, Carol C. 2004. *Globalizing Democracy and Human Rights*. Cambridge: Cambridge University Press.

Gould, Carol C. 2006. "Self-Determination Beyond Sovereignty: Relating Transnational Democracy to Local Autonomy." *Journal of Social Philosophy* 37 (1): 44–60.

Grimm, Dieter. 1995. *Braucht Europa Eine Verfassung? Vortrag Gehalten in Der Carl Friedrich Von Siemens Stiftung Am 19. Januar 1994*. München: Carl Friedrich von Siemens Stiftung.

Habermas, Jürgen. 1996. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge Mass.: MIT Press.

Habermas, Jürgen 1998. *The Inclusion of the Other: Studies in Political Theory*. Cambridge Mass.: MIT Press.

Habermas, Jürgen 2001a. "Why Europe Needs a Constitution." *The Shape of New Europe*: 25–45.

Habermas, Jürgen 2001b. "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" *Political Theory* 29 (6) (December): 766–781. doi:10.1177/0090591701029006002.

Hart, Herbert L.A. 1994. *The Concept of Law: With a Postscript Edited by Penelope A. Bulloch and Joseph Raz*. Edited by Herbert L.A. Hart and Penelope A. Bulloch. Oxford: Clarendon Press.

Jennings, Ivor. 1956. *The Approach to Self-Government*. Cambridge: Cambridge University Press.

Kymlicka, Will. 1995. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Oxford University Press.

Kymlicka, Will, and Wayne Norman. 2000. "Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts." *Citizenship in Diverse Societies*: 1–41.

Lacroix, Justine. 2009. "Does Europe Need Common Values? Habermas Vs Habermas." *European Journal of Political Theory* 8 (2) (April): 141–156. doi:10.1177/1474885108100850.

List, Christian, and Mathias König-Archibugi. 2010. "Can There Be a Global Demos? An Agency-Based Approach." *Philosophy & Public Affairs* 38 (1): 76–110.

López-Guerra, Claudio. 2005. "Should Expatriates Vote?" *Journal of Political Philosophy* 13 (2): 216–234. doi:10.1111/j.1467-9760.2005.00221.x.

Marshall, Thomas H. 1950. "Citizenship and Social Class." In *Citizenship and Social Class and Other Essays*, edited by Thomas H. Marshall. Cambridge: Cambridge University Press.

Michelman, Frank I. 1988. "Law's Republic." *The Yale Law Journal* 97 (8) (July 1): 1493–1537. doi:10.2307/796539.

Michelman, Frank 1999a. *Brennan and Democracy*. Princeton: Princeton University Press. http://books.google.ch/books?hl=en&lr=&id=Kl7VT8RGXu8C&oi=fnd&pg=PP2&dq=michelman+brennan+and+democracy&ots=s4EzFJWswx&sig=mIgHgCnF3J-B_QxP9E3_qTb-iEM.

Michelman, Frank 1999b. "Constitutional Authorship by the People." *Notre Dame Law Review* 74: 1605–1629.
Mill, John Stuart. 1861. *Considerations on Representative Government*. Indianapolis: Bobbs-Merrill.

Miller, David. 1988. "The Ethical Significance of Nationality." *Ethics* 98 (4): 647–662.

Miller, David. 1995. *On Nationality*. Oxford: Clarendon Press.

Miller, David. 2009. "Democracy's Domain." *Philosophy & Public Affairs* 37 (3): 201–228.

Miller, David. 2010. "Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh." *Political Theory* 38 (1) (February 1): 111–120. doi:10.1177/0090591709348194.

Müller, Jan-Werner. 2007. *Constitutional Patriotism*. Princeton University Press.

Näsström, Sofia. 2007. "The Legitimacy of the People." *Political Theory* 35 (5) (October): 624–658. doi:10.1177/0090591707304951.

Nozick, Robert. 1974. *Anarchy, State, and Utopia*. Basic Books. http://books.google.ch/books?hl=en&lr=&id=hAi3CdjXlQsC&oi=fnd&pg=PR9&dq=Robert+Nozick,+Anarchy,+State+and+Utopia+(&ots=OGm6s6nljF&sig=gpX36MsXSiREr4qyaL9bobqCNqM.

Owen, David. 2011. "Transnational Citizenship and the Democratic State: Modes of Membership and Voting Rights." *Critical Review of International Social and Political Philosophy* 14 (5): 641–663. doi:10.1080/13698230.2011.617123.

Owen, David. 2012. "Constituting the Polity, Constituting the Demos." *Ethics and Global Politics* 5 (3) (May): 129–152.

Rawls, John. 1971. *A Theory of Justice*. Cambridge, Mass: Belknap Press of Harvard University Press.

Schmitt, Carl. 1926. *Die Geistesgeschichtliche Lage Des Heutigen Parlamentarismus*. Zweite Auflage. München: Duncker & Humblot.

Schumpeter, Joseph. 2006. *Capitalism, Socialism and Democracy*. Routledge.

Shabani, Omid P. 2006. "Constitutional Patriotism as a Model of Postnational Political Association: The Case of the EU." *Philosophy & Social Criticism* 32 (6) (September): 699–718. doi:10.1177/0191453706066976.

Tännsjö, Torbjörn. 2007. "Future People, the All Affected Principle, and the Limits of the Aggregation: Model of Democracy."

Utzinger, André. 2009. *Identities and Institutions Beyond the Nation State the Case of the Emerging European Polity*. Zurich.

Walzer, Michael. 1983. *Spheres of Justice: A Defense of Pluralism and Equality*. Basic Books.

Warren, Mark E. 2006. "Democracy and the State." In *The Oxford Handbook of Political Theory*, edited by John S. Dryzek, Bonnie Honig, and Anne Philips, 382–399. Oxford University Press.

Weiler, Joseph H.H., Ulrich Haltern, and Franz Mayer. 1995. "European Democracy and Its Critique: Five Uneasy Pieces." *European University Institute, Florence Robert Schuman Centre*.

Whelan, Frederick G. 1983. "Prologue: Democratic Theory and the Boundary Problem." In *Nomos XXV: Liberal Democracy*, 13–47. New York: New York University Press.