

## **PRESENCE AND RIGHTS: A RESPONSE TO LINDA BOSNIAK**

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Inclusion and exclusion is the subject of our conference today. Linda Bosniak has given a powerful presentation of a philosophical concept based upon the idea that a person's physical presence should be the basis for extending rights and recognition. It is not easy to discuss a normative idea which has been put forward in the context of ethics rather than legal policy or political expediency. The very term "ethical territoriality" implies the division between good and bad; furthermore as a normative concept it seems to allow no distinctions between countries according to history, geographical location and political, social and economic structures.

If I dare nevertheless to challenge the ethical territoriality idea and to take the role of the bad guy, it is not because I consider territoriality and the fact of a person's mere presence on the territory as irrelevant for a person's rights by virtue of their presence on the territory. Persons are subject to the jurisdiction of that state, which implies protection and a set of fundamental rights. However, the fact that everybody enjoys certain basic rights in whatever situation he or she may be, does not answer the question of inclusion or exclusion. When we are talking about the extension of rights in immigration law we have to distinguish between different categories of rights and categories of foreigners such as illegal immigrants, asylum seekers, tourists, temporary workers, immigrants, long-term residents etc. The basic rationale for extending rights may well be different and may even be different between countries according to their geographical location or historical situation.

Let me start with the question: what are in fact the policy or maybe even ethically obliging considerations determining an immigrant's inclusion or exclusion to a given set of rights or privileges?

In approaching this question we must first of all reflect about the very content of inclusion. Inclusion seems to bring with it only an extension of rights but it is easily ignored that inclusion means also sharing of resources and determination powers. And even for the person included it does not only mean more rights but also possibilities and duties, at least when it comes to membership in a political community.

If we have realized that inclusion and exclusion is not just about extending rights but also sharing of resources, solidarity and protection and common determination of the future of a community, we are closer to an answer to

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the question of who should be the persons entitled to rights and recognition. I believe that the answer can only be found in a balancing of interests. The interest of a community to maintain their way of living, the interest to control immigration, the interest to secure the stability of the economic and financial systems, the interest to have a secure status, the interest to be treated fair etc.

Citizenship as the traditional, most important criteria for drawing a distinction obviously comes to mind when inclusion or exclusion in immigration law is under review. Yet, before we indulge into the issue of access of immigrants to citizenship it is necessary to take into account that we are facing a much more complex structure of inclusion and exclusion. Thus, for instance, no EU Member State determines inclusion or exclusion only on the basis of citizenship. With regard to employment, social insurance rights, working conditions, protection against employers' trade union association rights etc. there is no different treatment. Everybody is included by the very fact of being employed. The reason is not geographical presence on the territory but the membership in a group of common interests.

There is a second layer of rights which I have already referred to, which has been connected to the territoriality argument. Legal recognition, due process and fundamental primacy rights, family rights and property rights as well as freedom of expression and association, however, are as human rights granted irrespective of citizenship on the basis of constitutional law and human rights treaties. Physical presence of a person may be a requirement as the result of the fact that no state is responsible for granting the human rights of persons abroad. It is not, however, the decisive element for inclusion. The question whether people detained at the border ought to be included is therefore misleading. There is no question that they are included when it comes to human rights, such as the right to due process and humane treatment. They are not included into the social welfare system by their mere geographical presence. That the mere territorial presence is not the decisive element has also recently been demonstrated by the decision of the German Constitutional Court deciding that the refusal to grant a "Schengen-Visa" to a leader of a religious sect violates the constitutional right of freedom of religion.

In between citizenship rights and human rights there is a variety of different statuses embracing residence rights, protection against expulsion, access to social benefits etc. Generally speaking, inclusion or exclusion depends on a variety of factors, including the length of time and the assigned residential status as a tourist, student, temporary worker, asylum seeker etc. It is exactly this graduated or differential level of inclusion concept which is criticized as being anti-liberal and anti-democratic.

Yet, why should to the fact of a person's mere physical presence be attached such predominant weight? The legitimacy of governance does not provide the answer. The ethical territoriality argument fails to provide convincing

criteria for solving practical issues of inclusion or exclusion. This goes also against basic human rights like the right of association and the right of nation building.

Defending nationality and alienage puts one immediately under suspicion. I am not defending a position whereby there are no ethical or – as I would prefer it – human rights concerns as to who is to be granted citizenship. To make it clear: the mere fact of geographical presence has very little to do with it. There are legitimate concerns to make inclusion in that sense dependent upon factors like a certain length of time, integration, birth and territory etc. in addition to the more traditional criteria like descent. The reason is that nation building, which is an ongoing process, is intrinsically connected with demarcation and separation. As Ernst-Wolfgang Böckenförde has aptly described, the identity of a nation as a collective entity is determined by its distinctiveness, whether the real or imagined, dependent upon its historical situation.<sup>1</sup>

The principle of democracy requires that persons who are subject in the same manner to the exercise of political power have been given a right to participate in the political process. Yet, again – mere geographical presence does not mean that a person is affected in the same manner as citizens. It is a legitimate request to make full inclusion dependent upon certain requirements, such as length of lawful residence, integration and a certain legal status once it is acknowledged that nation is more than a multitude of persons combined by the fact of inhabiting the same territory. That, indeed, is the very basis of public international law principles of territoriality and personality granting a discretion to states to regulate the acquisition of citizenship and naturalization and the right to control borders while accepting at the same time that every person is affiliated by citizenship to a certain nation state regardless of his/her actual physical presence.

Contrary to Linda Bosniak's statement, to extend rights and recognition on the basis of mere physical presence will poison the democratic community at its heart, and even more so if the right to control borders is denied.

But even if the right to immigration control is conceded, there is no convincing reason why physical presence as a tourist, asylum seeker or temporary worker should imply full inclusion in the political process, as if the mere fact of entering accidentally or as an observer into an assembly of members of a rabbit breeding association would imply the right to put a proposal to vote to kill all rabbits.

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<sup>1</sup> Ernst-Wolfgang Böckenförde, *Staat, Nation, Europa*, 1999, S. 42: „Die Nation gewinnt ihr Eigenes, was sie zum „Wir“ verbindet, auch und manchmal gerade aus dem Unterschied oder Gegensatz zu anderen – auch dies ist jeweils historisch-konkret bestimmt abhängig von Situationen und Konstellationen. Zugleich erstrebt oder verteidigt sie ein bestimmtes Territorium als den ihr zugehörigen Boden und Raum, ihr eigenes Land, gegen andere Ansprüche und Prätendenten.“

The theory of ethical territoriality distracts from the issues as to who should be included in what set of rights. As previously noted the question of inclusion and exclusion is much more complex as the ethical territoriality argument suggests. It is therefore hardly surprising that in practice as well as in theory the dividing line is hardly ever “ethnic territoriality” but “territoriality plus” – even among the proponents of the territoriality argument. What we need to address is fairness and justice in the balance of interests arguing in favour or against inclusion which determine the political decision process.<sup>2</sup>

To submit a few examples at the end of my presentation:

Directive 2003/109 concerning the status of third-country nationals who are long-term residents provides for equal treatment with Union citizens in a wide range of economic and social matters but maintains the possibility to limit access to social assistance to “core” benefits. If we examine the basic rationale for rules on inclusion or exclusion to social benefits, we have to arrive to the conclusion that it is a legitimate concern to restrict access to those who did not contribute to the social system. Therefore, even within the European Union freedom of movement does not imply full inclusion of Union citizens into the social system. Therefore, with regard to the third-country nationals it is legitimate to make distinctions according to the legal status assigned. Yet, third-country nationals in order to acquire a status as long-term residents need to produce adequate resources, a legal and continuous stay of five years. Therefore, it is questionable whether restrictions with regard to access to social benefits can be justified.

High on the European agenda are issues of “illegal aliens” and regularisation. That physical presence should trump irregular status seems to me an untenable proposition under basic considerations of justice. An argument can be made for regularisation under considerations of fairness and legitimate trust if a state has for a long time tolerated illegal presence. However, I do not conceal that I have doubts as to the reasonableness of a theory that failure of law enforcement or the very fact of physical presence as such does create an obligation to grant a residence permit.<sup>3</sup> The European Court of Human Rights has recently relied upon the right to respect for private life as an argument for limiting the right of states to terminate the residence of illegal aliens.<sup>4</sup>

However, the cases decided did concern the particular situation of Russian minorities in the Baltic States which after the collapse of the Soviet system

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<sup>2</sup> See Thürer, ‘Gerechtigkeit im Ausländerrecht’, in: Übersax/Münch/Geiser/Arnold (ed.), *Ausländerrecht, Ausländerinnen und Ausländer in öffentlichen Recht, Privatrecht, Strafrecht, Steuerrecht und Sozialrecht der Schweiz*, 2002, No. 1.65.

<sup>3</sup> See also ECHR of 7 October 2004, Dragan and others/Germany, No. 33743/03.

<sup>4</sup> ECHR of 9 October 2003, Slivenko/Lithuania, No. 4831/99; cf. Thym, *InfAusLR* 2007, 133, 138.

did not receive a proper solution of their legal status. Therefore, the decisions cannot be easily generalised. The European Court of Human Rights has constantly upheld the right of states to decide upon the entry and residence of foreigners.<sup>5</sup>

To conclude: physical presence on the territory cannot be used as a valid argument as such for inclusion. That does not mean that there is no need to reflect about fairness and justice in drawing the lines determining inclusion or exclusion. Such reflection, however, needs pragmatic solutions.

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<sup>5</sup> See for instance ECHR of 16 September 2004, Ghiban/Germany, No. 11103/03.