

# **Autonomous Agency, Self-Determination, and the Argument for a Right to Exclude**

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## **Abstract**

In this thesis it is argued whether or not the right to exclude can be part of the right to self-determination, conceived of as a right to self-governance. There are three questions central to the inquiry into self-determination: 'what is it?', 'who has it?' and 'why is it important?'. The first part of the thesis argues that a right self-determination is granted to legal states for their ability to ensure and provide their citizens with autonomous agency. They do so by, amongst other things, providing citizens with (national) cultural identities and a shared identity of constitutional patriotism. The second part of the thesis continues the argument by stating that if the autonomous agency of citizens is threatened by immigration, the legal state can appeal to the right to exclude. Because this is a pro tanto right it can be outweighed by other reasons. Therefore, a cosmopolitan right to exclude is developed to strengthen the original argument for exclusion. Nevertheless, it is concluded that a broad right to exclude might have be to located elsewhere than in the right to self-determination.

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## Introduction

### Self-Determination and the Right to Exclude

In the past few years the concept of closed borders has become much more prominent in politics. Following the Syrian refugee crisis an increasing amount of countries in Europe have either closed their borders, are threatening to close their borders to refugees, or are at the very least looking at ways to limit the influx of refugees. Arguments given for this vary from the lack of proper processing facilities to the 'threat of Islam', a lack of space, high costs, and illegal immigration. Always already in the background of these arguments is the idea that states have the right to determine what they do with their borders. This on the surface simple idea is from the start complicated by the fact that many European states have made agreements on border policies. Why, then, should a state have a right to control what it does with its borders?

The self-determination thesis offers an answer to the above question. While the arguments for this thesis and its precise interpretation vary, the core concept is that states have a right to self-determination: a right to determine things for itself when it comes to matters concerning the governing of the state's territory. This right is often extended into the right to exclude: borders are part of a state's territory and states have a right to determine who can be part of the it. Although this sounds convincing and might appeal to our intuitions about what states are and do, these accounts are often criticized for their application of the concept of self-determination. Much has been written on self-determination, both favorably and less so, and the philosophical literature on this topic has been split in two camps: pro self-determination and anti self-determination. The first camp, those in favor of self-determination, is mostly concerned with why a state has a right to self-determination and why this right leads to the justification of closed borders. The second camps consists of anti self-determination writers criticizing self-determination or claiming that humanitarian concerns should override the right to self-determination. The trouble with this is that criticisms often only apply to one of the many 'why's' that different accounts of self- determination give, leaving alone other accounts of self-determination. Those in the second camp who are against a right to exclude also often outright dismiss arguments for self-determination, without looking critically at the concept of self-determination. Unfortunately, the concept of self-determination is often over-simplified; it is in fact a rather muddy concept. This makes it difficult to determine how strong the best case for self-determination is, and whether this best case can lead to exclusion of immigrants by closing the borders of a state.

In the current debate writers such as Joseph Carens, who sees self-determination as misleading, represent the second camp. The ideal of self-determination shields immigration and citizenship questions from moral scrutiny, and confuses the question of *who* ought to have authority with the question of whether a policy is morally acceptable (Carens, 2015, p. 6). Bas van der Vossen also criticizes the theory of self-determination, arguing that accounts of self-determination fail to incorporate certain desiderata that are necessary to explain: “how truly collective social processes can lead to legitimate moral variation between societies, in a way that does not posit groups or states as independent entities of moral value (Van der Vossen, 2016, p. 16).” He concludes that self-determination is capable of leading to moral variation, but that political states are not the sites of the requisite processes (Van der Vossen, 2016, p.31). Other writers, such as David Miller, belong in the first camp. Miller argues that national identity is important for the collective autonomy of a state, and the protection of this national identity requires self-determination. The right to exclude is for Miller a way to protect this national identity, and part of the right to self-determination. Michael Walzer on the other hand believes that admission and exclusion are crucial for the existence of justice within a community (Walzer, 2010, p. 62). This view is called bounded justice, in that there can be no justice if there is no spatial closure. For Walzer, justice requires separate spheres, and political communities are the best candidates for being these spheres. Distribution of membership in American society, and in any ongoing society, is a matter of political decision. Self-determination allows a community the right to determine who gets access to such a community and who does not because membership is such an important good, otherwise anyone can make insider claims. Yet another approach is found in the work of Christopher H. Wellman, for whom self-determination involves an argument on how group autonomy is an extension of personal autonomy and involves the right to freedom of association. What most of these arguments in favor of self-determination share is an emphasis on the importance of identity (cultural, political, national) and that this identity is constituted by being a member of a community (Gibney, 2004, p. 25).

There is also a third group of writers we can identify. Some of these authors subscribe to some form of self-determination but acknowledge that it is not without stringent qualifications. Examples of such authors are Avishai Margalit and Joseph Raz, who argue that the right to self-determination is neither absolute nor unconditional. Nevertheless, they believe that entrusting the decisions concerning self-determination to the group that counts as the majority of the population justified (Margalit & Raz, 1990, p. 461). There are also authors who argue in favor of a right to exclude without referring to the

right to self-determination, such as Thomas Christiano. His argument states that the modern liberal democratic state is crucial for ensuring global justice, and that it might be possible that there are scenarios in which the stability or functioning of the state is threatened by immigration (Christiano, 2008, p. 961). In addition some, such as Arash Abizadeh, believe that a state's unilateral control over borders must be democratically justified not just to citizens, but also to foreigners, something which a right to exclude based on a right to self-determination often fails to do (Abizadeh, 2008, p. 37).

What this short overview of the current debate makes clear is that different authors employ different arguments in their defense of self-determination and the right to exclude. In the light of this current debate, it thus seems worthwhile to first clarify the account of self-determination that is used before attempting to argue or conceive of a right to exclude based on self-determination. Doing so requires asking three, interdependent, questions of (the right to) self-determination: what is it, who has it, and why is it important? These questions that are central to this thesis, for they will lead to the answer of the research question: 'Is the right to exclude part of the right to self-determination, and what is the scope of this right?' Only when the three questions are satisfactorily answered it can be determined whether or not a right to exclude is part of self-determination and what the scope of this right is. In answering these three questions, this thesis will argue that the right to self-determination does include a right to exclude, but that this is a very minimal right that cannot serve as a right to discretionary entrance policies.<sup>1</sup>

### **Thesis Structure**

In the first part of this thesis, comprised of four chapters, an account of self-determination is developed that can answer the three questions named above: (1) What is self-determination? (2) Who has (a right to) self-determination? (3) Why is self-determination important? To understand why these questions are important, a short overview of the history of the concept of self-determination is given that will make clear why the third question (that of the importance of self-determination) is perhaps the most central question – for it influences the answers to the other questions. It will be argued that the value of self-determination lies in it being understood as self-governance, for then an argument is possible wherein self-determination is necessary to protect

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<sup>1</sup> Throughout this thesis a 'right' is understood as a legal entitlement to something (Wenar, 2015). When I speak of a state's right to self-determination I thus mean that the state is (legally) entitled to self-determination. What, exactly, this right means for any state depends on how the concept of self-determination in question is defined and how one further understands the term right (for example, whether a right is to be seen as unconditional or not).

something we value: autonomous agency. Autonomous agency is best protected in legal states (perhaps better known as 'rechtsstaten'), for these states ensure that their citizens are not only free in their choices, but also have a sufficient amount of positive freedom. These legal states need to be self-governing to ensure that this autonomous agency remains protected, and thus it needs to be self-determining. Two arguments that are comparable or related to this, the argument for national self-determination and constitutional patriotism, will then be discussed to strengthen the argument for self-determination. It will be argued that having access to a (national) cultural identity is not necessary for autonomous agency, but it does enhance it by providing citizens with a background upon which they can make their choices. Constitutional patriotism has the same enhancing function for it strengthens the positive freedom of citizens. Legal states thus offer a certain amount of autonomous agency, which can be enhanced via the existence of a national identity and/or constitutional patriotism. While this concept of self-determination comes with some limits, such as that it is self-regarding, there are possibilities for a right to exclude.

In the second part (chapters five, six, and seven) this right to exclude is explored. As it is part of the right to self-determination, the right to exclude will have to be related to the goal of self-determination: ensuring autonomous agency. Exclusion becomes a possibility when immigration threatens the autonomous agency of a legal state's citizens, directly or by being a threat to the constitution or stable functions of the legal state. Because the right to exclude is based in the right to self-determination, the same limits apply here. Thus, the right to exclude is a pro tanto right, and thus faces some outweighing reasons, such as the idea that we have some moral responsibility towards some immigrants if we have something to do with the reason of them having to flee their home country. It will become clear that these outweighing reasons pose a problem for the right to exclude, for if it can be outweighed, can it ever be successfully appealed to? To strengthen the right to exclude another argument is presented: the cosmopolitan argument. This argument states that legal states are critical for global development and global justice (which has consequences for the autonomous agency of individuals elsewhere in the world) and that a threat to the legal state is thus also a threat to long-term global goals. While this argument strengthens the case for the right to exclude, it will be concluded that a broader right to exclude – that is, a right to exclude that is not as limited by outweighing reasons or by its being related to self-determination and thus possibly easier and more feasible to appeal to – will be difficult to find if one wishes to locate it in the right to self-determination.

## **Part 1: The Argument for a Right to Self-Determination**

## **1. Three Central Questions Concerning Self-Determination**

It is hard to pinpoint what exactly a right to self-determination means or refers to. In the philosophical immigration debate, the right to self-determination is taken to mean something akin to a state's right to determine what happens within the borders of a state. This definition is rather problematic. One cause of concern is its vagueness; this description says next to nothing concerning what this right actually involves. It is therefore crucial to clarify the concept of self-determination before using it to argue for the right to exclude. There are three questions central to any account of self-determination. (1) What is self-determination? (2) Who has (a right to) self-determination? (3) Why is self-determination important? These questions are interdependent, for the answer to any one of these questions influences the answers to the other questions. This chapter will provide a preliminary inquiry into where answers to these questions can be found, starting with the question: what is self-determination?

### **1.1 What Is Self-Determination?**

An answer to the first question, 'what is self-determination?' should give an account of self-determination that goes beyond self-determination as a state's right to control what happens within its borders. Rather, it should tell us how it understands the term 'right' and what exactly this right to self-determination allows (and forbids) the state to do, going beyond the vagueness of 'control what happens within its borders'. Unsurprisingly, the answer to this question (and the other questions) will vary with each account of self-determination. Generally seen, there are two concepts of self-determination. One, that of self-determination as self-governance, which is what the concept of self-determination has historically meant and the above interpretation refers to. The other conception of self-determination sees self-determination as membership of a political community. The difference between these two forms of self-determination will become significant in the last chapter, and it is fruitful to keep the distinction in mind throughout the discussion on self-determination. Whatever differences there might be, all the different theories of self-determination share one thing: the historical roots of self-determination, which can perhaps help in understanding what self-determination was originally understood to be.

#### **1.1.1 The History of Self-Determination**

Before self-determination was applied to states and became the flagship of the proponents of the closed borders argument, it was used to describe the right of indigenous people wanting to claim back their colonized country. After the western colonization of (amongst other areas) Africa, the international

community was confronted with indigenous people fighting back for control over country or land. It is here, during and after the struggle in (former) colonies that the concept of self-determination becomes entrenched in international politics. The adoption of the International Covenant on Civil and Political Rights by the United Nations cements the concept of self-determination as a crucial player in civil and political rights. Signed party's committed to respect civil and political rights of individuals, among which are the right to life, freedom of assembly, electoral rights and the right to a fair trial. Whereas the majority of the covenant concerns individual rights, the covenant starts with the following Article:

- 1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- 2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
- 3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations (The United Nations General Assembly, 1966).

The description of the right to self-determination (section 1 of Article 1 of the International Covenant on Civil and Political Rights) strikes a resemblance with the definition given at the beginning of this chapter, and its answer to the question 'what is self-determination' is a bit less vague than the definition we employed earlier. Added to this it also tells us why we should care about self-determination: it gives indigenous people a right to be free of their colonizer/oppressor. However, the first sentence of the covenant itself is already troublesome, for it states that all *peoples* have a right to self-determination. But who, or what, is a people? What makes a group a people? The International Court of Justice has consistently offered the account that peoples are the indigenous populations colonized by Western European powers during the fifteenth to nineteenth centuries (Tesón, 2016, p. 2). This is not surprising, given the time during which the covenant was developed and

signed. While this interpretation of peoples had international support, it is rather unprincipled because it only allows some unjustly occupied populations to secede themselves from their occupier. It also raises the question whether *only* indigenous people have this right to self-determination. This problem has led to authors employing a broader definition of people, for example a nationalist one wherein a people is a nation, or one where people becomes substituted for state. But when the answer to ‘who has a right to self-determination?’ is changed, should not the answers to the other two questions change as well? If it is not to give indigenous people a right to be free from their colonizer, then why should we care about self-determination?

This short overview of historical self-determination shows that current accounts of self-determination cannot, without argument, keep intact the above answer to ‘what is self-determination’ while changing the answer to the other questions. To do so would be to disregard the historical situatedness of that particular usage of self-determination. Nevertheless, the definition of self-determination as given in Article 1 of the covenant is still a dominant answer to the question ‘what is self-determination?’ in current accounts of self-determination, even though the holder of this right is no longer thought to be peoples, but states.

### **1.1.2 Self-Determination as Sovereignty Within One’s Borders**

The account of historical self-determination answered the three questions concerning self-determination in light of indigenous, colonized, people. This led to self-determination being conceived of as a right that includes the freedom to determine one’s own political status and the freedom to free economic, social and cultural development. In current accounts of self-determination, the answer to the question ‘what is self-determination’ has not changed much, except for the switch from peoples to states. David Miller, for example, takes self-determination to mean “[t]he claim of a state to exercise sovereignty within its established borders [...]” (Miller, 1998, p. 63). Christopher Wellman’s understanding of self-determination is comparable: “A state is thought to be entitled to a sphere of group autonomy that includes all self-regarding matters” (Wellman & Cole, 2011, p. 15). This conception of what self-determination consists of has thus largely remained the same, although what exactly this sovereignty involves is not always the same with each account and the arguments for these accounts of self-determination differ.

If self-determination is conceived of as involving sovereignty over what goes on behind one’s borders, it should be explained or argued for *why* this sovereignty is needed, or why it is desirable. The answer to this question must

have something to do with the necessity or need for sovereignty over these internal affairs: there is something valuable in having the freedom to determine one's political status and economic/social/cultural/etcetera policy. Where this value is located will to a great extent determine the nature of the sovereignty involved in self-determination. It thus appears that the general answer to the question 'what is self-determination?' can only be specified by first answering the other two questions. It is here that the inquiry into self-determination truly begins: why is self-determination important? And whose borders are the topic of discussion here?

### **1.2 Why Is Self-Determination Important?**

If self-determination concerns (a degree of) sovereignty over what happens behind one's borders it can be asked why it is important that one has this sovereignty: why does self-determination matter? As discussed in the introduction, there are many answers to this question. Michael Walzer, for example, argues that self-determination matters because it is necessary for (global) justice (Walzer, 2010). There is one approach that I find especially promising, which is connecting self-determination to individual agency and personal autonomy<sup>2</sup>. This approach involves an argument on how self-determination is necessary for continuous existence of the legal state, which is in turn needed for the exercise of agency. The argument then becomes as follows: (1) because we value individual, autonomous, agency, which (2) requires the continuous existence of the legal state, we (3) should care about having self-determination. Particular arguments that take this shape will be discussed in chapter two and three, but before we do so it is important to look closer at the structure of an argument like this. Schematically, the argument takes the following shape.

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<sup>2</sup> In following the Stanford Encyclopedia article on personal autonomy (Buss, 2002) from hereon this will be referred to as 'autonomous agency'.



Figure 1: Autonomous Agency

### 1.2.1 Autonomous Agency

One of the central claims the above argument makes is that people care about having (autonomous) agency. But what does it mean for a person to have agency? And why is it important that we can ascribe agency to people? Very broadly described, agency refers to the capacity for acting, and an agent is someone with this capacity. An autonomous agent is an agent who acts on his own motives or reasons. There are numerous theories of agency that specify these broad definitions, but all ascribe, in one way or another, to the above (Schlosser, 2015). Without going into particulars concerning these different theories, why then should people care about being an autonomous agent? One reason is that autonomous agency is a barrier against paternalism, not just in the legal sphere but also in personal and informal spheres. In addition to this, it is necessary for being of equal political standing to others (Christman, 2003). Another (Kantian) sense in which autonomous agency is important lies in its making active agents of humans. Autonomous agents determine themselves by their own will, and are themselves the author of the laws they follow, making them not just passive means in nature's determined ends, but ends-in-themselves. This in turn means that they possess inherent dignity and thus deserve basic moral respect (Guyer, 2003, pp. 83–88). Yet another reason lies in the view that autonomy is a core feature of our well-being (Sumner, 2003), either by being intrinsic to it or by being a reliable road to well-being.

Summarized: for any chosen theory on agency and autonomy a reason can be found for why it should be valued. It is not necessary to agree with all these theories and their corresponding reasons for valuing autonomy and agency to

see that people, at least to a certain extent, place some value in being autonomous (agents). This does not necessarily mean that they acknowledge some theoretical view with a particular definition of autonomous agency. Rather it means that, generally seen, people value being able to make their own choices, whether this concerns what they eat, what they vote, or whether or not to act in certain ways. By abstaining from going into particulars concerning the specific meaning (beyond the broad definition) of autonomous agency and the value of it, the view of autonomous agency presented here does not appear to be controversial. The first step of the argument, as represented at the beginning of section 1.2, can thus be made without turning into any preliminary difficulties. A more difficult question lies in the next step: why is the continuous existence of a legal state necessary for autonomous agency?

### 1.2.2 The Legal State

Now it is time to turn to the second step in the argument: how are legal states related to individual citizens having autonomous agency? The answer to this question is perhaps more straightforward than expected: autonomous agency requires a certain amount of freedom of action and the legal state is the best form of government for realizing this. Why is freedom of action so important? If people are not, to a certain extent, free to act, their success in carrying out the ends they determine as autonomous agents is very limited. Of course, the success in carrying out ends is always dependent on factors that people cannot completely control, and the presence or absence of these factors is often not their responsibility (Buss, 2002). Hence, since freedom of action is restrained, it is relevant that those who have influence on these factors enable freedom of action as much as possible. Which party has one of the biggest influences on these factors? The government. Nevertheless, some factors cannot be influenced as much as others. For example, the country where we are born or the intellectual capacity we are born with cannot be so easily changed. Influences that the government can control are what kind of education is available, how free one is in moving around the country, etcetera. The government is capable of either extending or limiting our freedom of action in a number of ways. Thus: the amount of freedom individuals have, and therefore their autonomous agency, is greatly dependent on the government of the state they live in. Some forms of government do better in guaranteeing a certain amount of freedom of action than others, and legal states happen to be the best form of government in realizing this freedom of action. Before the argument of why this is the case is discussed, a clarification of what is understood with 'legal state' is needed. The terms 'legal state' and 'constitutional state' are one of the possible translations of the term 'rechtsstaat'. A 'rechtsstaat' is a state wherein the law not just restricts the power of the government in order to protect

citizens from the government using its power arbitrarily, but also assert what is just (Schmitt, 2007, pp. 58–68).<sup>3</sup>

Why, then, are these kinds of states the best form of government when it comes to enabling freedom of action and thus autonomous agency? Most importantly, the idea of freedom of action is central to the very idea of the legal state:

The constitutional principle of freedom of action is the normative axiom from which the Rechtsstaats-principle must be understood. It requires not that the exercise of freedom, but that the restriction of freedom is what must be justified (Kirste, 2014, p. 174).

There are (at least) six ways in which a legal state achieves provides and protects freedom of action. The first of these is a mechanism by which power is hampered; namely by separating the legislative and executive powers. This means that the institution that conceptualizes the rule (the legislative power) does not have the power to exercise the rule (the executive power) and vice versa. Second, there are three formal conditions for statutes. They must be abstract and general (1), sufficiently clear in meaning (2), and they have to be trustworthy and cannot be retroactive (3). Third, there has to be a principle of legality of public administration and justice. Having statutes adhere to the three formal conditions is only effective if those who exercise the executive power are also bound by those statutes and are willing and able to respect them. Fourth, there is the principle of legislative reservation, which states that the state can only intervene in the freedom of citizens if there is a law that allows this. Fifth, there has to be recognition of state liability in a legal state. This means that the state is liable for unlawful acts of its officials and should compensate if this is demanded and justifiable. Sixth, there is the requirement of independent judicial power: there should be judicial protection against the state acting unlawfully. This requires that once a statute has been put into force its interpretation becomes the subject of the judiciary and not politics (Kirste, 2014, pp. 173–182).

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<sup>3</sup> For the primary inquiry into the argument concerning self-determination, this will suffice as an account of what a legal or constitutional state is, but more will be said on legal states, and how a constitutional democratic state should function, in both this section and in later chapters.

In addition to the above ways of restricting power and protecting citizens, the principle of the legal state

[D]emand[s] that politics and administrative decisions are made in the form of law. And this demand implies that all persons concerned with their interests are taken into account (Kirste, 2014, p. 21).<sup>4</sup>

This is necessary to guarantee the positive freedom of individuals. Positive freedom refers to Isaiah Berlin's concept of positive liberty, wherein the word positive connotes the wish of the individual to be its own master (Berlin, 2002, pp. 178). If someone possesses positive freedom, they are in the capacity to act upon their own free will.<sup>5</sup> Positive freedom is the kind of freedom that is involved in the answer to the question: "What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?" (Berlin, 2002, p. 169). Since the law to a great extent dictates what we do or are, and the government makes the law, the government is one answer to the question of whom this source of control or interference is. However, if people are able to participate in the creation of the law, in the creation of individual rights and duties, their positive freedom is guaranteed (Kirste, 2014, p. 39). In this manner, they are themselves the author of laws that restrict their freedom of action, rather than the government. This means that these restrictions are no longer external, and thus do not limit their autonomous agency in the manner of external restrictions. Rather, as autonomous agents people participated in the process of creating the laws that restrict them, making the restrictions internal rather than external.

Summarized: the legal or constitutional state does not just protect and provide freedom of actions for individuals, it also allows individuals (should they be so inclined) to have their interests taken into account. These two aspects of the legal state combined make it so (theoretically) successful in protecting and ensuring the autonomous agency of individuals.

### 1.2.3 The Necessity of Legal States

It should be obvious that a legal state designed to protect citizens from the government misusing its power or using it arbitrarily, fares better than a dictatorship in guaranteeing people a certain amount of freedom of action. A dictatorship is an authoritarian form of government, and thus defined by a strong central power and limited (political) freedom. There is no constitutional

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<sup>4</sup> This aspect of the legal state will be especially relevant in relation to autonomous agency in chapter three.

<sup>5</sup> This is different from negative liberty, which refers to the freedom of having no external restraints on one's actions.

accountability and thus no restrictions or control of the state's use of its power. In addition individual freedom is subordinate to the state (Bedeski, 2009, p. 92). Under such forms of government, freedom of action and autonomous agency are severely restricted. In a dictatorship there is no protection for individuals from the state's power, so the state can limit the freedom of individuals as it pleases. There is no insurance that those in power are controlled and tempered by the law and there is nothing to stop them if they wish to change the law. Any freedom that is left cannot be called genuine freedom, because:

A genuine liberty is freedom to act within the law even when others, however justifiably, may strongly disapprove; and breaches of the law must be punished proportionately, according to recognizable criteria, faithfully and consistently applied (Allen, 2014, p. 165).

A legal state, with its checks on the state's power and possibilities for positive freedom, fares much better in ensuring and protecting the autonomous agency of individuals than dictatorships. But what if we imagine a so-called benevolent dictator? A dictator who would use his power for good, who would not unjustly take away the freedom of individuals or punish them unjustly when they behave in a manner he disapproves of. He might even have laws that put restrictions or limits on how he uses his power. Aside from the fact that this would leave individuals with less positive freedom (and thus less autonomous agency) than in a legal state, it can be wondered whether a benevolent dictatorship where individuals' freedom of action is guaranteed and protected the same as in a legal state is really a dictatorship. Central to a dictatorship is, after all, that those in power have *absolute* power with no constitutional limitations in place (The Editors of Encyclopædia Britannica, 1998). A benevolent dictator who protects and ensures the autonomous agency by providing freedom of action (which requires constitutional limitations) and enabling positive freedom is no dictator at all, but rather the solitary ruler of something approaching a legal state.

Because the constitutional limits in a legal state are so central to the freedom of action of individuals, autonomous agency is best achieved in a legal state. The first step of the argument (the value of autonomous agency), and the second step (the necessity of legal states in ensuring our autonomous agency) have now been, to a certain extent, worked out. What about self-determination? Why does a legal state need self-determination to protect and ensure our autonomous agency?

#### 1.2.4 Why Does a Legal State Need Self-Determination?

The possible arguments for why a legal state requires self-determination differ considerably. Very broadly said: self-determination gives a legal state the possibility to govern itself and take measures to guarantee the continued existence of the legal state. In this manner, self-determination is no more than the right to self-governance<sup>6</sup>. If the legal state was not able to govern itself, politically, economically, and/or culturally, it cannot guarantee the autonomous agency of citizens.<sup>7</sup> Thus, for the legal state to keep providing citizens with the optimum amount of autonomous agency, it needs to be self-governing. By being able to determine its own path (politically, economically, and culturally) the legal state can make sure that the institutions that protect, sustain, and enhance autonomous agency remain in existence.

Thus far, the argument we have developed does not sound very problematic. Legal states have a pro tanto right to self-determination because this is the best way to guarantee individual autonomous agency.<sup>8</sup> In chapter two and three, an argument will be developed that provides an account of why legal states need self-determination, based on the general idea that self-determination is necessary or at least needed to ensure the continuous existence of the legal state so that it can continue to ensure our freedom of action.

The first step in building this argument (chapter two) is the idea that our national identity is crucial for autonomous agency because it provides us with the background upon which we make our decisions concerning our lives. The state is thus not only needed to ensure freedom of action, it also functions as something of an ‘identity provider’, supplying people with a shared identity which they use when making decisions concerning their lives. The best way to protect and ensure this national identity is to allow (national) states to protect their national culture, which requires self-determination for the simple reason that it is the most effective manner in which to guarantee this protection. There are a few concerns that complicate this argument, namely whether a national state is truly necessary for the protection of national culture, and whether the right to protect one’s culture should be an absolute or pro tanto right.

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<sup>6</sup> See the UN Covenant in chapter one.

<sup>7</sup> For those who doubt this I refer back to the discussion on ‘benevolent’ dictators.

<sup>8</sup> This right is pro tanto, meaning it can be outweighed, because the argument is based on the idea that we value autonomous agency. We do not value autonomous agency absolutely and more than anything else, and the argument does not (yet) offer us any reason to believe that the right to self-determination should be absolute.

Second, in chapter three the concept of constitutional patriotism is used to look critically at the argument as it has been developed so far. Broadly said, constitutional patriotism is a shared identity that focuses on people's attachment to a constitution and shared political norms and values. Central to this concept is the goal of enabling citizens to facilitate and sustain a liberal democratic form of rule that is justified to each other (Müller, 2007, p. 1). It will be asked if constitutional patriotism can be an alternative for nationalism, and by adapting our argument for self-determination to encompass this, we are able to finalize the argument before relating it to the right to exclude.

### **1.3 Who Has a Right to Self-Determination?**

The last section focused primarily on states as the possessor of the right to self-determination. This is largely a consequence of the structure of the whole argument for self-determination. To quickly recap: we value autonomous agency, which is best protected in legal states, and states need self-determination to continue to offer this protection. Since legal states play an important part in the *why* part of the argument for self-determination, they appear to be the logical candidate for the answer to the 'who has a right to self-determination' question. Yet, the two arguments (national self-determination and constitutional patriotism) speak of different kind of states: national status versus a state with a 'liberal democratic form of rule'. How does this relate to the argument being focused on legal states? And are states truly necessary for autonomous agency?

#### **1.3.1 Do We Really Need States?**

It might be wondered whether states are needed at all for autonomous agency. If the state has to hamper itself so that it does not threaten our freedom of action, would we not be better off without states intervening in our lives? While it might appear that our freedom of action would be greater without any state influence, this would not be the case. If not the state, who else is to stop others from intervening in our freedom of action? That states are not necessary for autonomous agency is a rather crude argument, for it forgets that the state does not only restrain itself with regards to our freedom of action but also hinders others in decreasing our autonomous agency. It does so by providing laws and systems of justice that ensure our freedom of action and positive freedom, and in some circumstances even increase our freedom of action. Of course, while it might be thought that the less a state meddles in the affairs of its citizens the more autonomous these citizens are, this is not necessarily true. One's autonomous agency is not just factored by how free someone is to do what they want; it is also influenced by their available options and their positive freedom. In addition to this, (legal) states have proven to be highly successful in creating

and sustaining not just institutions for (global) justice, but also for providing medical care and education to all people, for infrastructure, etcetera. All these factors increase our autonomous agency (we have more options if we are not sick, for example), and we would lose these advantages of the legal state if we were to prefer some 'state of nature'. Maybe autonomous agency can function in a different system than a state system, but in the current world – which is compromised of states – legal states still appear to be our best bet in guaranteeing freedom of action and positive freedom.

### **1.3.2 Do Only Legal States Have a Right to Self-Determination?**

Surely not all states do a good job of ensuring and protecting citizen's autonomous agency. Because the argument for self-determination depends on the state's ability to protect this autonomous agency, as a consequence the ability of a state to do so becomes a condition for self-determination. It thus stands to reason that only those states that satisfy this condition can claim a right to self-determination. The preliminary argument stated that legal states are best suited for this. The structure of the arguments that were shortly discussed afterwards, and each steered the conversation to a different kind of state: national states and states that have a liberal democratic form of rule. Are these state-forms also legal states?

When it comes to the liberal democratic form of rule a complication arises immediately. Before it is possible to say anything concerning the relation between a liberal democracy and a legal state, something needs to be said on the term 'liberal democratic', because the connection between liberalism and democracy is not as problem free as might be assumed. There are (at least) two ways to understand 'liberal democracy': as a liberal regime adopting some democratic mechanisms of decision-making or as a democratic regime adopting liberal values. The first interpretation of liberal democracy makes liberalism its priority, and sees democracy as the means of implementing liberal values. Democracy gains its moral foundation from being the most efficient or best way to achieve this, and could thus easily be exchanged for another, more efficient, system. Nowadays the term liberal democracy connotes democracy, but developed and structured within the limits of liberalism. The second interpretation turns the relationship between liberalism and democracy around. Liberal values are the outcome of democratic decisions, and these democratic decisions could just as well lead to the adopting other (socialist, for example) values (Moulin-Doos, 2015, pp. 21–23). Which understanding of liberal democracy would apply best to constitutional patriotism? By looking at the relation between the legal state and democracy in the work of Jürgen Habermas, some clarity can be provided.

As discussed by Hugh Baxter in his book *Habermas: The Discourse Theory of Law and Democracy* (2011), Habermas is best seen as understanding democracy as a practice of deliberation as opposed to a contract between participants. For Habermas the relation between democracy and the legal state is not one of opposition, rather, there is a systematic referral between the two concepts. The legal state, with its fundamental rights and principles, *presupposes* a democratic and political activity (Habermas, 1996, p. 266). At the same time, liberal democracies emphasize separation of power and a principle of rule of law – all qualities we find in legal states. Nevertheless, the relation between the two concepts remains complex. Günter Frankenberg summarizes the intricate relation between the legal state and democracy as follows:

Just as democracy cannot be achieved without the form of semantically and procedurally general law, a democratic legislator must produce the very form of law. The principles of the Rechtsstaat [legal state] thus ensure the stability of the system of rights and of democratic law-making, especially by taming political technology (Frankenberg, 2014, p. 90).

The legal state, with its focus on positive freedom and the processes of public and parliamentary deliberation and its hampering of abuse or misuse of power, thus appears to be intricately bounded to democracy (Frankenberg, 2014, p. 91). This would mean that it would have to be democracy, rather than liberalism, that takes the foreground in the liberal democracy of constitutional patriotism. As will become clear in chapter three, this is indeed the case. This is not surprising, seeing as both our account of the legal state and our account of constitutional patriotism are heavily influenced by Habermas, if not directly, then through others who in turn follow in his tradition. One candidate for the right to self-determination would thus be the liberal democratic legal state, conceived of as a democratic polity adopting liberal values.

What about national states, then? Are national states legal states? National states are states that are at the same time nations; they are comprised of a group of people with (amongst other things) a shared national identity.<sup>9</sup> The legal state, at least as interpreted by Habermas, presupposes democratic activity. This creates a condition for national states: no matter their capacity for protecting the national culture, if the government of the national state is not democratic there is no claim to the right of self-determination as the concept is

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<sup>9</sup> This definition will be discussed in depth in the next pages.

employed here. Of course, a different argument for self-determination might have different results, but as will become evident in chapter two and three, the standard argument for the right to self-determination for national states faces some difficulties.

For now, let us return to the question at hand. Are national states democratic states? Miller seems to be unsure about this. At one point, he emphasizes the importance of national identity for practicing deliberative forms of democracy (Miller, 1995, p. 98). A few pages earlier Miller states that self-determination requires that what the state does should correspond to the popular will and that the best way to guarantee this is having a democratic state (Miller, 1995, p. 89). Yet, Miller hesitates to claim that (national) self-determination *requires* democracy. As long as there is a convergence between the aims and interests of the population and those who make the decisions on behalf of this population, there is no need for democracy (Miller, 1995, p. 90). National states are thus not necessarily also legal states – which as we saw earlier are inherently democratic. This would mean that the argument for self-determination based on the idea of national identity would need another qualification before it can be said to lead to a claim to self-determination: the qualification of being a democratic state.

This chapter has given an introduction into both the history and general concept of self-determination, as well as the three questions one needs to ask when the concept of self-determination is brought up. Asking these questions led to one particular argument one might use in arguing for a state's right to self-determination: the importance of individuals having autonomous agency. Three particular forms of this argument were then shortly discussed: the legal state itself, national identity and constitutional patriotism. Now it is time to critically engage with these arguments. In the next chapter the argument from national identity takes center stage. As we did in this chapter, we start by asking three questions of this particular kind of self-determination: why is it important? Who has (a right to) it? And then finally: what, then, is national self-determination exactly?

## 2. Self-Determination in a National State

It might seem contradictory to first ask why national self-determination is important before asking what it is. Broadly and very general speaking, national self-determination concerns the right of a national state, i.e. a state comprised of one nation, to self-determine or govern itself. While it is possible to expand on this broad definition, a much better and critical understanding of the particulars of this kind of self-determination can be developed by first asking why we should find national self-determination important. This is why this chapter starts with the question: why is self-determination important? As will become clear, the answer to this question greatly influences the answers to the questions concerning the content of the right and the holder of this right.

### 2.1 Why Is National Self-Determination Important?

The value of self-determination lies primarily in its necessity for guaranteeing autonomous agency. This also applies to national self-determination, although, as illustrated earlier, the particulars of the argument differ from the general argument developed in chapter one. National self-determination, in Miller's conception of it, centers around the idea that having a national identity is required for making decisions in our lives, and thus for autonomous agency. This is because national identity provides us with a background upon which we make decisions regarding our lives. The best guarantee for this national identity, and thus autonomous agency, is having a national state. This state having self-determination is in turn important because it gives the state tools to protect this national identity – which in turn means that we protect autonomous agency. In addition, having a shared national identity and the self-determination required to protect it allows a community to achieve social justice and allows individuals to partake in shaping the state (collective autonomy). Both the ability to create institutions of social justice and collective autonomy are seen as additional arguments for the right to self-determination by Miller. These additional arguments are of limited concern here as the focus of this thesis is on the argument for self-determination from autonomous agency.<sup>10</sup>

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<sup>10</sup> For those interested in these arguments see Miller (1995). A reply to the social justice argument can be found in Wellman & Cole (2011). Concerning the idea of collective autonomy: the ability to together decide the direction of the state can also be found in the very concept of the legal state. At most, self-determination as necessary for the continuous existence of the legal state is a way to guarantee the continued existence of this collective autonomy – which enlarges autonomous agency in the manner of positive freedom.

This argument for national self-determination differs from the general argument given in chapter one. Rather than the legal state being the best guarantee for autonomous agency, the state is the best guarantee for sustaining and protecting a certain identity that is deemed necessary for autonomous agency. Whereas in the general argument self-determination was required for the continuous existence of the legal state, here self-determination is required for the protection of the national identity and the continuous existence of the national state.

Schematically, the argument looks as follows:

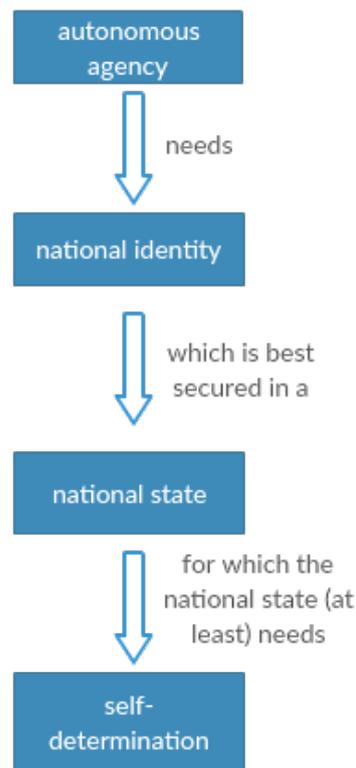


Figure 2: National Identity

### 2.1.1 National Identity and Autonomous Agency

The flowchart pictured above is helpful in understanding the crucial steps in the argument for national self-determination. If this argument is to hold, it needs to be certain that national identity is indeed as important for our decision making abilities as Miller (1995, p. 86) states. Before we can determine whether or not this is the case, we need to understand what national identity is to truly comprehend the argument for national self-determination.

### *2.1.1.1 What Is National Identity?*

In figuring out what a 'national identity' is, it is constructive to start at the core of this identity: the nation. In defining what a nation is, it is helpful to first determine what a nation is not. To start, a nation is not by definition a state. A state is, following the common understanding of the concept; a "territory considered as an organized political community under one government" (Oxford English Dictionary, n.d.). It is possible for a nation to also be a state, but this is not necessarily the case. Another way of putting the difference is by stating that a nation is a group of people that aspires to be politically self-determining, whereas state refers to a set of political institutions that a nation aspires to possess (Miller, 1995, pp. 18–19).

A nation is also often confused with an ethnic group; a group of people sharing cultural features like language and religion and also sharing a common descent. These two are closely related. Examining the ethnic origins of a group of people is necessary if we want to understand their national identity. Nations often emerge from ethnic groups: ethnicity is a source of potential new nations. However, even though nations might start from one ethnicity, they come to include a number of ethnicities over time. Miller (1995, pp. 19–21) sees the United States as an example of such a nation of mixed ethnicities: while U.S. citizens can lay a claim to an American nationality they are not of American ethnicity. Additionally, Russia recognizes over 170 ethnic groups with the Russian nationality (Gil-Robles, 2005, p. 43). What then, if not a state nor an ethnic group, is a nation? What makes a group of people a nation, and not some other kind of community? It is often thought that a nation is a group of people with common characteristics such as language, traditions, and customs.<sup>11</sup> As we have seen, one's ethnicity and nationality are not necessarily the same. We thus need a more in-depth account of what a nation is than such a general definition. David Miller gives us five characteristics of what makes a group of people a nation. One aspect of a nation is that the people conceive of themselves in some way (Miller, 1995, pp. 22–23). Members of a nation believe that they are compatriots and recognize each other as such. They believe that members of the community belong together and wish to continue together.

Another aspect of a nation is that its identity displays historical continuity:

In the course of [a nation's] history, various significant events have occurred, and we can identify with the actual people who acted at those moments, reappropriating their deeds as our own (Miller, 1995, p. 23).

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<sup>11</sup> It will be argued later that language is not a defining part of nationality.

This shared history leads to a 'community of obligation':

Because our forebears have toiled and split their blood to build and defend the nation, we who are born into it inherit an obligation to continue their work, which we discharge partly towards our contemporaries and partly towards our descendants (Miller, 1995, p. 23).

Miller appears to state here that because our forebears have done something to defend the nation, we inherit an *obligation* to continue their work. While it is quite a stretch to go from a shared history to an obligation, a nation can now be described as a community that stretches back towards a shared past, but also one that stretches forward, to future generations. It is not a community that simply ceases to exist when one generation has died, or something that people can renounce their membership of like they can renounce their membership of a sports club.

The third aspect of nation that differentiates it from other groups or communities is that a national identity is an active identity. A nation is a community that actively does things together (by proxy) and it shapes itself by the decisions it takes. Some of these decisions lead to national shame, such as slavery, others to great pride, such as winning an international sports tournament. The fourth aspect of a nation that Miller puts forth is a nation's connectedness to a particular geographical place. In contrast to other kinds of identities, permanently occupying a certain territory is essential to national identity. A national community, states Miller, must have a homeland. The last, and fifth, aspect of a nation may be its most problematic: people in a nation share a set of characteristics. These characteristics are described by Miller (1995, pp. 24–25) as 'common public culture'. There are a lot of characteristics that we would assume belong to this culture, but do not. One of these is language. After all, there are nations that share a language, and yet are separate from each other. Biological descent is also not a characteristic belonging to national identity, as it surely opens the door for racism, and people of different biological descents can belong to one national community. Instead of a speaking of a set of characteristics, public culture is perhaps better envisaged as a collection of beliefs about how a community should behave and live, or a set of understandings about how a community should live its life together. These beliefs are not fixed. They can include political beliefs, cultural ideals (for example religious beliefs or wish for preservation of language), and social norms that are expressed by members of a nation in different degrees and combinations (Miller, 1995, pp. 25–27, 85).

It is now somewhat clearer what a nation is: a nation is a community that has shared beliefs and commitments, is extended in history, is active in character, has connectedness to a particular territory, and has a distinct culture. These aspects of a nation form a national identity: every nation has its own shared beliefs and commitments, a particular history and territory, etcetera that together form a unique national identity. A national state is then a state comprised of one nation. It is now time to turn to the question that led to our inquiry into national identity: why does autonomous agency require individuals to have a national identity?

#### *2.1.1.2 The Importance of National Identity for Autonomous Agency*

Miller does not make the link between national identity or culture and autonomous agency all that clear. The most he has to say on the subject is almost said in passing when he discusses the importance of self-determination for the protection of national culture:

A common culture of this sort not only gives its bearers a sense of where they belong and provides an historical identity, but also provides them with a background against which more individual choices about how to live can be made (Miller, 1995, pp. 85–86).

For our argument, however, this is a crucial step that cannot be avoided: the importance of self-determination for the protection of national identity is only relevant to our argument if national identity is needed for autonomous agency. This means that having a national identity needs to either be necessary for autonomous agency, or that it greatly enlarges it in ways that are impossible or difficult to achieve otherwise.

What is the influence of national identity or culture on our decision-making? Miller states that it provides individuals with a background against which individual choices can be made (Miller, 1995, p. 86). One way to look at this is by emphasizing not just that national identity gives individuals more choices, but rather that it enables *meaningful* individual choices. Members of a nation might have different moral beliefs, and traditional ways of life have changed. Nonetheless, they still have an attachment to the national culture. It is this cultural membership that supplies individuals with the foundation for individual autonomy:

Cultural membership provides us with an intelligible context of choice, and a secure sense of identity and belonging, that we call upon in

confronting questions about personal values and projects (Kymlicka, 1995, p. 105).

The different roles and activities that are available to us in life only come to mean something to us because we are socialized in a particular national culture. This allows us to develop a perspective that enables us to make our own choices regarding our lives. In this manner, national identity enhances personal autonomy. This is not all there is to the argument for national self-determination. National identity is not just the background upon which we make decisions. It is through practices and institutions, embedded in and embodying a national culture, that options and possibilities are available to us (Patten, 1999, p. 5). We do not just need national identity for making decisions; we need a national culture to have options at all.

In a national culture our shared identity means that we are more inclined to certain measurements of social justice, like the redistribution of wealth, because the shared identity makes us care for others. This argument assumes that having a shared national identity makes people more willing to implement institutions of social justice, and that these institutions enable us to have more options to choose from. The assumption behind this claim is that we are more likely to feel moral obligations to and social trust with those with whom we share our culture. Those who make this claim appeal to a body of empirical evidence.<sup>12</sup> However, we have reasons to doubt these claims and the evidence to which they appeal. Social trust theories resulting from studies in countries with weak state institutions or a history of racial conflicts should not be generalized. There is evidence that support for social justice or the welfare state depends more on the institutions present than on the culture or characteristics of a population (Wellman & Cole, 2011, p. 269). This means that while the institutions that create more options for individuals might be the result of a shared national culture, support for these institutions is not dependent on a shared national identity. Given that in chapter one it was argued that such institutions exist in a legal state, this particular argument for national self-determination does not add anything to the argument for national self-determination, for these institutions are thus not exclusively present in national states.

As it turns out, the argument for why national self-determination is important is, at its core, best conceived of as follows. In the legal state, the necessary conditions for autonomous agency are present. However, they are not

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<sup>12</sup> See Wellman & Cole (2011, p. 388) footnote 23 for an overview of the evidence.

sufficient. To truly be an autonomous agent we need to be able to have an intelligible context of choice, and national identity is capable of providing this.<sup>13</sup> Since national states (at least those that are also legal states) are capable of providing this national identity for autonomous agency, the first step of the argument for national self-determination is achieved here. The connection between autonomous agency and national identity, which is present in a national state, has been made. We now need to find out what kind of a right the right to national self-determination is.

## **2.2. What Is the Right to National Self-Determination?**

In chapter one it was stated that self-determination is important because it is necessary for the continuous existence of legal states. If a legal state is to continue as it is, it needs to be able to govern itself. In this manner, a legal state can take measures to ensure its survival. For national states however, self-determination serves another purpose: it protects national identity. In the previous section it was argued that national identity does not so much provide us with autonomous agency itself but provides us with a context in which we can use this agency. Self-determination is then not only a way to guarantee the continued existence of the legal state, it can also be employed to protect national identity. This means that an additional argument is needed here because the right to self-governance does not by definition include the right to protect one's culture. A fruitful way of conceptualizing the link between self-determination and the protection of national culture is to state that if one has a right to self-determination, the right to protect national culture is part of the *content* of that right. But why should self-determination, understood as the right to govern oneself, include a right to protect one's culture?

### **2.2.1 Self-Determination and the Protection of Culture**

The idea that self-determination involves a right to protect one's culture is not new. After arguing that the shared identity of nationalism consists of national culture, and that the protection of this shared identity is desired, Miller (1995, p. 85) claims that self-determination gives people the right to do so. As was argued before, national culture needs protection because people use it make choices about their lives. Since national identity is the background for our decisions and choices in life, a change in national culture could bring about a change in the context for our decisions and choices. It can be imagined that some changes could pose a threat to our autonomous agency.<sup>14</sup> Nevertheless: people also make choices about their lives with other cultural identities as the

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<sup>13</sup> As we will see in chapter three, national identity might not be the only (collective) identity capable of doing so.

<sup>14</sup> The increased number of Sharia followers in Western culture is often cited as such a threat.

background upon which we make these decisions. Why should the protection of national culture, and not some other culture, give rise to claims of self-determination in order to protect it? After all, claims of self-determination concern the right to self-government, so the people of a legal national state (thus a democracy) already appear to be to a certain extent free with regards as to whether (and how) they want to protect their national culture or not. In other words: it seems a bit much to make the (pro tanto) right to protect one's culture such a big part of the concept of self-determination.

### 2.2.2 A Pro Tanto or Absolute Right?

A difficulty arises with the use of the term pro tanto. What happens when the wish (and right) of a state's people to protect their national culture can only be fulfilled by no longer accepting any immigrants into their state. That is, the state can only protect the national culture by not fulfilling the duty to give asylum to immigrants.<sup>15</sup> It is here that the argument for the right to self-determination as including a right to protect one's culture becomes problematic. One solution is to accept that the state's right to protect its culture is a pro tanto right that can be outweighed by other rights or considerations and that it can lead to situations as these (after all, the self-governing state itself chose to accept a duty to refugees), in which case it will have to be decided which right or duty takes precedence. Another solution is to say that the right to protect one's culture is not a pro tanto right, but rather something akin to absolute right, which means that it cannot be outweighed by anything. It is this last approach that Miller appears to take. While Miller puts some qualifications on what kind of actions the right to protect culture allows<sup>16</sup> it, in the end, takes precedence over other concerns (Miller, 2007, pp. 223–230).

It should be noted here that Miller's version of a state's right to protect its culture flows into a right to exclude, for the simple reason that sometimes the protection of culture requires that a state does not allow foreigners in. Whether one takes the first or second approach in regard to the state's right to protect its culture is especially important because, as Miller does, it can be used to argue for a right to exclude. Sometimes it is necessary to prevent outsiders from coming in because this brings unwanted changes to the national culture and national identity. This could have negative implications for our autonomous agency: if the context of our choices change, our possible choices might change

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<sup>15</sup> Many European countries have laws in place that ensure that refugees that are in real danger are given asylum.

<sup>16</sup> For example: In some cases a justification must be given, and immigration policy must be culturally neutral.

as well.<sup>17</sup> A state's right to protect its culture is thus a somewhat disguised right to exclude, and if it is absolute it enables a state to refuse immigrants entry in the name of cultural protection. The necessity of a state's right to protect its culture hinges, to a large extent, on how much of a threat outsiders really pose to a (national) culture<sup>18</sup>. For if it turns out that outsiders do not pose as much of a threat as Miller seems to assume, it makes little sense to have an absolute right, a *pro tanto* right should then suffice. In addition, it was argued that while national identity can indeed be important for autonomous agency, it was also shown that the argument for the importance of national identity for institutions is not indubitable. Ergo, the case for an absolute right to protect one's national culture is not as strong as Miller would like us to think.

It is thus very much possible to include a state's right to protect its culture in the right to self-determination. In fact, the UN article states that self-determination includes a people's (a state's, in this case) right to freely pursue their cultural development. However, there are two objections to making this right absolute. The first of these is that it seems a bit absurd to have a broad *pro tanto* right (the right to self-determination)<sup>19</sup> with as part of its content an absolute right. Second, a state's right to protect its culture does not need to be absolute for it to be able to come into action when there is a threat. The fact that other rights can outweigh a *pro tanto* right does not mean that every right that potentially could outweigh it actually does so.<sup>20</sup>

In this section the question 'what is the right to national self-determination?' was our main concern. As argued, national self-determination is the right of a national state to govern itself, including the right to protect its culture. This means that the state is free to determine its own political status and to pursue economic, social, and cultural development (The United Nations General Assembly, 1966). The right to protect the national culture only adds something to the right to self-determination when seen as an absolute right, which was argued to be problematic. For now, however, another question remains. We

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<sup>17</sup> This is my own argument. Miller takes the first two steps but then argues that national culture and national identity are important for collective agency, rather than individual autonomous agency.

<sup>18</sup> This will be discussed in part two on the right to exclude.

<sup>19</sup> Nothing has been said so far that suggests this should be an absolute right.

<sup>20</sup> Another argument for not making this right absolute is related to an argument in chapter four. It will be argued that there are some qualifications to the right to self-determination. One of these is that the right to self-determination concerns self-regarding acts, which means that a right to protect one's culture (grounded in self-determination) would also only concern self-regarding actions.

know why it is important, and what it is, but who has national self-determination?

## **2.2 Who Has a Right To National Self-Determination?**

Central to the idea of national self-determination is the concept of the national state, a state comprised of one nation, and thus one national identity. As has been argued not every national state is also a legal state and the argument for self-determination requires that a national state is also a legal state. We have also seen that this does not have to be a problem: there is nothing inherently contradictory in a state being both a legal state and a national state. However, some, like Miller, claim that a national state is *necessary* for the protection of a national culture and thus the national identity that enhances our autonomous agency. Is this truly the case, or is it possible for a (legal) state to consist of two nationalities that the state is capable of sustaining and protecting? If this is the case, then we need to ask critically what national self-determination adds to the general argument for self-determination.

### **2.2.1 The Argument for National States**

The argument for national self-determination states that for a national state to protect its national culture, self-determination needs to be located at the nation. The right to protect and preserve one's culture is part of the content of the right to self-determination. Since it is the nation who is best able to do so, and it is national identity that is crucial to autonomous agency, we should locate self-determination at the level of the national state. The argument that is presented for this claim is that when a state is comprised of more than one national culture, the minority cultures would suffer from this. The protection of culture argument justifies the necessity of a national state by claiming that when a state is comprised of more than one nationality it would give a dominant group a strong incentive to use its authority to force the other groups to adhere to its culture (Miller, 1995, p. 88). An historical example of this is the Turkish efforts to assimilate the Kurdish minority. There are examples of multinational states functioning just fine, like Canada and Belgium, but these are dismissed as exceptions by Miller, and while Canada has been successful it has paid a price for it: it has allowed American culture to pervade both the English Canadian and French Canadian culture (Miller, 1995, p. 88).

### **2.2.2 The Argument for Legal States**

What is surprising about this line of argument is that Miller sees “[m]any historical instances of attempts to assimilate national minorities by force to the culture of the majority community” (Miller, 1995, p. 88) but does not put any effort in critically studying these examples. Nor does he question why Belgium

succeeds where Turkey fails with regard to their having multiple nationalities in one state. The problem might not be having more than one nation under the governance of a single state. There are numerous factors that Miller does not consider here. To name a few: the form of government, the circumstances that brought the two or more nations together, and the interaction between the two nationalities. The statement that the Canadian culture has ‘Americanized’ is also presented without any argument supporting this statement. The two states are neighbors; some cultural mixing is not surprising.

The problem with the leap from wanting to protect national culture for its value to autonomous agency to the necessity of a national state for this protection is that the interference is too strong. Miller wants to claim that a national state is *necessary* to achieve the preservation of culture; but his argument only shows that it might be *easier* to do so when a state encompasses only one nation. The argument that national identity adds something to autonomous agency can also hold for legal states that are not also national states. This is especially true since legal states have institutions in place that ensure that the government cannot abuse or misuse its power, so the dominant group should not be able to use its authority to force the other groups to adhere to its culture. Nonetheless, the dominant culture is bound to influence the state. Why this need not by itself be a problem will be argued in the next chapter.

### 2.2.3 Who Has a Right to (National) Self-Determination?

As it turns out, the major value in the argument for national self-determination lies in its awareness of the importance of national identity for autonomous agency. As we have seen, however, this requires that the national state also be a legal state, for we already established that legal states are best capable of providing and protecting autonomous agency. As it turns out, national states might have an easier job protecting the national culture, although the protection of culture does not necessarily require a *national* state. Perhaps then, the argument for national self-determination is best used to broaden the general argument from chapter one:

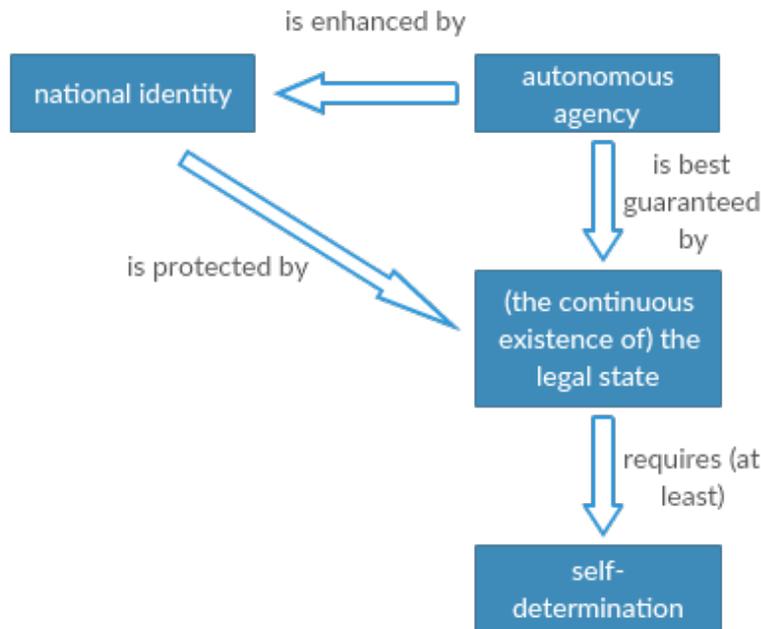


Figure 3: National Identity 2

Legal states thus do not only require self-determination for their continuous existence, but also for the protection of their national identity – which enhances the autonomous agency of citizens. Now, it might be wondered why sustaining the national identity is not simply part of the continuous existence of the legal state. There are two reasons for this. For one, there is no problem per se with protecting a national identity, but it is all too easy to slip in the kind of nationalism that is harmful. Second, there is an alternative to having national identity provide the identity that enhances our autonomous agency. There is also an identity that enhances not just our autonomous agency by possibly doing the same as a national identity, but which also enhances our positive freedom: constitutional patriotism. The next chapter will focus on these two reasons, for they do not only answer the question of why national identity should not be viewed as necessary for the continuous existence of the legal state, but also give us entry points for making some changes to our argument that will strengthen it.

### **3. Self-Determination and Constitutional Patriotism**

In chapter one and two the argument for self-determination was guided by three questions: why is self-determination important, what does the right to self-determination consist of, and who has this right to self-determination? In this chapter the structure will vary from this. Instead of proposing a new variation of the argument for self-determination, this chapter will use the concept of constitutional patriotism to propose some changes to the argument we now have before us. This will allow us to, at the end of this chapter, have one argument for self-determination that will be studied in the light of the right to exclude, rather than two arguments that would first need to be compared to each other. Chapter two ended with two reasons for why a sustained national identity (or multiple national identities) should not be seen as necessary for the continuous existence of a legal state. The second mentioned constitutional patriotism explicitly, and the first, that seeing national identity in this way would open the door to the wrong kind of nationalism, is related to the development of constitutional patriotism. This chapter will look closely at both of these reasons, starting with the first.

#### **3.1 Constitutional Patriotism as an Alternative to Nationalism?**

Constitutional patriotism proposes a model of identification that, instead of focusing on nationality, centers on loyalty to the constitution (Cronin, 2003, p. 1). This means that citizens of a state have to be attached, or identify with, not just the constitution of their state but also the very idea of a constitution. In other words: citizens are committed to mutual justification, fair terms of cooperation and fair terms of limiting power (Müller, 2007, p. 78). The influence of Jürgen Habermas on the concept of constitutional patriotism is considerable, especially in the light of it functioning as a replacement for nationalism, which Habermas saw as having outlived its potential.

##### **3.1.1 Why Should Nationalism Be Replaced?**

Habermas felt that the national state was Janus-faced: the voluntary nation of citizens is the source of democratic legitimacy, yet it is the inherited or ascribed national identity that enables social integration. This inherent tension between the universalism of a legal community and the particularism of a community that is united by its ascription to a national identity is built into the national state, and makes it susceptible to a lurch into nationalism (Habermas, 1998, p. 115). Of course, nationalism per se is not problematic, as long as national identification does not rest upon the exclusion of others and remains subordinate to the state's civil rights. As long as it is ensured that a cosmopolitan understanding of a national state should take priority over an

ethnocentric understanding there is no problem (Habermas, 1998, p. 115). However, once nationalism becomes chauvinistic, and national solidarity is no longer subordinate to civil rights, it does become problematic. Not only can this lead to horrendous acts (Habermas was, of course, influenced by the Second World War), it is also a threat to the autonomous agency of citizens, both to those who do and those who do not belong to the majority national culture.

Nevertheless, stable democratic cultures seem to have flourished primarily<sup>21</sup> within nation-states, even though there is an increasing tension between nationalist particularism and democratic universalism. Further, by providing an attractive answer to the question of what a 'people' (from whom the state derives its authority) consists of, nationalism contributed to the creation and legitimation of the modern state system (Cronin, 2003, pp. 2-4). According to Habermas, this success is owed "[t]o the fact that it [the nation state] substituted relations of solidarity between the citizens for the disintegrating corporative ties of early modern society" (Habermas, 1998, p. 115). What is meant here is that nationalism took the place of local communities, guilds, and religious bodies that provided a shared identity for people that they could use to inform their decisions and choices. This achievement (that of flourishing democratic cultures) is at risk when the ideal of a national identity shared by the citizens is seen as a pre-political fact, as an identity that is independent and prior to politics, for this can cause a shift towards 'bad' nationalism. This is, according to Habermas, what makes nationalism potentially harmful.

Habermas finds at least one reason why bad nationalism keeps occurring, a conception flaw in the national state. This has to do with the legal construction of a constitutional state, which, in a national state, would fail to explain in normative terms how the boundaries of a political community should be composed. Political boundaries are very much a result of historical events, the result of wars for example. Thus, Habermas states, it is a mistake to assume that the question of political boundaries can be answered in normative terms. The answer that nationalism has found for this problem is the idea that:

While national consciousness itself may very well be an artifact, it projects the imaginary reality of the nation as an organic development which, in contrast with the artificial order of enacted law and the

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<sup>21</sup> Cronin (2003, p. 1) states that democratic cultures have flourished *exclusively* in nation-states. This claim is too strong. Belgium and Canada, considered democratic cultures, are not nation-states, but states with two nations.

construction of the constitutional state, needs no justification beyond its sheer existence (Habermas, 1998, p. 116).

In the national state political boundaries come to be something that grew organically, rather than by historical chance, thereby obscuring the fact that political boundaries came into existence by historical events of which the outcomes were contingent. This can make it appear as if the national identity grew organically as well, and makes it appear as if the political boundaries have some sort of 'inherited' legitimacy. This idea of a national inheritance relates to Miller's idea of historical continuity, which could facilitate this view of political boundaries. The problem with this is that it makes nationalism into a pre-political fact. By linking the continuous existence of the state to a state's national identity, there comes a risk of seeing the national identity as pre-political, as already existing before the state was formed and perhaps even as essential to the creation of the state.

But why is nationalism as a pre-political fact considered to be 'bad' nationalism? For one reason, if the national identity is seen as pre-political and the corresponding boundaries to be organic, this opens the door to exclusionary policies towards anyone not belong to the nation. Another consequence of bad nationalism is that it can function as an instrument to mobilize the population for political goals that, while not contradictory with nationalism, cannot be reconciled with democratic principles. Habermas points out the history of European imperialism and the racist policies of the Nazis as examples of these kinds of policies (Habermas, 1998, p. 116). Additionally, the bad nationalism has detrimental consequences for autonomous agency. For example, the Nazi regime did not just limit the autonomous agency of those they saw as inferior but also of those who were perceived to be of the proper race, as is bound to happen in a authoritarian system.

The 'Janus-faced' national state, with its conceptual flaw, did have potential. It has reached the limit of this potential, however, but this does not mean that we cannot learn something valuable from its history. It enabled political communication and re-embedded populations through the "cultivation of a national consciousness" (Habermas, 1998, p. 117). The national state was able to do so successfully because it connected democratic principles to this national identity. However, today national states are challenged by multiculturalism and globalization. The question thus becomes: is there a functional equivalent for national identity that can bring together a heterogeneous, pluralistic society (Habermas, 1998, p. 117)? The answer to this question: constitutional patriotism.

### 3.1.2 What Is Constitutional Patriotism?

As said at the beginning of this section, the goal of constitutional patriotism is to offer a model for collective identification that does not rely on nationalism. Rather, constitutional patriotism focuses on loyalty to the constitution, with citizens committed to fair terms of limiting power, fair terms of cooperation, and mutual justification. Ultimately the goal of constitutional patriotism is to make it possible for free and equal citizens to enable and sustain a liberal democratic form of rule that they can justify to each other (Müller, 2007, p. 72).

The aforementioned identification with the constitution does not imply that citizens must agree on a certain specific constitution. Rather, it is expected that they disagree about both the application of the constitution, as well as its specific components. A state's constitution will be morally and politically contested, and citizens will have disagreements about how the constitution should be translated into legal and political institutions. Müller calls this 'contained disagreement' or 'limited diversity' because disagreement is contained and diversity limited by the core idea that citizens "[c]onceiving each other as free and equal should find fair terms of political cooperation that they can justify to each other (Müller, 2007, p. 79)."

Disagreement cannot be avoided, especially not in states with minorities. Constitutional patriotism provides these minorities with motivation to maintain the constitutional regime instead of, for example, opting for secession. It gives them a reason to maintain the constitution because of its embodiment of mutual justification, fair terms of cooperation and fair terms of limiting power. While the system might not always be in their interest and minorities might sometimes feel that they have had to concede on an important issue, their loyalty to the constitution means that they will uphold the system. This is because constitutional patriotism also gives minorities the means to challenge decisions made by the majority when they feel that they have been treated unfairly or unjustly. In such a situation, a minority can appeal to the majority's attachment to the constitution, and the majority cannot simply dismiss the minority's objections. We should not dismiss the effect that constitutional patriotism can have on a state all too easily; political situations differ greatly depending on whether fair cooperation is present or not, and the presence of constitutional patriotism can be helpful in divided societies. In this manner, constitutional patriotism also helps in regard to the long-term stability of constitutional regimes, because it gives citizens a mode of political problematizing within a shared framework (Müller, 2007, pp. 79–81)

Disagreements and debates concerning the constitution and its implementation lead, over time, to the emergence of what has been termed by some a ‘constitutional identity’ (f.e. Cronin, 2003) or ‘constitutional culture’ (Müller, 2007, p. 80). For some culture is the preferred term because they consider ‘identity’ to be too static and to focus too narrowly on an actual written document, whereas culture shows that shared symbols, rituals of membership, institutions (such as constitutional courts) that convey constitutional essentials should be included. The notion of constitution is more than just a legal framework; the constitution should also be seen as concrete social relationships. The term culture is also more appreciative of the fact that constitutional patriotism is not some sort of underlying statewide core identity of citizens (Müller, 2007, p. 81). As long as this is kept in mind, I do not find it necessarily to substitute identity for culture here. Adhering to the term identity is more consistent with the debate to follow and thus preferable. Constitutional patriotism as collective identity or culture can thus be characterized as a certain approach to political decision making and debating. It is a commitment to enable and uphold a liberal democratic form of rule with fair and democratic procedures, and an identification with the norms and values that lie at the center of the constitution.

If this identity of constitutional patriotism is indeed capable of providing individuals with an identity that can take the place of nationalism, the argument for self-determination would have to be changed to look as follows:

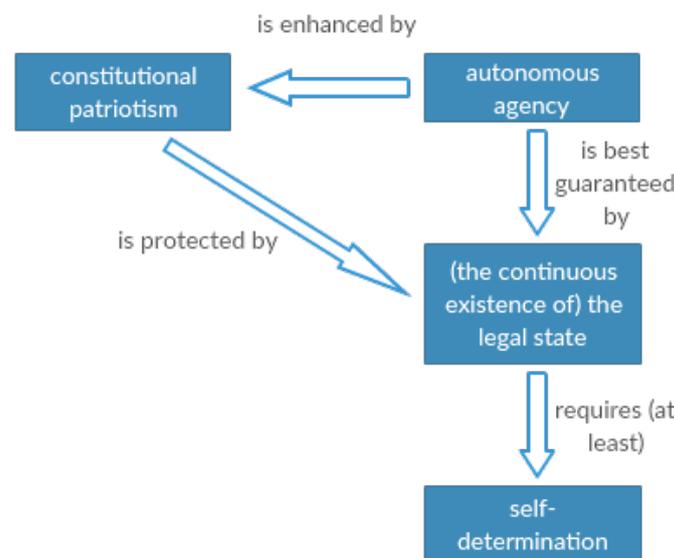


Figure 4: Constitutional Patriotism

The question that remains is whether constitutional patriotism is capable of offering individuals an identity that does the same for them as national identity in regard to their autonomous agency. Most authors<sup>22</sup> discussing constitutional patriotism and nationalism have focused on whether it can offer the same kind of shared identity. For our inquiry into self-determination we are more interested in whether this constitutional patriotism is also, like a national identity, capable of providing a background upon which individuals make their choices and decision – and not just political decisions and choices. In other words: can constitutional patriotism provide us with a strong enough identity?

### **3.2 Can Constitutional Patriotism Provide Us With an Alternative to Nationalism?**

There are three questions central to this section. First it needs to be seen how constitutional patriotism can function as an identity. In other words: how do citizens come to identify as a constitutional patriot? Second, it needs to be seen whether this identity is a coherent alternative to nationalism – is it strong enough to create an identification comparable to national identity? Third, is constitutional patriotism not just nationalism in disguise?

#### **3.2.1 How Do Citizens Come to Identify as a Constitutional Patriot?**

Constitutional patriotism depends on a conception of citizenship that is broader than one simply being a citizen of a certain state. Rather, citizenship is understood as a status that is determined by basic rights, which are implied by the practice of self-government by the citizens. This is an exercise of popular sovereignty; the authority of the state and the government is both created and sustained by the consent of its people. It is precisely this exercise that is the medium through which citizens give themselves a collective identity. By participating in the system of political cooperation, the making of law, solidarity with fellow citizens, and attachment to the polity, a collective identity is formed and maintained (Cronin, 2003, p. 4). Popular sovereignty and democratic processes in states thus create and maintain constitutional patriotism, but there is more to its maintenance:

Collective identities [...] are maintained over time through the interpretive practices of members in which they project public representations the group, its history and its distinctive belief and values, which provide a focus for shared identification (Cronin, 2003, p. 6).

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<sup>22</sup> For example: Cronin (2003) and Müller (2007).

It is thus by participating in the political system, which was also central to the concept of the legal state, that citizens can develop an identity of constitutional patriotism. Care must be taken that this collective identity does not make individuals subordinated to the collective. The freedom of individuals to pursue their own interests and to have other, non-political, identities should be protected in democratic constitutions:

Individual autonomy demands that the cultural embedding of constitutional principles be consistent with cultural pluralism below the political level; hence constitutional patriotism calls for a clear separation between political and subpolitical culture (Cronin, 2003: 4).

This is important with regard to autonomous agency: constitutional patriotism as a shared identity provides citizens with the means to enhance their positive freedom. In addition it also ensures that individuals can still use their other (cultural) identities as the background upon which they make their decisions and choices. When this subpolitical cultural pluralism is threatened (as can happen when 'bad' nationalism occurs) the autonomous agency of individuals is threatened because the choices and decisions they want to make based on this identity might no longer be available to them. For the same reason these identities should remain mostly subpolitical, otherwise one cultural identity might suppress or oppress the others. Constitutional patriotism is a political identity that is shared statewide, but leaves citizens room to cultivate other identities, something that becomes progressively important with the increased plurality in states.

Does this mean that we can simply replace nationalism with constitutional patriotism in our argument for self-determination? There are some issues with constitutional patriotism that need to be resolved before anything can be said regarding that. The second question we need to ask is whether constitutional patriotism is strong enough to create a patriotic attachment to the constitution and solidarity with other citizens in the way that nationalism does. The next section provides an answer to this question.

### **3.2.2 Is Constitutional Patriotism Strong Enough to Create a Patriotic Attachment to the Constitution?**

The first line of inquiry is whether constitutional patriotism is truly capable of creating an attachment to constitutional principles. Underlying this question is a misunderstanding of constitutional patriotism as insubstantial. It is true that constitutional patriotism turns down the notion that a shared prepolitical

cultural identity is needed as the foundation of a political identity. It does this precisely because such a pre-political identity can lead to bad nationalism. However, this does not mean that constitutional patriotism completely disregards traditions and values. As with nationalism, there is a relation between democratic principles and the identity informing these principles:

[i]t [constitutional patriotism] assumes that democratic constitutional projects must be rooted in the traditions and values of particular political communities if they are to continue to secure the loyalty of members of these communities (Cronin, 2003, p. 12).

This misunderstanding stems at least partly from an understanding of traditions and values as having a generally fixed content. This is, of course, an outdated conception of tradition and values. Constitutional patriotism views traditions and values as open to transformation. These transformations occur through the democratic process. In this manner they retain their meaning for members, while being open to continuous reinterpretation in response to political challenges, like conflicts with minorities, but also in response to cultural developments that are not necessarily related to politics. Although traditions and values have no fixed content, this does not make a political identity based on constitutional patriotism incoherent or insubstantial. It simply means that citizens might have to reinterpret traditions and values in a manner that preserves their integrity while at the same time accepting that some traditions or values are incompatible with justice (Cronin, 2003, p. 12).

Those doubtful of this conclusion might reply that this does not guarantee any kind of cultural continuity. Public culture is often represented as something that citizens are interested in controlling to ensure that they are able to shape their country and the values that are included in the public culture. Citizens are also seen as having reasons to try to maintain cultural continuity, because this would help them see themselves as part of a particular cultural tradition that goes back in history (Miller, 2005, p. 200). These doubts can easily be put to rest: constitutional patriotism is capable of ensuring a continuous identity as much as nationalism is. It can do so by representing the various shapes the collective identity will take as the result of discursive practices as different stages in an unfolding historical narrative. In this way, these various stages can be understood as different instances of the same identity.

Because constitutional patriotism is sensitive to the inclusion and recognition of marginalized groups and minorities, the traditions, values, and representations (that are constantly discursively reinterpreted) of the shared

identity make a claim on the loyalty of all citizens, not just those with a shared nationality (Cronin, 2003: 12-13). What further strengthens this identity is the shared practice of self-rule, which is capable of becoming another source of identification for citizens. This can be an especially important aspect in strengthening the solidarity and identification between citizens that are divided by class, race, and religion. The aforementioned conception of continuity also allows citizens to see the imperfections of their constitutional democracy as an ongoing shared project. With this in mind, there seems to be no reason to doubt that constitutional patriotism is capable of providing an identity, and a loyalty to democratic principles, as strong as nationalism.

There is one last potential objection to constitutional patriotism to discuss, which concerns the split between political and subpolitical identities. The political culture of a democratic state is bound to be influenced by the majority nonpolitical culture, so how is constitutional patriotism not just nationalism in disguise?<sup>23</sup>

### **3.2.3 Is Constitutional Patriotism Not Just Nationalism in Disguise?**

The third question concerns the separation between political and subpolitical identities. One source of this concern is the doubt that the shared political culture can be distinguished from the culture of the majority group. If they indeed cannot be distinguished, how does that make constitutional patriotism any different from nationalism<sup>24</sup>? As with the previous section, there is a misunderstanding of constitutional patriotism grounding this objection. Constitutional patriotism is not 'postnational' in the sense that democracies have to be a break with all national political traditions and lose any and all national cultural peculiarities in order to be truly pluralist. If this were the case it would be hard to say that any democracy has a citizenry that shares a collective identity we can call constitutional patriotism. This is because in almost every democracy, national language is, and is likely to remain, the most used means of communication. Take, for example, the Netherlands. In the Netherlands the primary medium of public communication is Dutch, and it is likely to remain so. As long as this is the case, the political culture of the Netherlands is nationally marked. If minorities want to participate politically they will have to do so in Dutch, which means assimilation of some aspects of Dutch culture (Cronin, 2003, pp. 15-16).

We have to accept that the political cultures of democracies are shaped by values and conceptions reflecting the majority culture. This is not

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<sup>23</sup> These questions are inspired by (Cronin, 2003, pp. 4-5).

<sup>24</sup> Assuming that the culture of the majority group is a national culture.

irreconcilable with citizens having a shared identity that is based on loyalty to the norms of the constitution, if we let go of the idea that constitutional patriotism is 'postnational'. Rather, it is 'postnationalist', rejecting narrow-minded interpretations of national identity while allowing for the preservation of a national character (Cronin, 2003, p. 16). Of course, this might lead to the political culture sharing more with the majority culture than with minority cultures. As long as the political culture is just for all cultures, not only for the majority culture, and every citizen can participate in the system of political cooperation, this need not disqualify constitutional patriotism as being nationalism in disguise.

In this section we explored whether constitutional patriotism is capable of providing us with an alternative to nationalism. As it turns out, it is perhaps not a replacement but more an addition that gives national identity a place in society where it is much less likely to hinge into 'bad' nationalism. Now, it might be wondered why it was necessary to have such an extensive discussion on constitutional patriotism. This served a purpose. We needed to know whether it, like nationalism, was strong enough to provide an identity upon which individuals make their choices and decision. On the other hand, it also needed to be argued that constitutional patriotism could substitute nationalism as a shared identity; for crucial to the idea of nationalism is that it relates democratic principles to the shared national identity. With these questions answered, it is time to look at the consequences this has for our argument for self-determination.

## 4. What Is the Final Argument for Self-Determination?

We started chapter three with an argument for (national) self-determination that looked as follows:

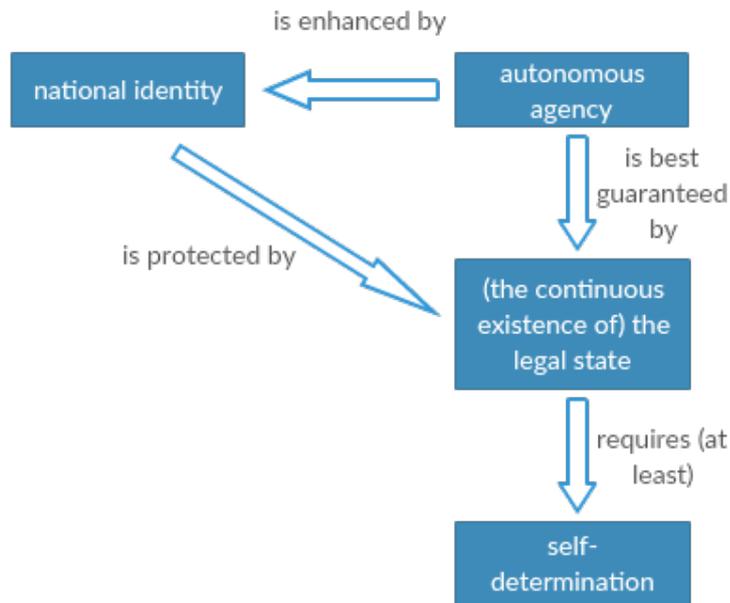


Figure 5: National Identity 2

In this chapter it was argued that national identity might be valuable, but that it can slide into bad nationalism. In addition, an alternative to national identity was provided: constitutional patriotism. It was argued that constitutional patriotism is a strong enough identity to substitute national identity as the political identity of a state. Furthermore, constitutional patriotism can be seen as increasing our autonomous agency because its very core consists of participating in the political system. As was mentioned, this focus on positive freedom can also be found in the concept of the legal state. This makes constitutional patriotism a very fitting shared identity for a legal state.

### 4.1 Developing the Final Argument

Because constitutional patriotism has a culture with traditions and values, it can be deemed to also be able to substitute national identity as the background for autonomous agency. However, are these values and traditions the same kind of values and traditions we find in nationalism? In chapter two it was argued that national identity *enhanced* our autonomous agency not so much by extending our range of options, but by providing us with a background to make decisions upon. It can indeed be doubted whether constitutional patriotism can

really provide the same kind of background. This worry, while appropriate, is not necessary. Constitutional patriotism leaves individual free to cultivate (non-political) cultural identities that can provide the kind of background needed. Additionally, as argued in section 3.2.3, constitutional patriotism leaves room for national identities – just not as much on the political level as nationalism does. As even Habermas acknowledges, national identities do have some value, and constitutional patriotism is thus not so much a replacement, as an addition to national identity in our argument. Constitutional patriotism increases the positive freedom of all citizens, and leaves them free to develop and cultivate other identities that they can use in exercising their autonomous agency – enhancing this autonomous agency in a comparable way to nationalism. The difference is that this (national) cultural identity is kept in check by the principles of constitutional patriotism when it concerns the governance of the state.

What are the consequences of this for the argument for self-determination? Recall that the argument broadly states that self-determination gives a legal state the possibility to govern itself and thus to take measures to guarantee the continued existence of the legal state. This continued existence of the legal state was necessary to protect autonomous agency because the legal state does the best job in ensuring that individuals have and can use this autonomous agency. Now, while national identity enhances autonomous agency, constitutional patriotism not only increases the positive freedom of citizens, it is also an identity that fits the very core ideas of the legal state. Remember that the legal state was deemed the best option in ensuring autonomous agency because it enabled citizens to exercise their positive freedom. The combination of the legal state and constitutional patriotism means that, more than in any other form of rule, citizens themselves are involved in the creation of individual rights and duties and thus also in the creation of the boundaries on their autonomous agency. However, if citizens (and thus the state) are to exercise this identity of constitutional patriotism the state needs to be self-governing, how else can these citizens exercise their positive freedom? In other words: for the citizens to exercise their identity of constitutional patriotism there needs to be self-determination for the state as a whole. Otherwise the possibilities for citizens to exercise their positive freedom are diminished.<sup>25</sup>

In the end, the final argument for self-determination looks like this:

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<sup>25</sup> It is true that the possibility to exercise one's positive freedom was already part of the idea of the legal state. Why then this extra focus on it? The answer to this is simple: not only does making constitutional patriotism protect the legal state from sliding into 'bad' nationalism, it is also an extra insurance that citizens actively use their positive freedom.

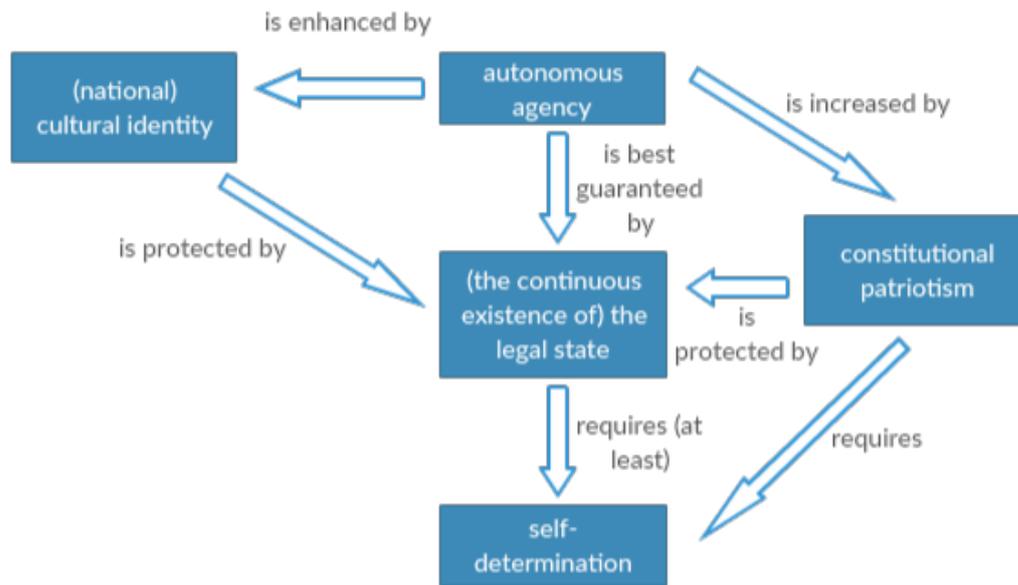


Figure 6: The Final Argument for Self-Determination

Here we return to the three interdependent questions that guided our inquiry in the first two chapters. We grant legal states (with constitutional patriotism as political identity)<sup>26</sup> a right to self-determination because we value autonomous agency<sup>27</sup>, and the best way to protect this is to have a legal state with a right to self-determination (interpreted as self-governance<sup>28</sup>). There are three lines in this argument. The primary argument is that the legal state requires self-determination for its continuous existence, which enables it to keep ensuring the autonomous agency of citizens. In addition to this, the legal state protects the different kinds of national identities that enhance autonomous agency by providing individuals with a background upon which to make their decisions and choices. Last, constitutional patriotism increases the autonomous agency of individuals via positive freedom and ensures that national identities do not overflow overly much to the political domain. If individuals are to exercise this positive freedom the state in which they do so needs to be self-determinant (self-governing).

<sup>26</sup> The answer to the question ‘who has a right to self-determination?’

<sup>27</sup> The answer to the question ‘why is self-determination important?’

<sup>28</sup> The answer to the question ‘what is self-determination?’

#### 4.2 Are There Qualifications to the Right to Self-Determination?

In the previous part an argument for self-determination was developed which states that we grant legal states this right because it is the best way to ensure and protect the autonomous agency of individuals. This right to self-determination is understood, as it was historically, as a right to self-governance. This is because self-governance is what a legal state needs to uphold the policies, institutions, and principles that have led to it being able to ensure autonomous agency. Before we can develop the argument that a right to exclude is part of this self-governance, we thus first need to be clear on what it means to be self-governing, and what the limits of self-governance are.

There are two qualifications to the right of self-determination, stemming from the fact that self-determination concerns primarily the state's self-governance. These qualifications will become relevant when it is asked whether a right to exclude is one of the rights that come with self-determination, for they limit the scope of the right to self-determination significantly. The qualifications are as follows: (1) self-determination only applies to *self-regarding* affairs and (2) only legal states can appeal to the right of self-determination.<sup>29</sup>

The second qualification does not seem to be controversial: our argument for self-determination concerned legal states so it is logical that only legal states can claim this right. The first qualification is a bit more questionable. It might be wondered why such a qualification of self-regarding affairs is necessary. If this qualification was not put upon the right to self-determination it would be possible for legal states to increase the autonomous agency of citizens even more by invading a neighboring country and seizing (for example) their means of production. This first qualification is meant to ensure acts like these do not happen. In other words: the first qualification is necessary because it is wholly implausible that self-determination would, without further argument, allow a state to interfere in other-regarding matters (Higgins, 2013, pp. 161, 248). Nonetheless, the terms that the qualification employs need some clarification. What does it mean for an affair to be self-regarding?

One definition is that self-regarding affairs are internal matters that only pertain to the state and its citizens, and not to other states or individuals. Self-regarding affairs would thus be those acts that do not affect others. This would significantly limit the scope of actions possible under the guise of self-determination. If a state can only act in the name of self-determination if its actions are to have no effect on others at all, it would be almost impossible for

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<sup>29</sup> These two qualifications are taken from/inspired by (Wellman & Cole, 2011, pp. 15–16).

the government to act. Imagine for example that the state wishes to sell a percentage of its military vehicles so that they can fund new educational plans that would make higher education cheaper and more accessible. This plan could potentially increase the autonomous agency of the citizens, but neighboring nations or the NATO might object because they feel affected by this decision. They might feel the safety of the region is compromised, or could simply prefer a more armed military presence. Thus, if we understand self-regarding affairs as strictly not other-regarding, legal states cannot act under the name of self-determination if their acts affect others. This could potentially mean legal states would not have much room at all to improve or maintain the autonomous agency of their citizens.

Self-determination over self-regarding matters can also be understood as follows: “[a]s long as a state’s conduct does not wrongfully impact any other country, it has full discretion to order its affairs however it sees” (Wellman & Cole, 2011, p. 15). If we use the term self-regarding in this manner, the term refers to acts that do not wrongfully impact other states. A minimal interpretation of self-regarding affairs would then be ‘all acts that are not harmful to others’. This means that acts done under the right of self-determination can affect others, and thus be other-regarding, but cannot do harm. Of course, this means we need at least a basic agreement of what constitutes harm. Legally understood, harm means injury, loss, or damage (“Harm Law and Legal Definition,” n.d.). Whilst this definition should not cause much disagreement, there is one problematic issue with seeing self-regarding affairs in this manner: does the qualification regarding harm concern harm done to individuals or other states? It is tempting to go for the latter, for if we are only concerned with acts that affect other states we significantly limit the scope of acts we need to consider. However, it would be neglectful to forget how significant the impact of a state’s acts and decisions can be on individuals. In addition to this, the right to exclude concerns individuals who apply for asylum and not other states. For these reasons we should understand the qualification of self-regarding affairs that do not harm others as not just applying to other states, but also to individuals.

Even though we now have a better understanding of self-regarding affairs, the term is still somewhat troubling. For one it is difficult to determine of every act whether or not it harms others. Nonetheless, this definition will prove helpful when we discuss the right to exclude. Furthermore, there is one more reason why we should accept the qualification that self-determination (as self-governance) only applies to self-regarding affairs: self-determination (as self-governance) is granted to legal states so that they can ensure that individual

citizens have a certain degree of autonomous agency. The autonomous agency of citizens is, if other countries do not interfere<sup>30</sup>, primarily an internal affair of a legal state: it is an affair that only concerns the state itself.<sup>31</sup> In other words: the autonomous agency of a legal state's citizen is a self-regarding affair. It makes sense that if a right to self-determination (as self-governance) is granted to ensure that one particular self-regarding affair is maintained, this right cannot simply be transferred to affairs of another kind.

We now have our argument for self-determination. Therefore, it is time to turn to the second part of this thesis concerning the right to exclude. Now, it might be wondered why all this effort was spent to come to an argument for the right to self-determination when the argument from chapter one or chapter two might have also sufficed. As stated in chapter one the particulars of an argument for self-determination influence the content of the right to self-determination. When, in the next chapter, we determine whether the right to exclude is part of the content to the right of self-determination, the particulars of our argument will to a large extent influence the extent to which can be said that self-determination involves a right to exclude.

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<sup>30</sup> This is an important qualification.

<sup>31</sup> This is also partly ensured by the first qualification.

## **Part 2: The Argument for the Right to Exclude**

## 5. Why Would We Want a Right to Exclude?

In the introduction it was said that the right to self-determination is often thought to include a right to exclude. It was argued that whether or not this is the case depends on one's account of self-determination. In the previous part of the thesis such an account was developed, based on the idea that we value the autonomous agency of individuals. In this chapter it is asked if this account of self-determination leads to a right to exclude, and what the scope of this right would be. Because the right to exclude faces some limitations due to it being part of the content to the right to self-determination, these limitations form the start of the discussion.

### 5.1 Limitations Concerning the Right to Exclude

In this section some limitations on the right to exclude are explored. Because this thesis is concerned with a right to exclude *as part of* a right to self-determination, our account of self-determination influences the possibilities for the right to exclude. The possibilities for a right to exclude are limited because such a right would have to contribute to the purpose of self-determination, even though there are numerous answers to the question why we would want a right to exclude. However, if the right to exclude is to be established as part of the right to self-determination or as following from the right to self-determination, the answer to this question will have to be related to the argument for self-determination. Another difficulty for the right to exclude stems from our understanding the right to self-determination as a *pro tanto* right. As a consequence, a right to exclude founded in self-determination should also be understood as a *pro tanto* right.<sup>32</sup> This means that, unless we can find an additional argument for the right to exclude, there might be outweighing reasons. Coupled with the qualifications discussed in the previous chapter, this could make excluding people based on the right to self-determination very difficult, depending on the kind of outweighing reasons there are.

Our account of self-determination granted the right to self-determination to a legal state, as this was required for the state to establish and protect the autonomous agency of its citizens. If a right to exclude is to be part of this right to self-determination, it has to, in some manner, contribute to the purpose of the right to self-determination. This is why, as discussed in chapter two, Miller relates his right to exclude to the protection of culture – which in his account of self-determination is needed as the background for (collective)

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<sup>32</sup> See chapter two for the discussion on this.

decision-making. The account of self-determination as it was developed in this thesis so far centered on the idea that we all value autonomous agency. Thus, if the right to exclude is to be part of this right to self-determination it has to be related to autonomous agency. The final argument for the right to self-determination looked as follows:

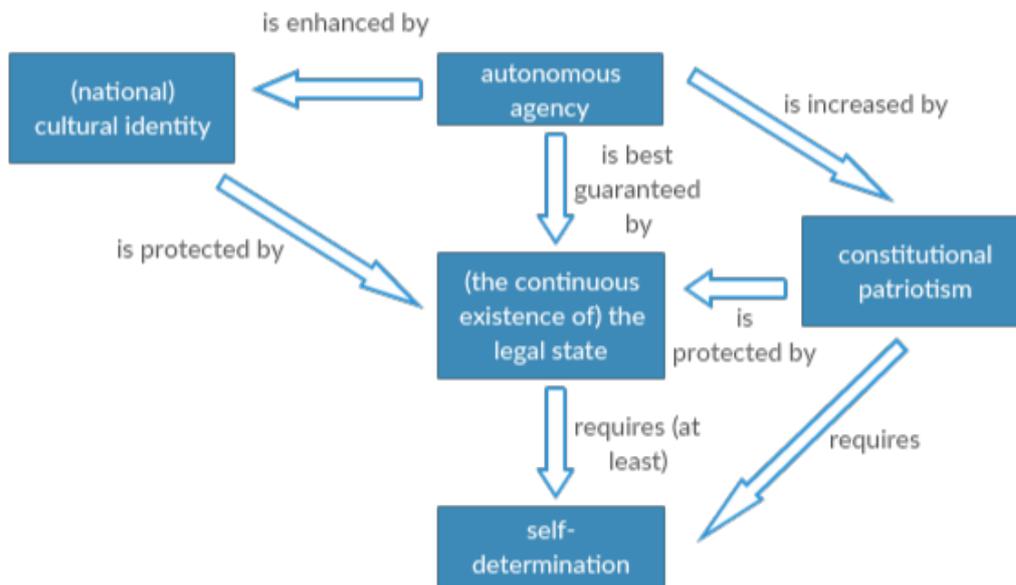


Figure 7: The Argument for Self-Determination

Self-determination thus serves two purposes: ensuring the continuous existence of the legal state and enabling constitutional patriotism. The continuous existence of the legal state was required for autonomous agency (both for its existence, but also for its enhancement through cultural identities), and constitutional patriotism increased the autonomous agency of individuals. If a right to exclude is to be part of this account of self-determination, it has to contribute to these goals: it has to protect the existence of the legal state and/or constitutional patriotism. This also means that a right to exclude has to contribute to upholding or protecting the autonomous agency of citizens. As was argued in the previous chapter constitutional patriotism and the legal state are related, which means it is possible that if the right to exclude protects the legal state it also in some manner protects constitutional patriotism.

The consequence of the general approach to locating the right to exclude within the right to self-determination limits the scope of possible arguments

for exclusion significantly. There are two possible ways in which we might find such arguments: immigration as a direct threat to autonomous agency and immigration as a threat to the continuous existence of the legal state. In the latter case this can mean a threat to the constitution or a threat to the stable functions of the legal state. Schematically seen, the argument will take the following shape:

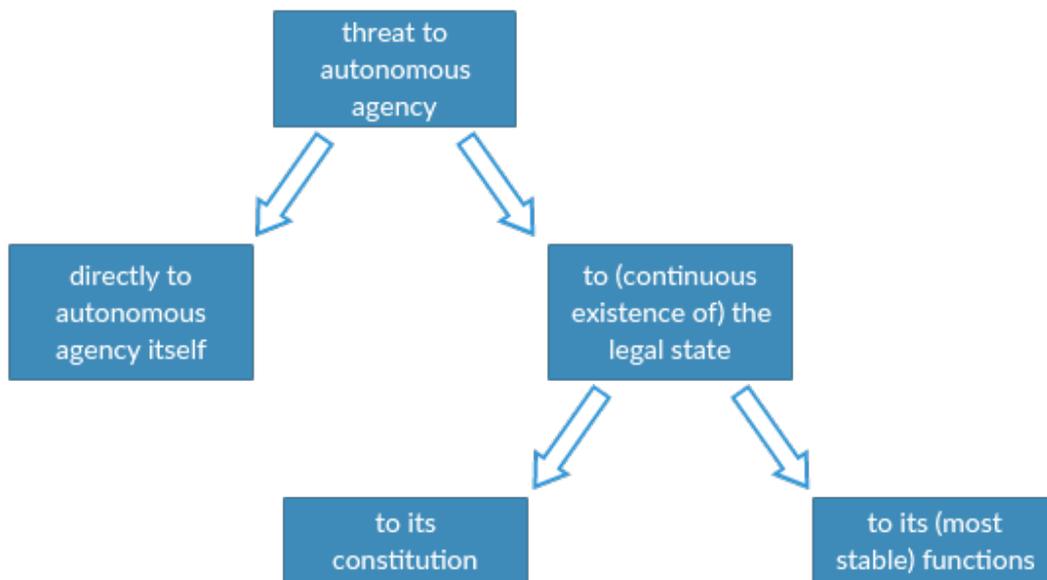


Figure 8: The Argument for the Right to Exclude

## 5.2 Arguments for a Right to Exclude

In this section a pro tanto argument for the right to exclude is developed. As was argued in the earlier section, the right to exclude will have to refer in some manner to the autonomous agency of the citizens of the state that wishes to exclude. In what way could the right to exclude have relevance to autonomous agency? The right to exclude would allow a state to refuse entry to people, so the question is how can we conceptualize the relation between exclusion and autonomous agency. The best way to do so would be to state that (sometimes) immigration into the legal state would have negative consequences for the autonomous agency of citizens, either directly or by being a threat to the continuous existence of the legal state.

### 5.2.1 Immigration as a Direct Threat to Autonomous Agency

How can immigration threaten the autonomous agency of citizens directly? Most threats (for example: immigration demands too much from institutions, migrants might wish to change the constitution) are essentially a threat to

autonomous agency because they are a threat to the continuous existence of the legal state. Is there a way in which immigration might have direct negative consequences for the autonomous agency of citizens? There is (at least) one way in which immigration could pose a direct threat to the autonomous agency of citizens: it could threaten their freedom of association. Freedom of association concerns the freedom to decide with whom (and whom not) to interact. The idea that citizens have some claim to freedom of association can be found in the work of Christopher Heath Wellman (f.e. Wellman & Cole, 2011). This idea is then extended into the argument that a state, as a collective, also has the right to freedom of association and thus the right to exclude. If an adaptation of this argument is going to be useful to us, we first need to determine how freedom of association is related to autonomous agency.

Imagine what would happen if there were no individual right to freedom of association. Envision, for example, that people could not decide to whom they want to get married because the government determines that for them. No matter the consequences (whether or not they would be happier with a government-chosen partner rather than a partner they choose themselves), this would be a violation of autonomous agency. It would take away the possibility for citizens to act on their own motives and reasons and make their own decisions and choices. The very idea of autonomous agency

[i]nvolves being the author of one's own life, and these individuals' lives clearly have vital parts of their scripts written by the government rather than auto-biographically, as it were (Wellman & Cole, 2011, pp. 30–31).

If people cannot reject potential partners they lose some of their autonomous agency, and this is why freedom of association is so important: it gives them the possibility to choose with whom they want to associate. People do not just value the freedom of association when it comes to choosing their partners; they value it in various aspects of their lives. Being able to form associations with whom they want to is essential in forming intimate attachments, not just in the personal sphere. It is also important with regard to identification (for example cultural identification) that people are free to determine with whom they want to associate. Freedom of association is thus an integral part of autonomous agency. How then, might immigration threaten autonomous agency by decreasing our freedom of association?

The core of the argument is that letting in immigrants could have potentially negative consequences for individuals' freedom to associate, and thus their autonomous agency. The presence of immigrants violates the freedom of

association of individual members of society who do not wish to associate with these immigrants. In order to protect freedom of association, and thus autonomous agency, exclusion of immigrants might be necessary. In this manner, the legal state could be said to have a right to exclude (based on the right to self-determination) that allows it to exclude immigrants, if these immigrants pose a threat to the freedom of association and thus autonomous agency of citizens. While this sounds plausible, it remains to be seen how an individual's freedom of association is violated by the entry of immigrants, something that Sarah Fine has argued is implausible:

The mere presence of immigrants within the state's borders cannot be a serious problem with regard to the associational rights of individual citizens—it is certainly compatible with their individual rights to associate freely within civil society, where they remain free to choose to associate, or not to associate, with newcomers and with other citizens in their private lives. In addition, it seems to be compatible with the collective right of citizens, as a group, to associate or not to associate with others in their political community (Fine, 2010, p. 343).

Thus, while freedom of association is related to, and beneficial for, autonomous agency, it does not necessarily lead to a right to exclude in the name of protecting autonomous agency. Another difficulty for this argument is that unless the argument is taken beyond its current pro tanto form; it could for example be outweighed by the fact that the immigration policies resulting from the right to exclude might be harmful to immigrants. As will become clear, this might not be the only outweighing concern. Before we discuss these other outweighing reasons, there is one more avenue to explore in finding a right to exclude in the right to self-determination: threats to the legal state.

### **5.2.2 Immigration as a Threat to the Continuous Existence of the Legal State**

As has been argued in chapter one, legal states are best suited for ensuring the autonomous agency of citizens and, as was argued later, the legal state's continuous existence requires self-determination. What if immigration could pose a threat to the continuous existence of a legal state? This would in turn threaten the autonomous agency of its citizens, and could thus be an argument for a right to exclude based in the right to self-determination. Wellman, who we also discussed in the last section, presents a comparable argument. What is surprising about Wellman's argument is that it goes no further than to assert that while one immigrant would indeed not impact a state very much, a sufficient number of immigrants could have negative impacts on a state (Wellman & Cole, 2011, p. 44). If we want to present an argument based on the

idea that immigration can pose a threat to the continuous existence of a legal state, this argument does not suffice. It is nothing more than a slippery slope argument. Wellman asserts that while one immigrant is not harmful, more are surely to follow (especially when there is no strict immigration policy) and this can culminate in more and more immigrants until one immigrant more means there are 'too many' – at which point (some part of) the state is in danger. The criticism of the argument is not to say that the impact of immigration should be disregarded in the discussion concerning the right to exclude. It is, nonetheless, to say that if one wishes to make such an argument it should at least be made clear what this impact is, and at what point the effects of immigration have a big enough impact to justifiably refuse more immigrants entry.

A more concrete version of this argument can be found in the work of Thomas Christiano, who states that immigration policies should be evaluated in terms of whether or not they “[u]ndermine the existence or normal functioning of liberal democratic states” (Christiano, 2008, p. 935). While this approach shares its core idea with Wellman, there is already more specificity here, for the argument concerns *the normal functioning* of liberal democratic states.<sup>33</sup> What then does a threat to this normal functioning, and thus the continuous existence, of a state consist of? According to Christiano the normal functioning of a state can be threatened in two ways:

A threat to the proper functioning of a democratic state involves a threat either to its constitutional structure or its ability to carry out some of the main functions democratic states have been able to successfully carry out over the last century, most particularly over the last half century (Christiano, 2008, p. 955).

#### ***5.2.2.1 Immigration as a Threat to Constitutional Structure***

The first of the threats to the continuous existence of the legal state would thus be a threat to the constitutional structure, because without the constitution, there is no legal state to speak of. As we saw, legal states also require a certain kind of constitution: one that ensured that the government cannot abuse its power, for example. In addition, the discussion on constitutional patriotism allowed us to further flesh out our view of the constitution in legal states, for constitutional patriotism also demands a certain kind of constitution: one that protects civil liberties (Cronin, 2003, p. 4) and consists of mutual justification, fair terms of cooperation and fair terms of limiting power (Müller, 2007, p. 10).

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<sup>33</sup> As was argued in chapter 1, liberal democratic states are often also legal states.

Immigration could pose a threat to the constitution if a large enough group of immigrants were to enter the country to change the constitution, either through the democratic process or by force. In the latter case, the unjustness of changing the constitution is immediately clear, in the former less so. Recall that part of the content of constitutional patriotism was that all groups need to be treated justly by the constitution (Müller, 2007, pp. 11–13), and also that it was unavoidable that the political culture would to some degree mirror the norms and values of the largest non-political culture (Cronin, 2003, pp. 15–16). So imagine that a large enough group of immigrants were to immigrate into one particular state and that this group is now the majority culture. They could then change the constitution in a manner that it no longer reflects democratic values, let alone constitutional patriotism (this need not happen – *if* the constitution is changed it does not necessarily mean that the constitution is no longer just, fair, etcetera).

It is possible that the changes made to the constitution are so impactful that they change the very nature of the state. Should this happen, the continuous existence of the legal state is at risk, with all its consequences for autonomous agency. Of course, the chances of a large enough immigration of one particular cultural group to one particular state is small, but *should* it seem likely to happen, a state could have legitimate reasons to restrict immigration by appealing to the right to self-determination.

#### *5.2.2.2 Immigration as a Threat to Stable Functions of a Democracy*

The second kind of threat to the continuous existence of the legal state consists of threats to the most stable functions of a state. This is because these stable functions have often managed to withstand time and thus appear to be those functions that have the strongest support from not just different legal states or liberal democratic societies, but also from the citizens in these societies. A threat to these activities would thus show that something has gone wrong in the democratic state (Christiano, 2008, pp. 955–956). One of the functions of a democratic state is to enable some form of welfare support and social justice (Christiano, 2008, p. 957). Welfare support can be crucial for the autonomous agency of citizens. It provides them, should something befall them, with a standard of living that enables them to continue to pursue their own choices and decisions. Of course, their range of options can still drastically decrease, but the autonomous agency of citizens in states with welfare support will decrease less than the autonomous agency of citizens in state where there is no welfare support. Functions like welfare and social justice in legal states require at the minimum a willingness to cooperate with other citizens, and in our account of the legal state (with the shared identity of constitutional patriotism)

this should be guaranteed by the shared loyalty to the constitution; a constitution that entailed mutual justification, fair terms of cooperation and fair terms of limiting power. Immigration could pose a threat to these functions if the shared loyalty and the willingness to cooperate are threatened. The question thus becomes how immigration could lead to a decrease in willingness to cooperate with and trust in fellow citizens, for this decrease could pose a threat to the continuous existence of these functions of legal state, and thus to autonomous agency.

One important factor in legal states (with constitutional patriotism as shared identity) is that citizens have a shared political identification, which fosters cooperation with each other and trust in both the constitution and other citizens. This trust, or loyalty, is necessary because one might not always be on the winning team when it comes to political issues. It is important that citizens believe that the manner in which the decision was made is just and that the decision falls within the values of the constitution. If this trust in others and loyalty to the constitution is not there, groups or citizens might become less willing to participate in the democratic process. This would unhinge the collective identity of constitutional patriotism and the activities of the state. How does immigration relate to this? Generally it is thought that a large influx of immigrants from a different culture with different traditions than the main non-political culture of a state, might increase the level of distrust between citizens. This does not necessarily have to be caused by xenophobia, but is instead more likely to be caused by misunderstandings, a lack of understanding, or uncertainty as to whether the new citizens will 'pull their weight' (Christiano, 2008, p. 957). This could then lead to a decrease in mutual identification, solidarity and trust between the citizens (Carens, 2015, p. 282)

Another possible problem for welfare programs is that citizens might not be willing to make sacrifices for people who are very different from them, people with whom they do not share a history or culture. Here, as with the threat to the constitution, numbers matter. If there is relatively little immigration of people with different cultures there should be little impact on the willingness of citizens to contribute to and support welfare and social justice programs. It might seem reasonable to restrict immigration so that the trust and solidarity between citizens remains strong, especially as immigration numbers increase. Be that as it may, it cannot be simply assumed that the erosion of this trust is morally legitimate (Carens, 2015, p. 283). Racism and other forms of prejudice towards the immigrants or indifference towards the well-being of these immigrants might have the same result on the viability of the welfare programs, but there is a crucial distinction:

To the extent that the unwillingness of current members to support welfare programs once immigrants benefit from them is the product of morally impermissible attitudes and dispositions, then to that extent any negative effects on the welfare state cannot provide a deep justification for closure (Carens, 2015, p. 283).

Xenophobia, attitudes like racism, or any other prejudice, should not be justifiable reasons for restricting immigration on the grounds that it would damage the necessary trust for welfare programs. The concern here is that welfare programs depend on support from the citizens of a state, and these citizens need to trust each other to not abuse the welfare system for the system to work. If people mistrust each other, the chance exists that the welfare system will slowly be dismantled as people elect officials who share this distrust. As argued in section 2.1.1.2 these concerns are misplaced. Support for welfare programs might very well depend more on the institutions in the state than on feelings of trust in the population (Wellman & Cole, 2011, p. 269).

Just as the fear that the trust between citizens would be damaged is not a satisfactory reason to limit immigration, neither is the misunderstanding and uncertainty that Christiano (2008, p. 957) mentions. Although fears and uncertainty should be taken seriously, they are not a legitimate justification for restricting immigration. Instead of restricting immigration, solutions to fear, misunderstanding and uncertainty should be found. Often there are already cultural groups akin to that of the immigrants present in the state. If these groups 'pull their weight', then why would the new immigrants not do so? This also goes for the idea that citizens might be unwilling to make sacrifices for people very different from them. In today's modern democracies there are almost always already citizens from the cultural group of the immigrants. Citizens are already making sacrifices for people with whom they might only share the collective identity of constitutional patriotism. These new immigrants should, in time, also come to identify that way, so the unwillingness to make sacrifices would in time go away. Additionally, social trust does not need to be already present in the community, because it can be created. When immigration numbers increase, states might want to restrict immigration based on the idea that they are justified in wanting to maintain the identity that is currently facilitating these programs (Wellman & Cole, 2011, pp. 269–270). Instead, they should attempt to create the shared identity that is best suited for these welfare and social justice programs.

Keeping the above in mind, it is possible that the influx of immigrants is significantly high to indeed pose a threat stable functions of the legal state, simply because the state can no longer perform its functions in the light of the increased demands. Can the state then appeal to the right to self-determination to justify the exclusion of these immigrants? The answer to this question will to a large extent depend on the presence of outweighing reasons, for the argument to exclude, as it has been presented here, is a pro tanto argument. In the next chapter possible outweighing reasons are explored to see what kind of arguments the right to exclude has to circumvent if it is to be effective.

## 6. Outweighing Reasons

In this chapter, three arguments or reasons are discussed that might outweigh the pro tanto right to exclude as it was formulated in the previous chapter. In other words: are there situations in which the right to self-determination leads to a right to exclude, but in which there are reasons that outweigh this right to exclude? The fact that outweighing reasons might exist, does not mean that they by definition outweigh the right to exclude. What their existence does mean is that the right to exclude cannot be appealed to without considering whether, in a particular instance, the right to exclude is outweighed. This means that there might be instances in which a state wishes to exclude others, and can do so according to the right to exclude and right to self-determination, but is stopped by the presence of one or more outweighing reasons. In this chapter three sources of such outweighing reasons are discussed: the doing-harm qualification, the principle of humanity and the idea that there are situations in which the state has a moral duty towards refugees.

### 6.1 The Doing-Harm Qualification

One of the outweighing reasons stems from our account of self-determination itself. The right to self-determination came with two important qualifications: self-determination only applies to self-regarding affairs, and only legal states can appeal to the right of self-determination. This has consequences for a right to exclude that is grounded in self-determination, because by making the right to exclude part of the right to self-determination, the same restrictions apply to it. The last qualification means that if there is indeed a right to exclude, only legal states can appeal to this right. The first qualification, which concerned self-regarding affairs, was understood to mean that the actions of a state can be other-regarding, but cannot harm other states or individuals. The same qualification would thus apply to the right to exclude. This has a severe consequence: there might be very little possibilities for actual exclusion if it turns out that this exclusion harms others.

It can be doubted how often actual harm is done, but that harm is done should be beyond any reasonable doubt. In a report it was documented that Britain sends back 98% of gay asylum seekers who are fleeing persecution for their sexuality (Miles, 2013, p. 5). When refugees like these are sent back to countries where their sexuality is perceived as a punishable crime, it is hard to see how refusing them entry is not causing these refugees (at the least potential) harm. It might be objected here that these refugees could apply elsewhere for asylum, though not only does this argument show a distinct lack of moral responsibility, it is also faulty. In immigration agreements between European

countries it has been stipulated that a refugee can only apply for asylum in *one* European country. If that country refuses entry, the refugee cannot apply elsewhere. This means that an argument for the case that refusing entry is not harmful is very implausible.<sup>34</sup>

This doing-harm qualification has consequences for our right to exclude, for if this right remains nothing more than a *pro tanto* right, it might be difficult to actually exclude people based on this right. This qualification is not the only consideration that might outweigh the right to exclude. Another reason that might outweigh this right concerns the principle of humanity.

## 6.2 The Principle of Humanity

It is not unlikely that while allowing immigrants to enter the legal state might have negative consequences for the autonomous agency of the citizens, it is at the same time inhuman to refuse these immigrants entry. Chandran Kukathas (2005) refers to this as the principle of humanity. Even if rich countries would invest more in poor countries, more aid was available and trade barriers were dismantled, for the majority of the people who live in poverty the surest and most promising way to improve their lives would be to move. Improving the conditions of poor countries does not solve everything; the situation of individuals can still be poor even though the condition of the state is improving. In these situations, migration is the best way in which these individuals can improve their lives. There are many people who undertake a journey to a new state, and

[t]o say to such people that they are forbidden to cross a border in order to improve their condition is to say to them that it is justified that they be denied the opportunity to get out of poverty, or even destitution (Kukathas, 2005, p. 211).

The fact that there are people who feel that migration is their best chance at a better life is without doubt: there are many immigrants taking substantial risks to get to other countries, of which the Syrian refugee crisis is just one example. The principle of humanity therefore states that if these immigrants are to be refused entry, a very good reason must be offered to justify this exclusion:

It would be bad enough to meet such people with indifference and to deny them positive assistance. It would be even worse to deny them the

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<sup>34</sup> An interesting related discussion is whether immigrants seeking entry are coerced when the state refuses them entry, and whether this coercion needs to be justified not just to the state but also to the immigrants. See: Abizadeh (2008), Abizadeh (2010), and Miller (2010).

opportunity to help themselves. To go to the length of denying one's fellow citizens the right to help those who are badly off, whether by employing them or by simply taking them in, seems even more difficult to justify – if, indeed, it is not entirely perverse (Kukathas, 2005, p. 211).<sup>35</sup>

Whether the protection of the autonomous agency of the legal state's citizens is a good enough reason, depends on the situation and the amount of people wishing to immigrate. If the number of people wanting to enter is indeed large enough to significantly alter the constitution or threaten the function's of the state, then it might be that these are good enough reasons to exclude the immigrants. One legal state might be willing to accept some decrease in autonomous agency if they put a great value on the principle of humanity, whereas another legal state would find the decrease in autonomous agency a good enough reason to exclude immigrations. It could very well be possible that these humanitarian concerns outweigh the right to exclude, especially if the appeal to the right to exclude cannot be justified. This is the case if immigration poses no *actual* threat to the autonomous agency of the citizens.<sup>36</sup> It might also be that the decrease in autonomous agency is so negligible that it cannot function as a 'good enough reason'. This can only be determined on a case-by-case basis – there is no one simple answer to the question of whether this outweighing reason always takes precedence over the right to exclude.

Humanitarian concerns are not the only source of possible outweighing reasons, for there are also reasons why states have a moral duty to admit refugees. Note that the principle of humanity states that humanitarian concerns must be taken into account – not that this generates a duty to admit refugees. In the next section, the argument is that certain reasons do lead to such a duty.

### 6.3 A Moral Duty

In this section two arguments are given that lead to the legal state having a moral duty to admit immigrants – a duty that can outweigh the state's claim to

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<sup>35</sup> The strength of this argument depends somewhat on the difference between immigrants and refugees. Humanitarian concerns do not apply so much when, for example, someone wishes to immigrate to a state that is comparable to the state of which he is a citizen (say from Belgium to the Netherlands). In the case of refugees, however, the circumstances between states can differ extensively, and humanitarian concerns are often applicable in these cases.

<sup>36</sup> Of course, immigration is often *perceived* as a threat. As argued in chapter five one can only appeal to the right to exclude when there is an actual threat. Xenophobic reactions within the legal state are not a legitimate reason for exclusion.

the right to exclude.<sup>37</sup> The first of these arguments states that a causal connection between the immigrants and the legal state can exist that leads to a moral duty to admit these immigrants. The second argument regards the duty to admit immigrants as resulting from the modern state system.

### 6.3.1 The Causal Connection

The first source of a moral duty to admit refugees is the fact that sometimes there is a causal connection between the reason why the immigrants are no longer safe in their home country and the actions of the state they wish to enter (Carens, 2015, p. 195). While it can be hard to determine to what degree a state is responsible for the immigrants having to flee<sup>38</sup>, that states sometimes are responsible is without doubt. The Americans recognized this after the Vietnam War, taking in numerous immigrants from Vietnam and surrounding countries. The same responsibility, claims Carens (2015, p. 195), should have been taken after the war in Afghanistan and Iraq. While it should be the subject of discussion to what degree the United States and its allies are responsible for all those fleeing these countries, it cannot be denied that there is some causal connection. This causal connection is especially apparent when Afghan and Iraqi people, who have worked with the American army, are in danger because of this cooperation. When the causal connection is this evident, the responsible state clearly has a moral duty to admit these refugees. Of course, the fact remains that it is often hard to determine which state is responsible for refugees no longer being safe. The conflict in Syria, for example, has become immensely complicated, and it is often unclear which party is responsible for (military) actions. Take into account that sometimes the army of a particular state acts under the approval or name of the United Nations, and the complexity increases. Although this complexity does not diminish the fact that a causal connection establishes a moral duty, it does make it harder to determine the exact connection. Thus, as Carens states: “Obviously, the assignment of moral responsibility on the basis of causal connections will depend crucially on the interpretation of those causal connections” (2015, p. 195). Of course, states might refuse to accept either the causal connection or the responsibility following from this, but the existence of a moral duty does not depend on whether or not states accept that they have this moral duty.

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<sup>37</sup> As opposed to the principle of humanity in section two, which merely said that good reasons would need to be given for exclusion, in this section the arguments involve a moral duty to admit refugees.

<sup>38</sup> Undoubtedly, any discussion on this matter will include the question whether this flight was really necessary.

### 6.3.2 The Modern State System

Another source for the moral duty to admit immigrants can be seen as emerging from the way in which the world is divided up in states: the modern state system. This system organizes the world by dividing up the land in different states that then have authority over a certain territory.<sup>39</sup> People are allocated to such a territory when they are born, and this is almost without exception the territory they are born in (with a few exceptions such as parental lineage or on-flight births). Over the course of history the world has grown into this state system, so in a certain sense it is historically contingent that we live in states. Nonetheless, there are arguments for this state system, such as the one presented in chapter one where it was argued that legal states are the best option when it comes to enabling and ensuring autonomous agency. Some arguments go even further, stating that humans are better off overall in the state system than under any other alternative (Carens, 2015, p. 196).

While it might be true that living in a certain state in this modern state system is working out very well for some part of humanity, the system clearly does not work as well for others. There are people living in states that have failed to ensure their well-being, either deliberately or due to incapability. One such group of people consists of certain immigrants. But why should other states have a moral duty to admit refugees whose own state fails to take care of them? Because people are assigned to states in the modern state system, states have a collective responsibility to help those for whom that state system works out unfavorably. In other words: “The duty to admit refugees can thus be seen as an obligation that emerges from the responsibility to make some provision to correct for the foreseeable failures of a social institution” (Carens, 2015, p. 196). If we view the state system as a social institution this moral duty would appear to make sense. No social institution is perfect, but they often have built-in solutions for possible failures. Admitting refugees when their state fails them is then one of these solutions.

It can be argued that to see the modern state system as a social institution is a gross oversimplification of both social institutions and modern states. Social institutions are almost without exemption regulated at the state level, with the state designing the different social institutions and ensuring their functioning. The modern state system, on the other hand, is comprised of different states that each function, to a certain limit, independent from each other. While there are organizations such as the United Nations and European Union that attempt to bring the functioning of different states in line with each other, there is no

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<sup>39</sup> As we have seen with self-determination in this thesis, the absoluteness of this authority can be doubted.

higher authority that does for all the states what one state does for all its institutions. In this manner, the analogy comes up short. Nonetheless, it is a fact that some benefit from the state system where others clearly do not. This can be a cause for concern and can lead to a moral duty stemming, depending on how plausible one finds the analogy with social institutions.

We have now discussed a number of possible outweighing reasons that could nullify the right to exclude.<sup>40</sup> Nonetheless, that outweighing reasons exist does not mean that they always outweigh the pro tanto right to exclude. How do we determine whether the state can appeal to the right to exclude or whether the (potentially) outweighing reasons carry more weight?

#### **6.4 The Right to Exclude Versus Outweighing Reasons**

It should be noted that if there is no threat to the autonomous agency of the legal state's citizens (directly or indirectly), there is no right to exclude to appeal to. But what if immigration does pose a threat? The question then becomes whether ensuring and protecting the autonomous agency of the state's citizens is a good enough reason. There is no answer to this question that will be able to account for every situation. It might be that a great amount of immigrants can be helped with the state's citizens only losing a negligible amount of autonomous agency. It could be that citizens lose some autonomous agency but are still in favor of allowing immigrants entry, because they feel the trade-off between their loss of agency and the immigrants gain of quality of life is worth their loss. On the other hand, it could be that the legal state is simply not capable of keeping up with the numbers of immigrants wishing to enter the state while at the same time ensuring its basic functions remain viable. In other words: whether the right to exclude or a (potentially) outweighing reason takes precedence will largely depend on the situation and will have to be determined on a case-by-case basis unless the status of the right to exclude is extended beyond its current pro tanto mode.

This conclusion poses a rather significant problem for our account of self-determination. If the account of self-determination includes the qualification that the state's policies cannot harm others, and it has also been established that immigration policies can be harmful to others, how can a right to exclude be part of the content of self-determination? Take in account the other potentially outweighing reasons, and it becomes difficult to see how a state can ever appeal to a right to exclude. We need an additional argument that is

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<sup>40</sup> Undoubtedly more outweighing reasons exist, but it would be impossible to discuss all of these here.

capable of making the right to exclude more than just this minimal pro tanto right if our account of self-determination is to lead to any significant right to exclude. Chapter seven, the last chapter of this thesis, will explore the possibilities for such an argument.

## **7. The Cosmopolitan Argument for Exclusion**

Throughout this thesis, the idea that the legal states are best suited for ensuring autonomous agency has been central to our discussion of self-determination and the subsequent pro tanto right to exclude. This yielded a very minimal right: it can only be appealed to when immigration endangers the autonomous agency of citizens either directly or by being a threat to the legal state. In addition to this, there are a number of outweighing reasons that might nullify the right to exclude. What is needed is an additional argument that makes the right to exclude less susceptible to these outweighing reasons. To put it rather crude: we need a reason for exclusion that outweighs the outweighing reasons. Is there something related to autonomous agency and the role of legal states that can offer such a reason?

### **7.1 The Legal State Is Critical for Global Development**

Ensuring and enabling autonomous agency is not all that legal states have achieved: modern liberal democratic states (which are prime candidates for being legal states, as argued in chapter one) are a fundamental achievement in realizing the protection of human rights and in bringing about social justice. Of course, these achievements are limited, but democratic states do give the world the best shot at realizing world-wide human rights and social justice because they are the basis of global institutions (Christiano, 2008, p. 934). Liberal democratic states (and thus legal states) are not just the world's best option for social justice; they are also responsible for the development of international institutions. These institutions in turn are crucial for providing poverty relief, fair international trade, protection of the environment, etcetera. Christiano believes that these institutions would not last very long if the democratic states would withdraw their support (2008, p. 935). This doesn't seem far-fetched: the most of the core members of the United Nations are all more or less liberal democratic states.

#### **7.1.1. Finding a Connection Between Legal States and Global Development**

Legal states are thus not only best suited for ensuring and enabling autonomous agency, but are also central to the development of global institutions. Is there a link between these two aspects of the legal state? One way to conceptualize this link is to see the aspects that make the legal state successful in regard to autonomous agency are also those aspects that make it successful in bringing about global social justice. This would mean that legal states are not just the best option for ensuring autonomous agency in their own state, but that they are also the best option for bringing about greater autonomous agency for individuals worldwide through these global

institutions. Central to the idea of the legal state was, to begin with, that restrictions of freedom must be justified. This was achieved in a multitude of ways, amongst which by separating the legislative and executive power, and by binding the executive power to the same statutes as the citizenry. In addition to this, there was a focus on positive freedom: the individual's participation in the creation of law so that restrictions on one's freedom are not just externally imposed. It was with regard to this aspect of legal states that constitutional patriotism played an important role. Why do these aspects of legal states make them critical for global development and global justice?

### **7.1.2 Aspects of Democratic States Needed for Global Development**

According to Christiano, liberal democratic states are crucial for global development for a number of reasons. Legal states are also democratic states, so the reasons that Christiano identifies should also apply to our definition of the legal state. The first of these reasons is that democratic states attempt to create justice among a local set of persons (the citizens of the state). Of course, Christiano admits, different states have different systems of law. Nonetheless, democratic states have systems of law that guarantee at least some form of justice (Christiano, 2008, p. 949). What makes this argument so applicable to legal states is that for Christiano, participation in law-making or forming a system of justice is central:

Ideally, law is made in a way that enables persons in the society to have a roughly equal say in at least the whole package of laws. This [...] ensures that when there is substantial disagreement on political matters, the great majority of people have some input in those areas that matter to them most, and individuals are treated as equals in the process of resolving those disagreements (Christiano, 2008, p. 949).

This clearly resonates with the ideal of positive freedom embedded in the legal states, which is emphasized by constitutional patriotism. This should not be surprising, for as argued in chapter one, (liberal) democratic states are often legal states.

Another aspect of democratic states that make them critical for global development, is their apparent success in establishing treaties with each other (Christiano, 2008, p. 952). Democratic states have negotiated a number of international treaties with that they mostly appear to follow. What is interesting in this is that these treaties often limit the respective freedom of each state in order to achieve a particular goal. This very much mirrors the restricting of freedom that is sometimes agreed to within the state for some

greater good. It appears that individuals in the state are not just capable of restricting their own freedom to achieve some goal (improved welfare, for example), but are also willing to limit the freedom of the state itself so that some other goal (international trade, for example) can be achieved. The European Union and its different treaties can be seen in this way. By entering the European Union a state has to hold itself to certain statutes, limiting its freedom with regard to certain things like its fiscal deficit. On the other hand, this state also gains certain benefits, like easier or cheaper access to certain trade markets.

In addition to establishing treaties, democratic states are also often the states that abide by most (of the) international laws. According to Christiano, who cites Simmons (1998), this is for a variety of reasons, such as internal respect of the law and the prevalence of active interest groups (Christiano, 2008, p. 952). While Simmons does indeed mention these reasons, Christiano appears to exaggerate how well established they are. Simmons is careful to reiterate constantly that while the study of compliance with international agreements has increased, “[w]e are a long way theoretically and empirically from an understanding of the conditions under which governments comply with international agreements” (Simmons, 1998, p. 91). Areas in which progress has been made in understanding why states comply with international agreements are very specific, such as human rights or the environment, and we cannot simply generalize these results. In addition, Simmons study did not focus specifically on (liberal) democratic states. Thus, while we can tentatively accept that democratic states appear to follow international law, we should be careful not to make our claim to this too strong. It might be that legal states tend to follow international agreements more often than other states, but the research to follow up this claim is not as clear-cut as Christiano presents it.

The third reason Christiano offers is less problematic, for this goes back to the ideal of individual participation in the governing of the state. Christiano sees democratic states as representing a wide array of interests in negotiations. This is crucial, for the negotiations between democratic states are critical for the development of international institutions, and it is only through democratic states that the interests of a large majority of people can be accommodated in negotiations (Christiano, 2008, pp. 952–953). Democratic states are used to accommodating the wishes and needs to a large number of people in the negotiations that happen on a state level. This makes these states, and thus also legal states, suitable for international negotiations where they can take the same approach to international matters.

### 7.1.3 The Legal State and Autonomous Agency in the World

The very same qualities that make the legal state so suitable for ensuring and protecting autonomous agency, also appear to make the legal state crucial for international institutions and global justice. We can formulate this in a different way: legal states are not just best capable of ensuring the autonomous agency in their own state, but are also critical for enlarging the autonomous agency of citizens world-wide. With increased global development and global justice the autonomous agency of individuals in states that are not legal states is bound to increase too, as the constitutions of these states change to reflect international standards. This does not happen overnight, but even small things such as foreign aid can improve the autonomous agency of individuals, as happens when this aid is used to, for example, build schools.

Legal states are thus important for global justice, but this does not mean that states have a duty to involve themselves with global justice and development. Nonetheless, it is generally accepted that there are circumstances in which people are entitled to our hospitality, assistance, and good will.<sup>41</sup> Even proponents of a right to exclude admit to something like this. For example, Michael Walzer formalizes the idea that sometimes people are entitled to help the principle of mutual aid. Positive assistance, giving aid, is required if (1) it is needed or urgently needed by one of the parties; and (2) if the risks and costs of giving it are relatively low for the other party (Walzer, 2010, pp. 32–33). Given that some of the poorest countries in the world can be said to urgently need aid, as do people in war-ridden countries, and that this aid does not have to come at a high cost to legal states, it might be that his principle of mutual aid is applicable more often than thought. When giving this aid comes at a low cost, it would appear that some form of assistance through global development might be required.

Acknowledging such a principle is not inconsistent with the core principles of the legal state, but it does not lead to a strict duty. Nevertheless, this does not change the idea that legal states are, out of all states, most likely to be able to create and sustain international institutions and increase the autonomous agency of individuals. While this principle of mutual aid might be part of what global development and global justice aim to achieve, it is only a very small factor. It does not account for institutions such as the European Union, so the possibility of such a principle cannot account for all that legal states might (aim to) achieve on the global level. Still, the principle goes some way in articulating

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<sup>41</sup> See, for example, Carens, (2015) and Gibney (2004).

why legal states (or liberal democratic states, in Christiano's work) should involve themselves with global development and global justice.

Now, at the start of this chapter it was said that we needed an additional argument for why legal states should be able to appeal to the right to exclude for autonomous agency related reasons. How can the importance of legal states for autonomous agency, not just on a state-level but also more globally, lead to such an argument?

## **7.2 Global Autonomous Agency and Immigration**

In chapter five it was argued that when immigration threatens the constitution of a legal state or its functioning, this would give the state a reason to appeal to the right to exclude. When these things occur the autonomous agency of the state's citizens might be threatened. In the previous section it was argued that legal states are not just best suited for ensuring autonomous agency for their own citizens, but are also crucial in the development of global justice and autonomous agency of citizens worldwide. This means that if immigration were to undermine the practices of a legal state in the ways mentioned in chapter five, it would thus not only be harmful on the level of the state, but also on an international level. Legal (or in Christiano's argument liberal democratic) states are critical for achieving cosmopolitan justice. If their functioning is threatened, so is global justice and thus the autonomous agency of individuals in less well-off states who benefit from the international involvement of legal states. If a legal state cannot perform its functions on a state-level, how can it contribute to the development of global justice? The very same functions of the legal state that make it able to ensure the autonomous agency of its citizens are those that make it suitable for participating in the development of global justice. Thus: if immigration threatens the constitution or functioning of a legal state, its role in developing global justice is also threatened.

### **7.2.1 The Cosmopolitan Argument for Exclusion**

Whereas the arguments for a right to exclude that were presented in chapter five were centered on the state itself, this argument is centered on moral cosmopolitanism and the importance of democratic states for cosmopolitan justice. It has been established that legal states are beneficial to the development of global justice, and that if immigration threatens the functioning of such a legal state, the development of global justice might also be threatened. How can this lead to an argument for exclusion? The general idea is that, while excluding people might be unbeneficial for those excluded, not excluding them will lead to greater (global) harm in the long run. Christiano formulates the argument as following:

To put the argument in the crudest possible form, the idea is that if democracies are essential to the long-term realization of a just cosmopolitan order, and if open immigration would threaten democracies either in constitutional structure or proper functioning, then open immigration amounts at most to a short-term gain at the expense of much greater long-term gains. It amounts to killing the goose that will lay the golden egg in the long term (Christiano, 2008, p. 956).

The argument thus consists of a trade-off between two things: the (short term) harm done to immigrants when we exclude them and the harm to global justice and global development in the long term if we do let people in. It is unfortunate for those excluded that they cannot find refuge in a certain state should they be excluded on account of their being a threat to the function of a state. However, a lot more people would, in the long term, be worse off if the legal state could not exercise its functions on a global level anymore. While letting immigrants in might enlarge the autonomous agency of these immigrants, in the long run the autonomous agency of individuals worldwide might suffer from not excluding these immigrants.

We now have two arguments for the right to exclude. The pro tanto argument that immigration can be a threat to autonomous agency by being a threat to the constitution and proper functioning of the legal state, and the additional argument that excluding immigrants from the legal state can be necessary for global development and global justice. In chapter six we saw that the pro tanto argument faces some outweighing reasons, and the development of the latter argument resulted from the need for an additional argument. Can this additional argument provide some counterweight to the outweighing reasons?

### **7.2.2 Outweighing Reasons and the Cosmopolitan Argument for Exclusion**

There were three outweighing reasons presented in chapter six: the doing-harm qualification, the principle of humanity, and the idea that we sometimes have a moral duty towards immigrants.

#### **7.2.2.1 The Doing-Harm Qualification**

The doing-harm qualification stipulated that actions done in the name of the right to self-determination (amongst which is thus the right to exclude) cannot harm others. Immigration policies that exclude immigrants are very often harming these immigrants: they are looking for a safe place to live because their home countries are not safe. Because they are refused entry, they have to find another place to apply for asylum (which they cannot do in Europe due to

European policy) or return home. This qualification makes it very difficult to actually execute the right to exclude – for in most instances it can be argued that exclusion harms the immigrant. The cosmopolitan argument for exclusion is not so easily outweighed by this qualification. The right to exclude would still only apply when the autonomous agency of citizens is threatened (either directly or through a threat to the constitution or function of the legal state). In addition to the legal state protecting the autonomous agency of the citizens through exclusion, it also ensures that the development of global justice is not threatened. If the legal state were to become unable to perform its central functions, more harm might eventually befall people than the harm done to the excluded immigrants. This is because legal states are critical for global development and global justice, and if these are hindered or somehow undone, more harm will occur than by excluding the immigrants wishing to enter the legal state.

The right to exclude, with the addition of the cosmopolitan argument, is not as susceptible to the doing-harm qualification as the *pro tanto* version of the argument. Of course, this does not mean that any immigrant can be refused on the grounds of protecting global justice: only when the entry of immigrants is truly a threat to the most stable functions of the legal state or its constitution can the legal state appeal to the right to exclude. Even then, it is a choice between two kinds of harm, and it will need to be determined how crucial the legal state is for the goal of global justice. Crudely said: it might be that the harm done to excluded immigrants is larger than the harm done to the project of global development. To truly make a judgment on whether the state can execute the right to exclude, it will need to be assessed which harm is, in the end, greater. No matter the result of such an investigation, it will be a trade-off between injustices done to immigrants or to all those benefiting from global justice.

#### *7.2.2.2 The Principle of Humanity*

The principle of humanity states that for immigrants, migration can in some cases be the best, or only, way to improve their lives. Foreign aid can only do so much, and even if the rich states were to invest in poor ones, undertaking the journey to another state can be the surest way to a better life. To then deny people the chance to have a better life is to deny them the opportunity to escape, for example, poverty or war. If we deny these people this opportunity, we must be able to give a good reason for this, for humanitarian concerns would normally ask us to help these people. The *pro tanto* argument for exclusion was capable of offering such a reason, but this would have to be determined on a case-by-case base. There is no simple answer in complex cases

such as immigration where every situation differs. Nonetheless, the cosmopolitan argument for exclusion might be of some help here. The major concern of the principle of humanity is that immigration can be the surest way to improve people's lives. True as this might be, if this means that the legal state's functions are threatened, this has consequences not just for the autonomous agency of the citizens of that state, but also for global development and global justice. Legal states play a critical role in this, and if the most stable functions of the legal state cannot longer be carried out, this has consequences for global development and global justice.

If global development and global justice suffer on account of the legal state no longer being able to participate in the establishment of treaties, or ensuring fair negotiations, this can potentially have far reaching consequences. Enabling global development and justice translates into foreign aid programs and investments in poorer states so that these states can eventually escape poverty. This increases the autonomous agency of the citizens in these states. In addition, these aid programs often come with changes to the states that potentially offer citizens more freedom – also increasing their autonomous agency. If these processes of global development and global justice are hampered, and as a consequences foreign aid programs suffer, it might be that allowing immigrants entry does not just happen at the cost of the autonomous agency of citizens, but also at the cost of the autonomous agency of those benefiting from international cooperation. Helping people in the short term (allowing them entry) could then very well be *against* the principle of humanity, if we are aware of the fact that there are circumstances wherein this could have far reaching consequences. This does not mean that we should always deny immigrants entry by stating that in the end people all over the world are better off (in terms of autonomous agency as well as general well-being)<sup>42</sup> if the legal state is able to function properly. Only when immigration poses a real threat to the constitution or the stable functions of the legal state (and thus to the autonomous agency of the state's citizens), can the right to exclude be appealed to.

So far, the cosmopolitan argument for the right to exclude appears to be able to counter the outweighing reasons to some degree. There is one more outweighing reason to discuss: the one that states that there are situations in which we have a moral duty towards immigrants.

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<sup>42</sup> These two cannot be seen as separate. The general well-being of a person (accessibility to food, shelter, etcetera) has a great influence on their capability to exercise their autonomous agency.

### *7.2.2.3 A Moral Duty*

The third outweighing reason discussed in chapter six was that there are occasions in which states have a moral duty to admit immigrants. One such an occasion was the occurrence of a causal connection between the immigrants needing to flee their home country and the legal state. The involvement of states in world politics can sometimes lead to unsafe circumstances for people who then need to flee. Should this occur, the state responsible for these circumstances has a duty to admit these immigrants. What if admitting these refugees leads to the state no longer being able to carry out its most stable functions, and thus no longer being able to partake in global development? What should take precedence? A duty towards those with whom the legal state has a causal connection or the state's role in global development and global justice? It should no longer come as a surprise that there is no clear-cut answer to this question. This will, again, depend on the situation and the history between the immigrants and the legal state.

In addition to a depending on the situation, the above question is complicated by a number of considerations. One of these is the possibility that the immigrants wanting to enter with whom the state has a causal connection, might very well be the result of actions done in the name of global development. Think, for example, of the people fleeing Syria. At least a part of these immigrants result from military actions undertaken by democratic, and maybe even legal, states. Can states refuse to take in these immigrants if this would lead to a threat to the legal state's most stable functions or its constitution? One consideration here should at least be the idea that if one cannot take responsibility for one's actions one should perhaps not act. If a consequence of upending a dictator is a flow of refugees that is too large for the legal state, it can be questioned whether this course of action is the right one. In addition, it can be questioned whether it is justified to refuse these immigrants entry, while at the same time partaking in global actions that cause even more refugees – even if the long term results might be beneficial to global justice. Of course, this is a simplified scenario, but considerations like these cannot be forgotten when it is determined whether the right to exclude or the moral duty towards these immigrants takes precedence.

Another source for a moral duty towards immigrants comes from the modern state system. The argument stated that while living in a state works out very well for some, it does not work as well for others. Because people are assigned to a state (by birth), states have a responsibility to help those who have ended up in a state that does not perform as well. This argument dependent on an analogy with social institutions that one needs to subscribe to for it to be

plausible, but it remains worthwhile to see how this outweighing reasons holds up against the cosmopolitan argument for the right to exclude. Let us assume, for the sake of the argument, that the analogy with social institutions is capable of holding up to scrutiny and that there is indeed a moral duty resulting from the modern state system. The pro tanto right to exclude, as formulated in chapter five, might then be outweighed. The immigrants wishing entry suffered from the moral state system, and the legal state thus has a moral duty towards them. This applies even if the legal state itself might suffer from allowing these people entry. What happens when we add the cosmopolitan argument for the right to exclude to the scenario? This would mean that if the legal state appeals to the right to exclude because its functions or constitution are under threat, this also poses a threat to global development and global justice. Does this have consequences for the moral duty resulting from the modern state system? Arguably, it does.

Legal states are critical for global development and global justice. It is through global development and global justice that states can attempt to somewhat 'right the wrongs' of the modern state system. Take, for example, the United Nations with its variety of programs concerned with peace, food assistance, equality of women, assistance of developing countries, etcetera. Institutions like these are important in realizing a more equally developed and more just world. This, in turn, has as a consequence that the modern state system should become less unequal as these institutions become more successful. As stated above, the moral duty resulting from the modern states system claims that legal states should allow immigrants entry to correct for the failures of this state system. Alleviating the failings of the modern state system short term (allowing the immigrants to enter), might be detrimental for working towards a more just state system (through global development and global justice). If the true focus of this moral duty is the unjustness of the modern state system, and it is not just a vehicle for an argument against the right to exclude, it might be the case the exclusion is the moral thing to do.

This chapter has argued in favor of an additional argument: the cosmopolitan argument for the right to exclude. As the previous sections showed, this argument for the right to exclude has consequences for when we determine what takes precedence: the right to exclude or the outweighing reasons. It turned out that the cosmopolitan argument makes the case for the right to exclude stronger. However, there is still no final answer to whether the legal state can exclude immigrants, and the situations in which the state would appear to be able to do so are small in number. Are there then no possibilities

for a broader right to exclude that is easier and more feasible to appeal to and not as limited?

### 7.3 Why Is There No Broader Right to Exclude?

The final argument for a right to exclude, based on self-determination, looks as follows:

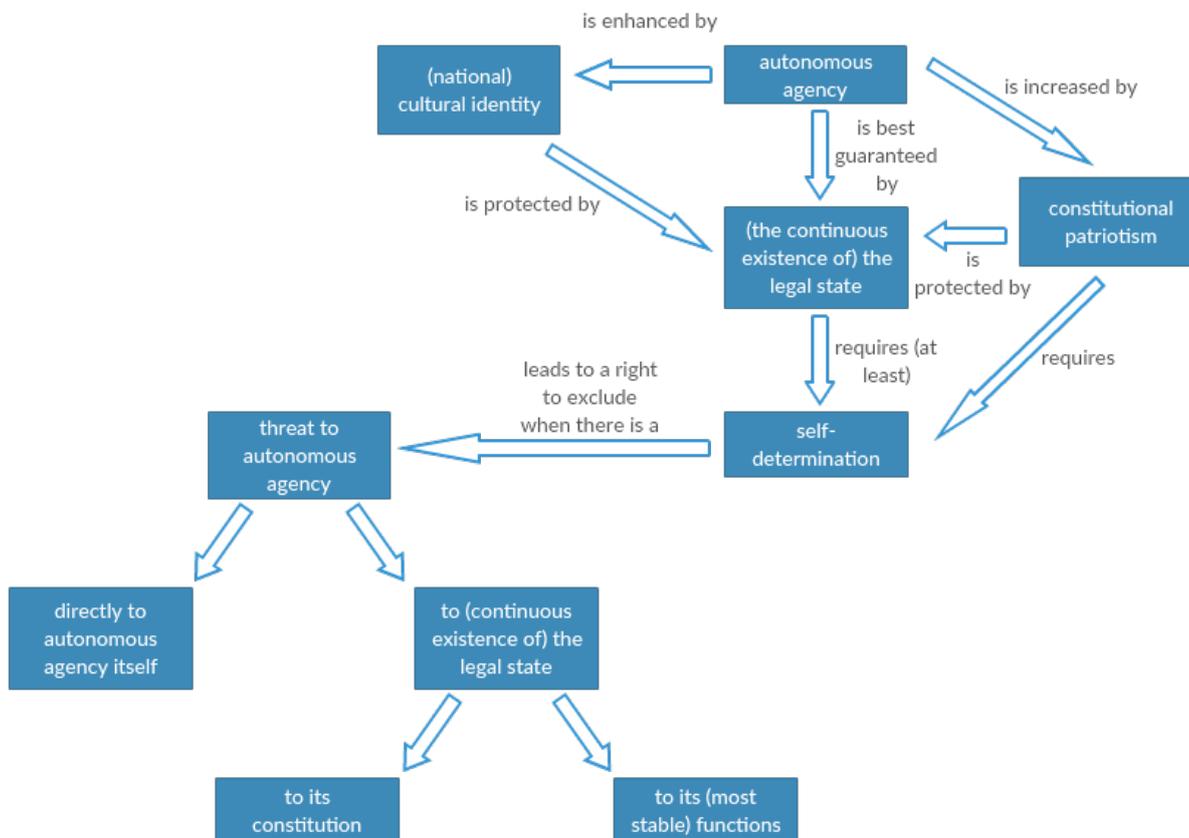


Figure 9: The Final Argument

While the cosmopolitan argument for the right to exclude broadens the scope of situations in which a legal state can appeal and execute the right to exclude, there are still many possible scenarios in which outweighing reasons form a challenge. As a result, the right to exclude that has been developed is not as broad as it is in other accounts of self-determination<sup>43</sup>. Even in the situations where the right to exclude can be appealed to it can be outweighed, which means that we are quite some ways of from an absolute right to exclude. The cause of this lies in our account of self-determination: we value autonomous

<sup>43</sup> For examples see Miller (1995) and Walzer (2010), whose accounts of self-determination lead to considerable broader rights to exclude.

agency, and to a certain extent we let concerns of autonomous agency precede other things we value. However, we do not value autonomous agency absolutely. This is reflected in the right to exclude, for if we sometimes value other things more than autonomous agency, the right to protect this autonomous agency (the right to self-determination and thus the right to exclude) cannot be absolute, for there might be cases in which we want to give precedence to other concerns.

Naturally, this does not mean that there is no right to exclude that entails more discretionary control over immigration. Rather, it means that a broader right to exclude cannot be grounded in the account of self-determination developed here. This conclusion might be unsatisfactory to those who see self-determination as the way to a broad right to restrict immigration. I do not see how self-determination, seen as self-government, can lead to such a right. As Van der Vossen states:

Self-determination concerns self-government, a group freely acting on its communal values without wrongful interference. The nature of that group is always changing. It changes because new people are born, because of outside cultural influences, and because of technological change. It also changes because of immigration (van der Vossen, 2015, p. 285).

Immigration is simply one of the multiple ways in which a state can change. Worries that the legal state and its citizens might change too much for the state to properly function cannot lead to a broader right to exclude than has been formulated here, for this right protects the legal state from this. Should one wish to argue that self-determination also concerns the protection of a community, one immediately runs into a problem: the boundaries of such a community. Arguments that perceive of self-determination as a means to protect and uphold a community and its characteristics assume that the spatial closure that founds a community has already occurred. However, as Hans Lindahl points out: “[t]he founding closure of a polity is not and cannot be the expression of political reflexivity because closure conditions the possibility of political reflexivity” (Lindahl, 2007, p. 151).

Lindahl illustrates this by referring to the European Union, in particular the foundation of the European (Economic) Community. The Preamble to the Treaty of Rome states that the parties that have signed it, are committed to creating the foundation of an increasingly closer union between the people of Europe. This preamble makes four things clear: (1) who is part of this collective

(the people of Europe); (2) what their common interests are; (3) where this interest is located; and (4) when this interests comes about (in the course of European history). What is so interesting about this is that the six founding members claimed to represent Europe (the continent) as a spatial unity, but they had no such mandate from all the relevant parties. Not only did they not have this mandate, it was impossible for them to have it, because the founding act of the European (Economic) Community determined who the relevant parties were by determining where their interest laid: the common market (Lindahl, 2009: 151). According to Lindahl, this signifies that:

[t]he European polity and its Member States not only expect individuals inside but also those outside to recognise and abide by the (incipient) right to closure claimed for the EC in the immigration policy provisions of the Amsterdam Treaty of 1997 (Lindahl, 2007, p. 151).

So by the very creation of the European (Economic) Community it was determined who were to be insiders and outsiders. The result of this is a preferential distinction between Europeans and non-Europeans. This distinction arose through a closure that could never have been a joint act of the two groups, because it was the closure that gave rise to them. This makes the immigration policy of the European Union circular. The EU claims a right to exclude (or include) immigrants because Europe is 'the own place of its citizens' (Lindahl, 2007, p. 151) and thus a particular community, but it was an act of closure (or inclusion and exclusion) that gave rise to European citizens and Europe as a polity. What this argument shows is that wanting to include protection of the community in the content of self-determination (in order to have a broad right to exclude) is troublesome. If one wishes to do so, an argument is needed that shows why outsiders are outsiders and insiders are insiders of the community, and this quickly runs into circularity.

It might be wondered why this argument would not also apply to the right of self-determination and the right to exclude as they have been developed throughout this thesis. The right to exclude in our account does not serve, in any situation, to uphold a certain community and its (cultural) characteristics. The importance of self-determination for our account lies in the protection of autonomous agency, not in upholding a certain community. The only time it can be said to somewhat refer to community, is when this right is appealed to in order to ensure the legal state is able to carry out its most stable functions and keep its constitution intact. However, the ultimate goal of this right to exclude is, as we have seen throughout the thesis, to protect the autonomous agency of those living in the legal state. It does not exclude anyone from

becoming a part of this state *until* the very foundations of the legal state are under threat.<sup>44</sup> Admittedly, the chances of this actually happening might be small, and until the time it does happen, the right to self-determination does not offer us a right to exclude that leads to easy exclusion of others.

I firmly believe that if one wants a sustainable account of self-determination, it is very unlikely that a broader right to exclude will be part of this account. With this in mind, there is one last thing that I want to articulate for those who feel that states should have a broader right to exclude than this account of self-determination can offer. Perhaps it should be accepted that self-determination is about self-governance, and that some rights people would like to be included are not within the scope of self-determination. There are then two options: accept that self-determination cannot ground a broad right to exclude and attempt to locate this right somewhere else, or attempt anew to find a broad right to exclude in the concept of self-determination. This account of self-determination is capable of answering the three central questions concerning self-determination: 'what is it?'<sup>45</sup>, 'who has a right to it?'<sup>46</sup>, and 'why it is important?'<sup>47</sup> That it does not lead to a broad right to exclude should perhaps be taken as a sign that self-determination, properly treated, does not lend itself to such purposes of exclusion.

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<sup>44</sup> For it is then that the autonomous agency of its citizens is at risk.

<sup>45</sup> Self-governance.

<sup>46</sup> Legal states.

<sup>47</sup> Because we value autonomous agency.

## Conclusion

In this thesis I asked three questions of self-determination in order to answer the question 'Is the right to exclude part of the right to self-determination, and what is the scope of this right?'

In answering this question it was first necessary to clarify the concept of self-determination by answering the three questions central any account of self-determination. (1) What is self-determination? (2) Who has (a right to) self-determination? (3) Why is self-determination important? The history of self-determination was discussed, and a pro tanto argument for self-determination developed: we value self-determination because it protects and ensures autonomous agency. Two particular forms of this argument were shortly discussed: national identity and constitutional patriotism. In chapter two, a closer look was taken at the argument for national identity. Again, the three questions were asked, but now of national self-determination: why is it important? Who has (a right to) it? And finally: what is national self-determination exactly? It was argued that national identity is not as crucial for autonomous agency as authors like David Miller present it to be. Nonetheless, national identity adds something to autonomous agency: it enhances it by providing a background upon which we can make decisions and choices.

In chapter three another identity that might be capable of providing such a background was explored: constitutional patriotism. It was discussed why constitutional patriotism was originally suggested as an alternative to nationalism. It was then argued that rather than a replacement, constitutional patriotism should be seen as an addition: one that cements the positive freedom aspect of the legal state. Chapter four discussed the consequences of chapter two and three for our account of self-determination. It was repeated that the primary argument for self-determination lies in the idea that a legal state needs self-determination for its continuous existence. This is what enables it to ensure the autonomous agency of its citizens. In addition, some qualifications to this account of self-determination were discussed, among which the qualification to not do harm.

In the second part of the thesis I turned to the question of exclusion in order to determine whether the developed account of self-determination includes a right to exclude, and what the scope of this right to exclude might be. In chapter five, after a short discussion on possible limitations (such as the right being a pro tanto right), it was argued that a right to exclude is indeed part of the right to self-determination, but that it can only be appealed to when the

autonomous agency of citizens comes under threat due to immigration. This can either be a direct threat, or an indirect threat to the constitution or most stable functions of the legal state. However, since the right to exclude is a *pro tanto* right it can be outweighed by other reasons, rights, or considerations.

In chapter six three possible outweighing reasons were discussed: the doing-harm qualification, the principle of humanity, and the possibility of a moral duty towards immigrants. An additional argument was needed if the outweighing reasons are to be 'outweighed', if the right to exclude is to actually be 'useful'. Chapter seven gave such an argument by focusing on the importance of legal states for global development and global justice. It was argued that legal states play an important role in international politics and that immigration can threaten this. Allowing immigrants entry might alleviate harm on the short term, but it should be wondered whether it does not cause harm in the long term. Additionally, it was discussed why; even with the addition of the cosmopolitan argument, the scope of the right to exclude is not broader.

In this thesis I have thus shown that while a right to exclude can indeed be part of the right to self-determination, it is a very limited right. The right to exclude is not only rather limited, it also only applies to legal states. The limitations to the right to exclude are, in part, dependent on how the three questions I asked of self-determination are answered. As argued in chapter seven however, some of these limitations are also inherent to conceiving of self-determination as self-governance and not as community focused. Thus, while there might be other arguments for self-determination that locate the right to self-determination elsewhere than in legal states, the limits of the right to exclude might not disappear. Ultimately, I do not believe that the right to self-determination lends itself well to arguments that attempt to locate a broad right to exclude within it. This is because if it is to lead to any argument for exclusion, self-determination needs to be about self-governance. Frankly, I find it onerous to imagine how excluding people from a state when there is no threat is related to self-governance, except for reasons of controlling who is part of the community. This does not need to be the end of the search for a broad right to exclude, but perhaps we are better of attempting to locate it elsewhere.

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