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**Minorías territoriales y autodeterminación  
nacional: las antinomias de la teoría  
democrática**



*“I will not speak French on the  
schoolgrounds  
I will not speak French on the  
schoolgrounds  
I will not speak French...  
I will not speak French...  
I will not speak French...  
Hé! Ils ne sont pas bêtes, ces salauds  
Après mille fois, ça commence à  
pénétrer*

*Dans n'importe quel esprit.  
Ça fait mal; ça fait honte.  
Et on speak pas French on the  
schoolgrounds  
Et ni anywhere non plus.”  
- Jean Arceneaux, *Je suis  
Cadien* (excerpt from *Anthologie de la  
poésie acadienne*), Éditions perce-neige,  
Nouveau Brunswick, Canada, 2009*

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Estimados colegas: os pido disculpas por presentar este trabajo en inglés. Si bien el castellano es mi lengua materna, mi trabajo académico se desarrolla en el mundo anglo-sajón, por lo que he perdido la capacidad de expresarme académicamente por escrito en castellano. Esto es, en cierta manera, un ejemplo y a su vez una contradicción con las ideas expresadas aquí. Intentaré presentar oralmente en castellano.

## Introduction



The aim of this paper is to critically evaluate the concept of territorial national self determination and its conflation with popular sovereignty in liberal democracies. The paper finds this conflation to be undemocratic because of its tendency to conflate Ethnos with Demos and in this way, perpetuate the tyranny of the majority nation (the titular nation). There is almost always more than one nation or ethnic group in a sovereign territorial space and minority ethnic groups and nations find it difficult to be collectively represented in a monist liberal democratic nation state. It is argued that in the manner above, the nation state has a democratic deficit in its inability to allow for the political representation of cultural minority communities. The paper argues instead for the incorporation of national and ethnic communities in an inter-national (as opposed to cosmopolitan) Commonwealth of Demoi, through which cultural communities that are also territorial minorities can be incorporated through models of non territorial self determination. The paper sees in the European Union, with all its shortcomings and democratic deficits, an important initial vehicle to emancipate democratic governance from the tyranny of the monistic nation state into a more pluralist and genuinely democratic model of governance.

## Shifting Democratic Theory and National Self Determination



The national state claims to treat all citizens as equal members of the nation, this fair principle only serves to disguise the tyranny of one group over another. The nation must be, all its citizens must be, animated with the same spirit. Differences are divisive and therefore treasonable. *E. Kedourie, Nationalism, Hutchinson, London, 1960 p.127*

The mainstream concept of National Self Determination (NSD), as officially recorded in international law and enshrined in UN resolutions, and, as normatively argued in mainstream liberal democratic theories<sup>1</sup>, is the principle that nations have the right to freely

<sup>1</sup> I call mainstream liberal democratic theories, what Warren calls Standard liberal democracy. These theories differ on many matters, but they commonly assume that democracy is an instrumental value for protecting and realizing the rights of atomised individuals. See Mark Warren, *Democratic Theory*

choose their sovereignty and international political status with no external compulsion or external interference. In this doctrine, nationhood and territorial sovereignty are inextricably linked, for nations are a constitutive element of the configuration of states in the age of Modernity. It need not be so, and it was not so before Modernity. Nevertheless, the linkage between nation and state became constitutive and normatively hegemonic, to the extent that it became counterintuitive to think otherwise. This all encompassing hegemonic logic of national self-determination is thus applied to states and to cultural communities that can build a sovereign state that does not clash with a world system of sovereign states<sup>2</sup>.

The above is certainly not the only way to understand national self-determination, and even less so, democracy, as both terms are polysemic and multifaceted. But by virtue of being hegemonic, the interpretation above is the most common and the most dangerous. It has the proclivity to sacrifice cultural minorities in the High Altar of nation building, to securitize cultural communities, and, ominously, to conflate Ethnos with Demos. This is by no means a recent development, but one that goes back to earliest modern expressions of Republican egalitarianism, and is in more than one way, a constitutive failure of the modern nation state. Consider the statements of radical Jacobins:

*La langue d'un peuple libre doit être une et la même pour tous. (...) Le fédéralisme et la superstition parlent bas-breton; l'émigration et la haine de la république parlent allemand; la contre-révolution parle italien et le fanatisme parle basque. Brisons ces instruments de dommage et d'erreur(...) Parmi les idiomes anciens, welches, gascons, celtiques, wisigoths, phocéens ou orientaux, qui forment quelques nuances dans les communications des divers citoyens et des pays formant le territoire de la République, nous avons observé (et les rapports des représentants se réunissent sur ce point avec ceux des divers agents envoyés dans les départements) que l'idiome appelé bas-breton, l'idiome basque, les langues allemande et italienne ont perpétué le règne du fanatisme et de la superstition, assuré la domination des prêtres, des nobles et des praticiens, empêché la révolution de pénétrer dans neuf départements importants, et peuvent favoriser les ennemis de la France.<sup>3</sup>*

Here you have a splendid example of securitization of minorities, two hundred and ten years before the term was coined! Securitization is not a contemporary innovation as many International Relations users of securitization argue<sup>4</sup> (let's stop re-inventing wheels), but a

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*and Self-Transformation* The American Political Science Review Vol. 86, No. 1, Mar., 1992, p.9, from a different angle, see Otto Bauer's notion of the centralist atomist character of the modern state, in Otto Bauer, The Question of Nationalities and Social Democracy, E. Nimni (ed.) University of Minnesota Press, 2000, p. 30

<sup>2</sup> Douglas J Sylvester, *International Law as Sword or Shield--Early American Foreign Policy and the Law of Nations*, New York University Journal of International Law and Politics, 1999-2000, 32, 1, pp10-11.

<sup>3</sup> Bertrand Barère de Vieuzac, Rapport du Comité de salut public sur les idiomes (*Report of the Committee of Public Health on Languages*) - 8 pluviôse an II: 27 January 1794

<http://www.tlfq.ulaval.ca/axl/francophonie/barere-rapport.htm> Accessed 12 December 2012

*The language of a free people must be one and the same for all. (...) Federalism and superstition speak low Breton, emigration and hatred of the Republic speak German, the counterrevolution speaks Italian and fanaticism speaks Basque. Lets break these instruments damage and error (...) Among the ancient idioms, Welsh<sic> (Cymraeg), Gascon, Celtic, Visigoths, Phoenicians or oriental nuances that make communications in various countries and citizens forming the territory of the Republic. We observed (and reports of representatives meet on this point with those of various agents sent into the departments), that the idiom called low-Breton, Basque idiom, the German and Italian languages have perpetuated the reign of fanaticism and superstition, ensured the domination of priests, nobles and practitioners, prevented the entry of the revolution into nine important departments and could help the enemies of France. (my own translation)*

<sup>4</sup> Olav F. Knudsen, *Post-Copenhagen Security Studies: Desecuritizing Securitization*, Security Dialogue, 2001 32: 358

by product of the historical conflation of nations, popular sovereignty and territorial states. In whatever way one defines national-popular sovereignty, it is a concept dependent upon the definition of cultural- territorial boundaries, which inexorably creates outsiders and cultural insiders.

To be sure, this argument is not a peculiarity of French Republicanism, far from it. It is also present in the works of the founding father of Anglo liberalism. Consider John Stuart Mill well known assertion that: *Free institutions are next to impossible in a country made up of different nationalities. . . . Among people without fellow-feeling, especially if they speak different languages, the united public opinion, necessary to the working of representative government cannot exist*<sup>5</sup>.

For this reason, securitization of minorities is in many ways, a constitutive deficiency of a model of political organization that became hegemonic over the last three hundred years, and generated what Michael Mann calls in an important work, “The Dark Side of Democracy”; its propensity for ethnic cleansing<sup>6</sup>. I will here immediately qualify Mann’s generalisation of the process he so eloquently and incisively describes with one important consideration. Ethnic cleansing is not the dark side of democracy, for the later has forms that roundly escape this cruel imposition – Democracy must not be exclusively conflated with popular sovereignty and liberal democratic representative democracy in nation states. What Mann refers to is the dark side of the sovereign, popular democratic nation state, and the likely by-product of the exercise of national (territorial) self determination in areas of mixed populations. In these cases, when two or more national communities reside in the same territorial space, when it is not possible to territorially disentangle one from the other, demands for popular national sovereignty and territorial national self determination becomes a zero sum game between contending parties. The gain of one is unavoidably, the loss of the other. For this reason, ethno-national conflicts in mixed areas are bloody, extremely violent and protracted, for full victory for one means the expulsion or destruction of the other. Consider the Nakbah, the paradox of a national community being cleansed from its homeland by a contemporary ethnocracy<sup>7</sup> wanting to secure its ethnic homogeneity, and claiming to act on behalf of the victims of the most murderous European genocide, which, incidentally, was carried out by a different type of ethnocratic state claiming to act to secure the racial homogeneity of its own citizens. To be sure, these are two extreme and fortunately rare examples, both of them superficially appear to contradict

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<sup>5</sup> J. S Mill, (1862) *Considerations of Representative Government*, in H. B. Acton (ed.) Utilitarianism, On Liberty and Considerations on Representative Government. London: J. M. Dent & Sons. 1976

<sup>6</sup> Michael Mann, The Dark Side of Democracy: Explaining Ethnic Cleansing, Cambridge University Press, 2005 and four reprints

<sup>7</sup> Ethnocracy is a model of government where the various institutions of governance exclusively represent a particular ethnic group, and use mechanisms of power and governance to enshrine the dominance of this group. Its main characteristic is the systematic use of legal, institutional, and physical instruments of power to secure ethnic dominance. An Ethnocracy normally is a political regime which citizenship is instituted on the basis of qualified rights and with ethnic affiliation (defined in terms of ethnicity, descent or religion) as the fundamental principle. The aim is to secure the most important instruments of state power in the hands of a dominant ethnic collectivity. For this reason, Ethnocracies are considered to be non-democratic. From a different direction, an Ethnocracy could be considered also a radical and extreme exaggeration of the European nation-state model. See. Oren Yiftachel (2006), Ethnocracy Land and Identity Politics in Israel/Palestine, Penn University Press, 2006, and Oren Yftachel, (2011) *The Israeli Regime and the Question of Democracy* in Encyclopedia of the Israeli-Palestinian Conflict (ed: C. Rubenberg), London: Lynne Reiner Publishers: 691-699.

the egalitarian spirit of the liberal democratic states. Disturbingly, even if they contradict the egalitarian spirit of liberal democracies, they are not unrelated to the popular sovereign nation state in what Ludwig Wittgenstein calls a “family resemblance” (*Familienähnlichkeit*)<sup>8</sup> From here, and fortunately in a much less extreme fashion, family resemblances notwithstanding, out of the concurrence of French Republicanism and English Liberalism, the model of a democratically sovereign monocultural state over which one nation (titular) exercises its right to self-determination, became the imprint of the modern process of liberal democratic national emancipation. This model was used colonial settler states of the Americas and Oceania to politically preserve and protect the newly created colonial settler nations in lands illegitimately taken from indigenous peoples, who were then subjected to ethnic cleansing and genocide. Make no mistake, whatever other reasons are invoked; most of the European inspired nation states of the Americas and Oceania were born under the original sin of genocide and ethnic cleansing. When the equality of all citizens is conflated with the equality for all members of the nation under the guise of an egalitarian liberal democracy in nascent colonial settler societies, these societies are at their most murderous, for they create a community of insiders that must destroy their local outsiders (which often outnumber the new nation), if the new born liberal nation-state is to expand and survive<sup>9</sup>. In colonial settler societies, the concomitant destruction of indigenous peoples and other injustices to those culturally different from the dominant nation became hidden under the seductive rhetoric of the discourse of liberal Modernisation.

In whatever way one understands liberal democratic national-popular sovereignty, the demos is always defined by mechanisms of inclusion and exclusion, mechanisms that by virtue of its inescapable national dimension, are always cultural. National-popular sovereignty cannot be by definition coterminous with the whole of humanity, so there has to be an explicit definition of insiders and outsiders. Sovereignty is thus the prerogative of a titular nation<sup>10</sup>, a culturally defined democratic polity that sits uncomfortably with universal claims of democracy and liberalism. Consider that liberal democracies are predicated on the principle of formal equality between citizens. This principle is then subverted by the linguistic and cultural privileges of the titular nation. Minorities of different kind and sorts are often invited to assimilate to the ways of the titular nation with equality as compensation. This invitation is often couched in the language of modernization, integration and Affirmative Action. In many cases, this procedure intensifies ethno-cultural injustices and generates alienation, for in the eyes of many members of minority communities, the procedure violates the egalitarian ethos of liberal democracy that the

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<sup>8</sup> Ludwig Wittgenstein, *Philosophical Investigations* (2010) John Wiley & Sons, pp. 250, ff92 clarification of the editors. Wittgenstein suggests that concepts may not be connected by one essential common feature, but may in fact be connected by a series of overlapping similarities, with no one feature common to all. He rejects definitions based on sufficient and necessary conditions (“craving for generality” as he calls it). In contrast, he points to ‘family resemblance’ as the more suitable analogy for the way of connecting particular uses of the same concept. Family resemblance also serves to exhibit the lack of boundaries due to unavoidable interpretations, and the subsequent imprecise uses of the same concept. In this regard, as the nation state when subverted by different interpretations of democracy, sovereignty and nation, might not share a common essence, but a family resemblance in the overlapping characteristic of conflating ethnos with demos.

<sup>9</sup> Michael Mann, *The Dark side of Democracy, Explaining Ethnic Cleansing*, Cambridge University Press, 2005 and four subsequent editions, p.4

<sup>10</sup> The term "titular nation" is taken from the terminology of the former Soviet Union, but it is applicable to most liberal democratic nation states. It refers to a governing ethno-national community in the state, usually the majority of the population, typically after which the state is named.

state purports to defend. The standard accusation is *we are only equals if we partake in the cultural behaviour of the majority*. The issue touches many dimensions (the vast majority of liberal democratic nation states are not culturally homogeneous) , and this is convincingly shown in an example by Paul Stratham in relation to the debate over asylum seekers: he claims that the issue of asylum ...*opens up a particular contradiction within liberal nation-states: it puts the universal principle that they should respect and protect human rights by offering asylum to aliens fleeing persecution in direct competition with the principle that they should primarily serve the interests of the national community of people from whom sovereignty derives--a group with a self-image of common descent and ethnicity enshrined in a shared nationhood*<sup>11</sup>. Hannah Arendt, in different but important twist of this argument, in an case that has some parallels (and many differences) from the one developed here, also explains that in the cruel logic of the declining nation state, the human being that is stateless and a refugee can only be recognized as a human being when s/he has been recognized as citizens of other nation-states.<sup>12</sup>

When understood in the manner above, the doctrines of popular nation-state sovereignty and national self determination are monistic, not democratic, and are neither pluralist nor inclusive. Here I part ways with Arendt, for the problem does not result from the decline of the nation state, the emergence of imperialism, or the emergence of what she calls "Totalitarianism". As argued earlier, securitization of minorities was present since the early days of the French Revolution, long before imperialism and "totalitarianism" had any relevance. The key problem is ingrained in the likely conflation of ethnos with demos in the monist architecture of an exemplary nation state. Popular nation-state sovereignty runs the serious risk of fusing the dominant ethnos with sovereign demos, for the most common manner of exercising popular sovereignty is through the regime of one nation in one state. It is important to note here that the conflation of ethnos with demos might not be in some circumstances dangerous: in the form of collective rights and community representation for example. Like in many deadly explosives, in isolation the ingredients are harmless; even it could be argued that in the case of collective rights, the conflation of ethnos with demos might offer a positive contribution to the expansion of democracy to alienated or subordinated communities. The argument here is that the formula becomes unstable and dynamite like when it incorporates ethnos as the foundation for the demos, and as an equivalent to popular territorial sovereignty in a single monist mixture. This is particularly so when other cultural communities are present in the territory of the state. In this explosive mix, national self determination and territorial sovereignty legitimises the governance of only a minority of nations, the titular ones. It threatens others with disappearance in most cases through forceful assimilation, or thankfully in a small number of cases, through ethnic cleansing and genocide. In this way, this type of sovereign self-determination contradicts the democratic, universally egalitarian values that laid the original foundation of its principles<sup>13</sup>.

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<sup>11</sup> Paul Stratham, *Understanding Anti-Asylum Rhetoric: Restrictive Politics or Racist Publics?* The Political Quarterly, Vol. 74, Issue, Supplement s1, p.165 August 2003

<sup>12</sup> Hannah Arendt,(1962), The Origins of Totalitarianism, Ch 9, *The Decline of Nation-State; end of Rights of Man*, Meridian Books Cleveland and New York September p.280

<sup>13</sup> In a dissenting view, Allen Buchanan shows clearly the serious limitations of international law's line of reasoning when he argues that *International law should recognize a remedial right to secede, but not a general right of self-determination that includes the right to secede for all peoples or nations. From the standpoint of international law, the unilateral right to secede –the right to secede without consent or constitutional authorization – should be understood as a remedial right only, as a last resort response to serious injustices.* Allen Buchanan, Justice, Legitimacy, and Self-Determination: Moral

Consider the following: a conservative estimate puts the number of nations in this world to well above 3,000, while with the admission of South Sudan in July 2011, there are 193 states represented in the UN. Fewer than 20 states are ethnically homogeneous in the sense that cultural minorities account for less than 5% of the population<sup>14</sup>. Nation-states in the proper sense of the term are only a handful, and titular nations (nations that have states) are only a small fraction of all nations, and it is not an exaggeration to say that the term “nation state” –understood as one (cultural) nation in one state -- is a misnomer<sup>15</sup>.

While the overwhelming majority of states represented in the UN are not culturally homogeneous, the configuration of their political institutions often gives the impression they are, trapping indigenous peoples and other cultural minorities that have different symbols and memories into at best, ambiguity and at worst, alienation, subordination, and in worst case scenario, ethnic cleansing. For make no mistake, if the term ethnic cleansing is a by product of the Modernity of the monist popular-sovereign nation state, and like the latter, it was invented in Europe, and spread across the world and scattered minorities are its appointed victims. Michael Mann in his authoritative “Dark Side of Democracy” meticulously substantives this argument.

#### THE CENTRALIST ATOMIST PRINCIPLE AND THE LIMITS OF LIBERAL DEMOCRACIES

Otto Bauer, in his 1907 seminal work, argues that the liberal democratic state is an imperfect democracy because it is organised according to the 'centralist-atomist' principle. In the genesis of the modern nation state, Bauer argues, one of its most important characteristics, its centralisation of power, was in fact initially developed by the absolutism. This centralisation completed in a democratic mode, through the abolition of guilds, estates, and other segmental organizations. This had the effect of reducing recognised political actors to their smallest parts, Bauer call these “atoms”, i.e. to single individual citizens. For Otto Bauer and Karl Renner, a constitutional jurist, the legal representative order knows only two units. On the one hand, state sovereignty and on the other, the sovereignty of the individual citizen<sup>16</sup>. On this point Bauer sees no difference between Rousseau and Hobbes. With the hegemonic victory of modern liberal democracy, the work of absolutism was roundly completed. Constitutionally, in nation state liberal democracies, there are two recognised sovereign politico-juridical entities, the atomised citizen and the collective totality. This logic is also applicable to federal territorial states with some adjustments to cater for the division of competences between the central state and the provinces. In both cases, the juridical political entities are atomised individuals and the sovereign will of the undivided collective. This is what Bauer calls the centralist-atomist structure of modern liberal democratic nation-states. This organizational characteristic eliminates all intermediate communitarian locations from the arena of representative politics. There can

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Foundations for International Law (Oxford Political Theory Series) Oxford university Press, 2004, pp.331 Even if this were the case, for the right to NSD to be exercised in this way it requires a territorial majority exercising territorial sovereignty, thus rendering this principle ineligible for territorial minorities such as indigenous peoples.

<sup>14</sup> Michael E. Brown, Ethnic Conflict and International Security, Princeton University Press, 1993 p.6

<sup>15</sup> Trudy Govier, Social Trust and Human Communities, McGill-Queen's University Press, Montréal, Québec, 1997 p. 269 Ch 10, note 1

<sup>16</sup> Otto Bauer, (1907/2000) The Question of Nationalities and Social Democracy, (ed. E. Nimni) University of Minnesota Press, Minneapolis , p. 232

be no doubt (in Bauer's mind also) that in some important cases this led to the expansion of democracy through the irrevocable abolition of sectarian political privilege, in the form of castes, feudal guilds, landlords, etc. Nevertheless, there is here an important consideration; it simultaneously threw the new born democratic baby through the bath water, for it impoverished the quality of the nascent democracy. This is because it also abolished and made impossible mechanisms of representation of different, territorially scattered national and ethnic minorities which are left at the mercy of governmental bureaucracies or worse, they are left at the mercy of the tyranny of the majority; a less than adequate form of democracy.

The citizens of the modern state are nationally identified with the state through residence and citizenship, irrespectively of ethnic and national affiliations. Most states represented in the UN are thus seen as nation-states whether or not they are ethnically or nationally homogeneous. In the liberal democratic nation-state the cultural practice of the dominant nation (the "titular nation" or if you prefer, the official ethnicity of the state) is disguised by a procedural practice that claims neutrality but it is in fact derived from the cultural and historical experiences of the dominant national community. Following the logic of this argument, atomistic states, however much consideration they might show for individual and democratic rights, and however equalitarian their practices, are disinclined to recognise collective representation mechanisms for its cultural minorities. These demands are effectively suppressed with what are apparently "democratic instruments", via the tyranny of the majority. These include state sanctioned monolingualism, gerrymandering of electoral boundaries, rejection in the name of modernity of ancestral rights and customary laws of minority cultures, etc. If individual rights and freedom of expression and petition remain in place, the violations above are not perceived by titular national democracies as anti-democratic. In a paradoxical way, this situation makes de-facto, but not de-jure, multinational states inherently unstable, for there are no actionable legal mechanisms to represent national minorities. Both, majorities and minorities are faced with an increasingly difficult dilemma: coercively assimilate cultural minorities through the famous Friedrich Engels' slogan of assimilation to more "energetic" and "vital" nations with "democracy as compensation"<sup>17</sup>, or, to alternatively split the de-facto multinational state along national lines. Both strategies have been tried with catastrophic results, for there is no democratic gain the coerced assimilation of minorities, and because the other solution, partition, often exhibits the "Matrioshka (Russian doll) syndrome", when you pull one out, there is another one inside<sup>18</sup>.

## EXPANSIVE DEMOCRACY AND HUMAN RIGHTS

In a dissenting discussion to mainstream liberal democratic theories, liberal democratic models that attach a positive normative value to democracy -- the ones that argue that democracy has more than an instrumental value to liberalism, are often referred as expansive liberal democratic theories. Expansive democracy refers to the effects of institutions in increasing individuals' control over self governance, self-determination and

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<sup>17</sup> E. Nimni, Marxism and Nationalism Theoretical Origins of a Political Crisis (1994), Second Edition, Pluto Press, London p.43

<sup>18</sup> For an expansion of this argument, see: E. Nimni (1999) *Nationalist multiculturalism in late imperial Austria as a critique of contemporary liberalism: The case of Bauer and Renner*, Journal of Political Ideologies, 4:3, pp. 289-314

self-development<sup>19</sup>. The idea (supported in this paper) is that democracy is much more than instrument for the preservation of liberty. Collective democratic participation is a normative value in itself, one that enhances the quality of governance and the plural participation of citizens. These types of theories accentuate the democratic side of the equation (as opposed to liberal individualism), and are more receptive and supportive to the value of collective action as a mechanism of human empowerment. A significant part of Feminist theories start from here, in that they demand the recognition of the collective specificity of women in male dominated societies. For example, they advocate the normative value of women rights as one form group rights<sup>20</sup>. It this, the transformation of democratic theory that resulted from Feminist activism is a source of inspiration for the ideas presented in this paper. But while group rights are a significant advance in earlier monist interpretations of democracy, they not fully suited to represent cultural communities. The value of culture is not recognised per se, but only insofar as those individuals who are members of a cultural group wish to exercise those rights. But even here, either culture has no bearing in political representation, or, the architecture of citizenship is designed for individuals that are culturally homologous<sup>21</sup>. Here minority members must “fit” the architecture of citizenship. But even if the contemporary architecture of citizenship has been in most cases, successfully transformed by the incorporation of Feminist demands, this might not suffice in the case of cultural minorities. This is because this limited pluralisation of citizenship still renders invisible citizens community insertion, something that becomes fatally problematic when – as in the case of indigenous peoples and disadvantaged territorial minorities-- that very insertion is the source for the disadvantage in relation to the majority, and it is one expansive democratic theory wishes to remedy<sup>22</sup>. This can only be done by taking the argument one step further and instutionalise some form of collective rights.

While of course it will be absurd to institutionalise collective rights not wished by members of the collective, individual will is not sufficient in creating forms of representation, and even less so in creating forms of collective minority protection. Collective rights cannot be adequately recognised without representatives or institutions that have the ability or legitimation to further the collectivity’s goals<sup>23</sup>. While the idea of group rights allows for the abstract possibility of individual members of minorities to enjoy cultural rights, without some form of institutionalised representation (collective rights), those individuals are dangerously dependent on the good will of majorities. Consider the *Tyranny of the Majority*<sup>24</sup> when decisions are taken by a majority in a centralist -atomist system of governance (almost all liberal democracies), and these decisions are undesired by members

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<sup>19</sup> Mark Warren, *Democratic Theory and Self-Transformation*, The American Political Science Review, Vol. 86, No. 1 (Mar., 1992), p.9

<sup>20</sup> Will Kymlicka, Multicultural Citizenship, Oxford University Press, 1995, p.34

<sup>21</sup> A minority of liberal theorists dissent from this view, see in particular Will Kymlicka, Multicultural Citizenship, Oxford University Press, 1995 and Will Kymlicka, and Christine Straehle, *Cosmopolitanism, Nation-States, and Minority Nationalism: A Critical Review of Recent Literature*, European Journal of Philosophy, 7:1, April 1999, pp. 65-88.

<sup>22</sup> In a provocative work, Leslie G. Carr calls this interpretation “colour blind racism”, see: Leslie G. Carr, “Color-Blind” Racism, Sage publishers, 1997, Introduction.

<sup>23</sup> Douglas Sanders (1991), *Collective Rights*, Human Rights Quarterly, Vol. 13, No. 3. (1991), p. 369

<sup>24</sup> John Stuart Mill,(1998) On Liberty and Other Essays With an introduction by John Gray, Oxford University Press, p.8

of a minority group and in many cases, are seen by the minority as an active form of oppression. Here, the ensuing alienation can easily turn into distrust and hostility to the majority. In these circumstances, any resulting demands for assimilation cannot be considered fair, for these are the outcome of majority institutional coercion. It is not uncommon for securitized religious or ethnic groups to be penalized in this way by majorities through the liberal-democratic process. This can be done without infringing on the basic personal rights of the individual members. As Kymlicka and Straehle persuasively argue<sup>25</sup>, even if this abuse of power is considered an injustice, it can occur without violating individual civil and political rights, so long as individual members maintain the right to run for office, voice their grievances, and indeed the right to vote. This is a shallow, narrow and limited individual understanding of human rights, for it creates no obstacles to disempower minority communities fatally subjected to the tyranny of the majority. For this very reason, collective rights must guarantee the effective participation of minorities as specified in the OSCE Lund Recommendations<sup>26</sup>, so that vital interests of minorities cannot be overturned by majority decisions.

#### DO COLLECTIVE RIGHTS ESSENTIALISE CULTURE?

Collective cultural rights have been criticised from many quarters with the argument that they protect or essentialise some kind of unpalatable or reactionary behaviour, or, that the institutionalisation of these cultures in the form of collective rights will “fossilises” these cultures, turning them into conservative, static and unable to change. Very often these criticisms misunderstand the issue they are criticising, or have a superficial or inaccurate knowledge of these cultures. These criticisms tend to unfairly focus on immigrant minority communities and carry a more than fair dose of prejudice. These communities are seen as “static”, “backward” unable to change, misogynist and bent upon oppressing women and unable to adapt to modernity<sup>27</sup>. In sharp contrast, these kinds of criticisms are rarely directed to the culture of titular nations, and that in itself is an important pointer of the unfair character of this approach.

Let’s start from the discussion of dominant cultures. It is clear to most fair minded observers, that titular nation cultures, such as English, French, German, Swedish etc. It is clear that these cultures cannot be defined as “progressive”, “reactionary” “misogynist”, “racist” and so on, even if there are interpretations of these cultures in the form of political ideologies that could well be understood in the manner above. Nevertheless, occasionally, the behaviour of the government of the titular nations, or, the dominant political forces within it could be understood in that way. For the sake of an example, if some could plausibly argue that the US Government committed crimes against humanity in recent wars, this accusation does not and cannot extend to the US culture and even less so, to any

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<sup>25</sup> Will Kymlicka and Christine Straehle (1999), *Cosmopolitanism, Nation-States, and Minority Nationalism: A Critical Review of Recent Literature*, *European Journal of Philosophy*, Vol. 7, Issue 1, p. 75

<sup>26</sup> The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note, Foundation on Inter-Ethnic Relations September 1999 ISBN 90-7598905-9 This is a copy of the booklet published by the Foundation on Inter-Ethnic Relations. It was accessed at: [www.osce.org/documents/hcnm/1999/09/2698\\_en.pdf](http://www.osce.org/documents/hcnm/1999/09/2698_en.pdf)

<sup>27</sup> A classical example is the debate around Susan Moller Okin’s assertion that multiculturalism is bad for women. Susan Moller Okin, (1999) *Is multiculturalism bad for women?* edited by Joshua Cohen, Matthew Howard and Martha C. Nussbaum, Princeton, N.J, Princeton University Press,

individual that is a US citizen or shares in the cultural mores of that nation. Cultural values are not an explanation for what leaders or even sections of dominant communities do or do not do.

National and ethnic cultures are what Ernesto Laclau calls “floating signifiers”, they are not intrinsically associated with left, right centre, feminist or misogynist ideas, etc, even if significant groups that partake in those cultures can be identified as such. The cultures are arenas for struggle between contending forces that wish to hegemonise that particular community. When Fidel Castro said the “*the idiosyncrasy of the Cuban people will not allow Yankee imperialists to dominate our country*” was simply incorporating icons of Cuban nationalism into his ideological stance. Likewise when the Miami exiles said “*Cuba, the pearl of the Caribbean is now occupied by godless communists*” were doing the same from their ideological perspective. Cuban nationalism (or any nationalism for that matter) is neither intrinsically left or right, but an arena for struggle for hegemony between contesting ideologies. Ethnic and national cultures are, as pointed before, important elements in the definition of our common humanity, but are equally politically floating signifiers, pitched at a high level of generality and amenable to be interpreted in different and contrasting ways. They are arenas for political struggle between antagonistic world views, each of which aims to monopolize the role of the “true” defender or the “true” interpreter of that culture in order to gain support and constitute itself as the dominant political force within that culture. None of this is particularly controversial and it is somewhat pedestrian, for an observer of electoral contests will easily reach this conclusion.

Why is it that the same plural understanding is not afforded to minority cultures, particularly immigrant minority cultures? Discussions of this will take away of our topic into a long discussion of racism and prejudice particularly in Europe. It is sufficient to say that minority cultures and minority religions are subjected to the same ideological battles, and that like dominant cultures, minority cultures are equally pitched at a high level of generality and are the subject of internal contestation. Islam for example, is a very plural religion with contesting interpretations, and lively internal debates. But this is obscured in the West by a continuous accusation of fundamentalism, which paradoxically gives comfort and support to the fundamentalist forces the West wishes to neutralise.

The feminist writer Ayelet Shachar, expresses this same idea from a different direction:

..... the components that constitute the nomos of a group at any given time never are as fixed or stable as they might appear. Over time, identity is negotiated, contested, transformed, defined, and redefined by group members through ongoing interactions both inside and outside the identity group. In this sense, nomoi groups are contingent, historical, and socially constructed entities, not the natural or fixed essences they often are thought to be. Identity groups constantly redefine their established traditions in relation to inside or outside challenges<sup>28</sup>.

The openness and plurality of minority cultures is crucially shaped by the attitude of the majority, to which they are vulnerable in a world of nation states. Internal debate flourishes when the community is not under threat, and vice versa it decreases when the community is under threat by outsiders. This is a constant in minority communities, when under threat, they close ranks under a leadership that they might not all otherwise accept uncritically. To afford collective rights and institutional representation is one of the best methods to secure

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<sup>28</sup> Ayelet Shachar (2000) *On Citizenship and Multicultural Vulnerability*, *Political Theory*, 28, p. 72

a vibrant internal debate and to de-essentialise any attempt to fix or essentialise their identities.

#### ARE HUMAN RIGHTS INDIVIDUAL RIGHTS?

Disadvantaged cultural minorities often seek more than the right of their individual members to equality and participation within the larger society. They require mechanisms that protect their culture from the tyranny of the majority, they seek either protection or autonomy as the means to ensure that their communities can survive and thrive in minority circumstances. In short, these minorities require some form of autonomy and/or community representation<sup>29</sup>. Here, many liberal critics vehemently disagree, for they see in granting communal or autonomous rights to minorities a grave transgression to a theory of rights that is exclusively oriented towards individuals<sup>30</sup> or as simply a violation of human rights as these are in their interpretation, entirely individual in nature and exclusively afforded to individuals.

These understandings of human rights are fallacious and some say, ethnocentric, in that they see human rights as granted to an “ideal type” individual that is at best, little more than a transcendental abstraction. In this “ideal type” the exemplary individual is often unconnected to real and existing human beings and at worst, a simple ethnocentric replication of the dominant individual type. Consider the “veil of ignorance” and the “original position”, concepts introduced by John Rawls in his book “A Theory of Justice”.<sup>31</sup> This is a method of determining the cultural and political neutrality of policy based upon ignorance or “benign neglect” of particular cultures, tastes, political position and inclinations of the individual within the social order of society. Here, for Rawls, fairness and human rights presumably require ignorance of everything except the transcendental and homologous human condition of the individual in question. An important Feminist critique of the “veil of ignorance” doctrine persuasively argues that this theory fails because on its choice of an abstraction of human being in the exemplary image of a “normal” member of the dominant group. This abstraction indeed invokes the characteristics of a WASP male member of the dominant majority. The consensus it creates is thus achieved by fiat<sup>32</sup> subsuming all into the WASP male stereotype and purposely ignoring differences. This important criticism equally applies to the discussion of the values of non Christian minorities in secular democracies. The abstraction of the “veil of ignorance” subsumes non-Christian communities into what they are not. As such is a mechanism of oppression, not emancipation, of its actually veiled female citizens. It also produces unwarranted and undesired generalisations. Do we all celebrate Christmas? If not, why we all get compulsory holidays in Christmas?

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<sup>29</sup> Douglas Sanders, *Collective rights*, Human Rights Quarterly, 13, (1991) p. 370

<sup>30</sup> Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in Amy Gutmann(ed.), Multiculturalism. Examining the Politics of Recognition, Princeton University Press, 1974, pp. 108-10

<sup>31</sup> John Rawls, A Theory of Justice, Oxford University Press, 1999, p 118

<sup>32</sup> Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, New Mexico Law Review, 1986, 16, 613–630

In a paradoxical way, these assertions on human rights are defined by Kinley<sup>33</sup> as a form 'Transcendental Fundamentalism'. This is the idea based on the dubious claim that human rights are the fundamental, immutable and transcendent principles regardless of context and circumstance, upon which our political, social and legal orders are based today. Kinley further argues that this kind of fallacious interpretation exhibits:

*...a tendency towards human rights evangelicalism where human rights are touted as a panacea for many or all social, political, legal and economic ills. As such, human rights are considered to be beyond reproach or even critique. I refer to such a phenomenon as 'Reactionary Fundamentalism', and see the threat it poses to human rights as coming from the devitalisation of the body of human rights discourse and argument that is the inevitable consequence of all dogma that eschews the rigours of intellectual inquiry and challenge.*<sup>34</sup>

There is nothing odd with this claim, particularly when it challenges dogmatic assertions of human rights fundamentalism by using the very methodology bequeathed to us by the Philosophy of the Enlightenment (the rigours of intellectual enquiry and challenge). On a more concrete dimension, the practice becomes clear if we consider how one of the central tenants of the Philosophy of the Enlightenment, secularity and the value of reason, has been curiously reverted into a fundamentalist dogma by the European anti-Islamic crusaders of *laïcité*.

An inverted mirror image of this kind of transcendental human rights fundamentalism can be found in the caricatures of one of the most acerbic critics of the Philosophy of the Enlightenment, Joseph-Marie de Maistre, who defended hierarchical societies and a monarchical State. In "Considerations on France" (1797) He wrote: *The Constitution of 1795 like its predecessors was made for man. But there is no such thing as man in the world. In my lifetime I have seen Frenchmen, Italians, Russians, etc.; thanks to Montesquieu, I even know that one can be Persian. But as for man, I declare that I have never in my life met him; if he exists, he is unknown to me...*<sup>35</sup>

In surprising and most perplexing turn of events, De Maistre finds support in an unexpected quarter. Hannah Arendt expresses her bitter disappointment on the value Human Rights following the genocide of European Jewry in words that are similar to those of De Maistre, but relying instead on another sharp Anglo critic of the Philosophy of the Enlightenment, Edmund Burke. She argues that World War Two events *offer an ironical, bitter, and belated confirmation of the famous arguments with which Edmund Burke opposed the French Revolution's Declaration of the Rights of Man*. Her claim is that the WW2 events "amply justify" Burke's claim that human rights are an "abstraction" and that it is much wiser to rely on inherited rights such as the rights of the Englishman *which one transmits to one's children like life itself*, rather than on the rights of "man" <sic>. She then enigmatically supports Burke's idea that the rights we have spring from within the nation, so that no other concept is needed as a source of law<sup>36</sup>.

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<sup>33</sup> David Kinley, *Human Rights Fundamentalisms*, inaugural professorial lecture, Department of Law, University of Sydney. Published in the Sydney Law Review, 2007, vol 19, p. 545.

<sup>34</sup> Ibid, p. 547

<sup>35</sup> Joseph de Maistre, Considerations on France, Richard A. Lebrun (ed.), Introduction by Isaiah Berlin Cambridge Texts in the History of Political Thought, Cambridge University Press, 1994, p. xxiii

<sup>36</sup> Hannah Arendt,(1962), The Origins of Totalitarianism, Ch 9, *The Decline of Nation-State; end of Rights of Man*, Meridian Books Cleveland and New York p. 299

So it appears that we are faced by a human rights dog's breakfast, a choice between two dangerous and unappealing conceptions of rights. One vision is egalitarian, but ethnocentric, and to a large extent, dogmatic Universalist. The other vision is ostensible pluralist, but inhumane, hierarchical undemocratic, with a propensity to inequality and hierarchical structures and images of human life of the sort that paradoxically (!) Arendt warned us about in other important works.

#### HUMAN RIGHTS AND POPULAR SOVEREIGNTY

What escapes De Maistre, in criticising a “non existing man” and likewise, Bourke and Arendt in the curious notion of rights by “national inheritance”, and, equally escapes Rawls and other dogmatic and monist transcendentalist defenders of human rights, who only see human rights as an abstract universal category, is that our common human characteristics, the point of departure for human rights, are precisely constituted through our insertion in time and space into a community. We are human not in spite of cultural diversity, but because of cultural diversity. Our common humanity derives from the irrevocably and specifically plural character of human existence. To paraphrase de Maistre sustaining the opposite point of view, we are humans and worthy of universal human rights precisely because we are French, Italian, Russian and Persian, etc. To deny the importance and value of cultural diversity, and, our cultural insertion, denies the very notion of human rights, as this means denying an important constitutive element of the human condition. Recognition of difference is therefore a key part of the assertion of our common humanity, for human beings cannot be conceived outside their culturally and religiously diverse settings. Even cultural and postcolonial hybridity is constitutive. Universal human rights do not exist in abstraction but in a human world that is for all time culturally diverse. Without such diversity, the very notion of a common humanity is inconceivable. In the worst case scenario, and as a result of the two sets of ideas criticised above, selective and tendentious understanding of human rights simply replicates selective attributes of the dominant culture. This is explicit in the reactionary thinking of Burke and De Maistre, as well as in the dogmatic universalism of Rawls. At the same time, this accusation is often and with some justification, held against Western powers and some Liberal Democracies. But the accusation of Western liberal hypocrisy does not undermine human rights, but on the contrary, it strengthens them, for we are able to critically analyse our own ethnocentric failings, which we can understand when we put to work one of the most subversive components of the Philosophy of the Enlightenment, that of rigorous intellectual enquiry and challenge.

The discussion above is crucially important for the discussion of national self-determination and popular sovereignty because the assertion of human rights as a foundational recognition of human plurality and cultural diversity is decisive to dismiss rigid models of popular sovereignty and national self-determination. The unrelenting understanding enshrined in both, liberal democratic theory and international law, that national self-determination is to be understood as the creation of separate territorial sovereignties (states) for aggrieved or deserving communities is insensible to the reality that most states house diverse cultural communities. It is furthermore, skewed in favour of a small number of relative powerful national-territorial communities. More ominously, it is also informed by a narrow and perhaps ethnocentric interpretation of human rights in which self-determination only the expression of the group will of atomised individuals whose cultural affiliation is rendered invisible. In this case, national self-determination has one “fit all” meaning. In contrast, in a plural world, sovereign territorial self-determination must come to terms with the practical impossibility of generalising a common will without putting communities in a democratic

equal footing. For this reason, a discussion of human rights is necessary to show how monist understandings of national self determination and popular sovereignty clash with a constitutive characteristic of humanity, its irrevocable cultural diversity.

If one of the most deserving human categories for self determination, recognition and some form of sovereignty are indigenous peoples, the monist model of “one fit all” is unsuitable or worse for the vast majority of indigenous and dispersed territorial minorities. They are gravely affected by the doctrine of indivisible sovereignty that originates from the centralist atomist conceptualisation of the nation state. This leads to the inflexible paradigm presently understood in international law, that no right of self-determination can be recognised where it clashes with a world of sovereign states. This influential argument is unreceptive to the implementation of minority and territorially dispersed community rights and therefore unsuitable for indigenous communities<sup>37</sup>. In a partially dissenting voice, Will Kymlicka argues that autonomous self-government rights, which require collective rights and the delegation of legal powers to national minorities, should be awarded exclusively to groups of indigenous peoples and others who have been incorporated to settler states through conquest or colonialization.<sup>38</sup> It is now to these that we turn.

#### INDIGENOUS PEOPLES AND DEMOCRATIC THEORY

The democratic normative basis of the model of National Self-Determination -- the emancipation from alien rule -- makes some territorial minorities and most indigenous peoples to be among those who most deserve this right. Yet, at the same time, because of their territorial configuration, these groups are unable to fulfil the requirements of national self determination laid out in international law and the UN charter. With some few exceptions<sup>39</sup>, Indigenous peoples have been conquered, their territories occupied by settlers, and in many cases subjected to genocide by settler colonialism. In the majority of cases, they are now marginal minorities in their ancestral lands. The most recent tragedy is Palestine, which in a scandalous turn of events, the indigenous people of Palestine have been made the indirect victims of European racist genocides. In these circumstances, Palestinians, as well as other indigenous peoples have a unique normative claim for self governance, cultural recognition and community rights.

For the reasons discussed earlier in this paper, the politics of national self determination demanded and argued by indigenous peoples differs greatly from mainstream liberal and UN definitions of national self determination and even more so, from the way self determination is understood in international law. In many ways demands for self-determination of indigenous peoples test hitherto established notions of popular sovereignty in contemporary liberal democratic nation states, particularly those that have been built in colonial settler societies. As shown earlier, this problem does not only affect indigenous peoples; other scattered territorial minorities are also affected by the sovereign-

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<sup>37</sup> Catherine J. Iorns, *Indigenous peoples and self determination: Challenging State Sovereignty*, Case Western Reserve Journal of International Law; Spring 1992, Vol. 24 , 2, p. 199

<sup>38</sup> Will Kymlicka, Multicultural Citizenship, Oxford University Press 1995, pp-10-11

<sup>39</sup> Consider the case of Fiji as an exception

territorial bias of mainstream understanding of self-determination, the Roma are a classical example<sup>40</sup>.

Out of necessity, these indigenous peoples and scattered communities have no choice but to radically redefine the forms of national self-determination, shifting toward models of non territorial autonomy even when their ancestral nexus with the territory is strong. This is in many cases done by separating sovereignty into overlapping jurisdictions, and incorporating and being incorporated into forms of multi level governance. This procedure in some way reminds the architecture of pre modern Empires, but also to some extent and important for us, of recent events in the European Union. Here the revised architecture of the EU and in particular the ongoing discussions about a tighter unity in a quasi federal Europe could open interesting parallel opportunities. At a day to day level of politics, the idea of European politicians learning something from indigenous peoples elicits a broad smile for it will test their ethnocentrism to the limit. Nevertheless, forms of multi level governance in the EU have been described as communal, when a particular community acquires jurisdiction over a particular domain. The strongest pressures for multilevel governance in the EU occur in de-facto multination states (Spain, Belgium, and UK among others) with politically active and regionally based national minorities and nationalist movements<sup>41</sup>. In most cases the desire for self-determination is coupled with a desire to integrate further into the EU, making their demands for independence to be significantly less than achieving nation state sovereignty. In the cases I am familiar with (Spain and the UK) there is an awareness of this in minority nationalist parties, but none of the main minority nationalist parties has engaged in a debate on the implications of this, particularly for the in some case large number of regional residents that do not belong to the regionally dominant national community.

Here there are, unsuspected but important parallel dimensions between the demands of stateless nations of the European Union and the demands of indigenous peoples, particularly in the way they frame their demands of national self determination in conjunction with demands of multi level governance. Such jurisdictions are defined by cultural boundaries for people whose residential areas intersect with others, with whom they share membership of other (multiple) jurisdictions. In the EU, the emerging idea is that the process of integration that results from the serious economic crisis is shifting the process of integration toward the idea of increased shared sovereignty and policy making shared across a growing number of spheres of influence that criss-crosses the existing nation state configuration. The direction in the integrated Europe is to move toward states that continuously loose, in a relentless process, authority over individuals and policies<sup>42</sup>. In more than one way, these trends appear to indicate a parallel path between indigenous demands for self determination couched in a language that international jurists will find heterodox, and the pressures for European integration on the stateless nations of Europe, a pressure

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<sup>40</sup> Jarmila Lajcakova,(2010) *Advancing Empowerment of the Roma in Slovakia through a Non-territorial National Autonomy*, *Ethnopolitics*; June, Vol. 9, :pp 171-196, Ilona Klimova-Alexander,(2005) *The Romani Voice in World Politics:The United Nations and Non-state Actors*, Ashgate, Aldershot,

<sup>41</sup> Hooghe Liesbet & Marks Gary, *Unravelling the Central State, But How? Types of Multi-Level Governance* (2003), Political Science Series, Monograph 87, *Institute for Advanced Studies*, Vienna, p. 16 and Hooghe, Liesbet, Gary Marks, and Carole Wilson (2002), *Does Left/Right Structure Party Positions on European Integration?* *Comparative Political Studies* 35: 965–89,

<sup>42</sup> Liesbet Hooghe and Gary Marks, *Multi-Level Governance and European Integration*, Rowman & Littlefield publishers, Boulder, 2001, pp 1-3

that has been thus far absorbed by minority nationalist movements. Nevertheless, we should accept that an admission of this parallelism will test Eurocentric sentiments to the limit.

Multi-level governance is y more open to non-territorial arrangements and these are valuable options for dispersed minority communities. The best known examples are the Sami Parliaments in Scandinavian countries, as well as the different jurisdictions of the Plurinational State of Bolivia<sup>43</sup>.

Yet, notwithstanding the similarities with consociationalism and national cultural autonomy, the new and imaginative way in which indigenous peoples operationalise the idea of national self determination remains significantly under-theorised and little known outside the area of specialised studies of indigenous peoples. The practice of indigenous peoples, coupled with the challenges emerging in Europe as result of the demands for secession within the UK Spain and Belgium are pushing for solutions to the problems of representation of stateless nations that falls short of total sovereignty. These changes have the undeniable potential to transform the way we understand self-determination and popular sovereignty, and these changes are important and relevant to other types of communities affected by the rigidities of nation-state governance. Here indigenous groups are making a contribution to a paradigm shift in the way we understand democratic rights and this in time will help reshape democratic theory. The emerging models resemble in organization and characteristics the models for National Cultural Autonomy advocated around the turn of the twentieth century by Otto Bauer and Karl Renner, models designed to avoid the disintegration of the Austro-Hungarian monarchy, an implementing through a complex network of overlapping jurisdictions, maximum autonomy and maximum self-determination to minority communities while avoiding exclusive control over territory. This might be the right time to revisit these models and see if they can help to provide solution to the crisis in the EU, and indeed help theorize the innovative models for self-determination advanced by indigenous peoples. Much in the same way as nowadays the EU needs flexible models of self governance and non exclusive sovereignty to avoid the disintegration of the system, the Austrian late nineteenth century socialists faced similar issues in the context of the Austro-Hungarian dual monarchy. In light of the experience of indigenous peoples and the crisis in Europe, it might be wise to re-examine these old models, which highlight a crying need in 21<sup>st</sup> century Europe for the apparently contradictory demands for more self-governance and more integration<sup>44</sup>.

#### THE TRANSFORMATION OF DEMOCRATIC THEORY- FROM THE NATION STATE DEMOS TO A COMMOWEALTH OF DEMOI

Since their development in the eighteen to the early twentieth century, democratic theories took for granted the insertion of political democracy within institution of the nation state. More often than not, they took this assertion at face value without explanation or

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<sup>43</sup> I have discussed this in some detail in E. Nimni, *Indigenous Peoples and the Development of New Paradigms in the Theory and Practice of National Self Determination and Sovereignty*.

<sup>44</sup> D Smith, J Hiden, (2012) Ethnic Diversity and the Nation State National Cultural Autonomy Revisited, Routledge, London 166 pages, David Smith and Karl Cordell (eds.) Cultural Autonomy in Contemporary Europe, Routledge, London, 2008, E. Nimni, *National Cultural Autonomy as an Alternative to Minority Nationalism*, in *Ethnopolitics*, Vol. 3 No.3, pp. 345-365, September 2007, E. Nimni, (2005) National-Cultural Autonomy and its Contemporary Critics, Routledge, London,

justification<sup>45</sup>. Recently, and as a result of the newly recognised democratic shortcomings in the practice of democracy, important arguments and objections are beginning to emerge in the area of international political theory, questioning if the nation state can be the exclusive locus of democratic activity. In what I have described elsewhere as a Kuhnian Paradigm shift<sup>46</sup>, the emerging approaches are ambitiously addressing long neglected issues, such as whether it is possible to realize democracy beyond the skeleton of the nation state and in particular, if national self-determination should only mean the creation of separate states. Further important questions emerging are what kind of democracy may exist outside the domain of the nation state, and how different might its foundations be, and what institutions and practices will reform or replace the regime of the contemporary nation-state.

Initially, contemporary advocates of cosmopolitanism began to challenge the insertion of democratic theory within the framework of the nation state. David Held for example, advocates in a number of important works, a model of cosmopolitan democracy that transcends the borders of the nation state, and that assumes the entrenchment of a cluster of rights and obligations enshrined within the constitutions of parliaments and assemblies, as well as various regional bodies such as the European Union, with a global parliament and an interconnected legal system.<sup>47</sup> The argument in Held's work is for broad conception pluralism within single fully inclusive demos.

While this approach can be commended for its departure from the domination of the nation state formation, it leaves intact the problem of community representation and the recognition of collective democratic subjects, the core of democratic demands of indigenous peoples and scattered minority communities. Taking the argument a step further, James Bohman<sup>48</sup> argues, that a form of radical plural democracy requires deeper transformations of democracy away from the morphology of the nation state. He further argues that the conditions exist for democratization beyond the limits of the nation-state, and that this expansion is not only possible, but necessary for the renewal of democratic theory. Bohman argues is that democracy must function *across* rather than simply *beyond* borders. The renewed democratic theory must not demolish cultural differences, as in the early republican model of the nation state, which was not only one of nation building, but simultaneously one of nation destroying<sup>49</sup>. This means that democracy must now become a democracy of the *demos*, a plural and diverse conglomerate of democratic communities and constituencies. This is not only to change the institutional structure of the nation state, but also a change in the political subject that sustains the democratic formation, from a unified

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<sup>45</sup> An interesting exception to this is the work of the Austrian socialists, Karl Renner and Otto Bauer, who developed the National Cultural Autonomy Model as a forerunner to contemporary consociationalism. See E. Nimni, *Nationalist multiculturalism in late imperial Austria as a critique of contemporary liberalism: The case of Bauer and Renner*, Journal of Political Ideologies, Volume 4, Issue 3 October 1999, pages 289 – 314 and E. Nimni, National Cultural Autonomy and its Contemporary Critics, Routledge, London 2005.

<sup>46</sup> E. Nimni. (2010) *Nationalism, Ethnicity and Self-Determination: A Paradigm Shift?*, in Keith Breen and Shane O'Neill (eds.), After the Nation? Critical Reflections on Post-Nationalism, Palgrave

<sup>47</sup> David Held, Models of Democracy, Polity Press, 3<sup>rd</sup> Edition, Cambridge 2006, p. 307-9

<sup>48</sup> James Bohman, *From Demos to Demoi: Democracy across Borders*, Ratio Juris, Vol. 18, 3, 2005, pp. 297-8

<sup>49</sup> Walker Connor, (1972) *Nation-Building or Nation-Destroying?* World Politics 24, pp.319-55.

constituency to a plurality of diverse constituencies, from 'a people' to 'peoples'<sup>50</sup>. In other words, Bohman brings the debate about the expansion of the democracy to the recognition of the collective rights and collective personae of the constituent communities or demoi.

Bohman argument speaks to the needs and demands of indigenous peoples and territorial minorities, it that it eliminates the key stumbling block for the communitarian political participation of these communities: territorial sovereignty as a condition for collective community participation. This argument is crucially important for the emancipation of territorial minorities because it distinguishes this approach to democracy from cosmopolitan arguments that imagine a single institutional skeleton of authority, a kind of a global state. Even more so, its comprehensive understanding of democratic values is sharply different from those who link global democracy to what could be defined as a minimalist approach, a kind of compelling human rights legal apparatus existing above the nation-state, only limiting its sovereignty when it transgresses the agreed framework of human rights. This last approach is of no use for minority communities, for as argued earlier, majoritarian democracies can transgress the rights of cultural minorities without violating an individualist definition of democratic rights.

#### NOT COSMOPOLITAN, BUT INTER-NATIONAL DEMOI

To develop democracy beyond the borders of the nation state is important but it is not sufficient to overcome the pluralist deficit of the modern nation state. It is self defeating to maintain the faulty configuration of the nation state, only to expand it to a gigantic world cosmopolitan constituency. Instead of perceiving democracy as *cosmopolitan (non-national and cultural)*, democracy as the domain of single demos, democratic theory must break with this residue of the nation state and understand democracy not as a single body but as a plurality of constituent democracies. In this way, it becomes ***inter-national and inter-cultural***, operating not beyond border but across borders, not negating but affirming the democratic value of the collective governance of nations and cultural communities, creating democratic models that incorporate self-determining constituent autonomous communities and recognising their right for effective collective representation.

Democracy must be organised in more than one unit in order to satisfy demands for recognition that result from the logic of pluralist democratic governance. In this global democracy cannot be some analogical world of individuals enjoying equal rights which inevitably leads to misrecognition of minorities and the corresponding tyranny of the majority. Instead global democracy must be seen as a plurality of demos (demoi) within a federal arrangement instead of a state inspired conception of single demos<sup>51</sup>. In other words, democracy must be implemented in a Commonwealth of Demoi, understanding by that a highly interconnected world, where territories are shared between differing demoi and territorial polities cannot be the basis for exclusive sovereignties.

The growth of governance beyond nation states is perhaps one of the most important political developments of the last decades. In recent years these incipient transnational

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<sup>50</sup> James Bohman (2007), Democracy Across Borders: from Demos to Demoi, The MIT Press, p. 13

<sup>51</sup> Ferran Requejo, *Value Pluralism and Multinational federalism*, in Alain-G. Gagnon, Montserrat Guibernau, Francois Rocher (eds.) The Conditions of Diversity in Multinational Democracies, l'Institut de recherche en politiques publiques-The Institute for Research on Public Policy (IRPP) Montréal , Québec, 2004, p. 26

organizations have been challenged on normative grounds for their lack of democracy in the form of various democratic deficits<sup>52</sup>. This criticism is particularly strong in the case of the European Union, with the famous “democratic deficit” being paraded by many, friends and enemies of European integration alike. This required a reconceptualisation of the modalities of the European Union away from the analogies of the nation state, and the pioneering work of Francis Cheneval and in a different dimension, Kalypto Nicolaidis is extremely helpful in this regard.

Cheneval<sup>53</sup> correctly argues that it is mistaken to analyze the European Union and its democratic deficit with democratic analogies from the nation state (He rather uses the term *statespeople*). He uses instead the term ‘*demoicracy*’, a polity of multiple *demoi* as appropriate for the European Union. From here, any normative evaluation of democracy in the European Union must start from the premise that it is organisation with many *demoi* and not a nation state, in other words *a demoicracy*. This argument is important and constructive, for it is very helpful in establishing the foundational differences between the EU and nation states. It helps us move away from the morphology of the nation state, and since the democratic terminology associated with the nation state has become so common sensical and hegemonic, it is necessary, as Cheneval does, to create to neologisms to break out of this tight conceptual straitjacket. *Demoicracy* represents an intermediary level between nation-state and international politics. This is a key first step to move away from the morphology of the nation state while discussing democracy. Yet, the EU *demoicracy* cannot be composed exclusively by *statespeople* as its collective constituents, for as argued before, every European state, has ethnic and national minorities whose identity is different from the titular nation. Consider for example the Turkish permanent residents in Germany. They are culturally different from the titular nation of the Federal Republic of Germany, as explicitly defined in ethnic terms in the German constitution<sup>54</sup>, and in terms of their numbers, they are more than several titular nations of the European Union (Latvia, Estonia and Luxemburg among others). Consequently, in democratic terms, the case for their collective representation in the EU *demoicracy* is very compelling.

Nicolaidis<sup>55</sup> follows a similar line of argument. He defines ‘*demoicracy*’ as ‘*a Union of peoples, understood both as states and as citizens, who govern together but not as one*’, and

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<sup>52</sup> Magdalena Bexell, Jonas Tallberg and Anders Uhlin, (2010) *Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors*, *Global Governance*, 16, pp.81-82

<sup>53</sup> Francis Cheneval and Frank Schimmelfennig, (2012) *The Case for Demoicracy in the European Union*, June 2012, <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-5965.2012.02262.x/abstract> Accessed 28 December 2012

<sup>54</sup> The definition of a German in the Constitution of the Federal Republic of Germany is found in article 116 (1) Which states: *Deutscher im Sinne dieses Grundgesetzes ist vorbehaltlich anderweitiger gesetzlicher Regelung, wer die deutsche Staatsangehörigkeit besitzt oder als Flüchtling oder Vertriebener deutscher Volkszugehörigkeit oder als dessen Ehegatte oder Abkömmling in dem Gebiete des Deutschen Reiches nach dem Stande vom 31. Dezember 1937 Aufnahme gefunden hat.* (emphasis mine). *Grundgesetz für die Bundesrepublik Deutschland*, This is one of the very few “liberal democratic” constitutions that explicitly define a component of citizenship in ethnic terms (*deutscher Volkszugehörigkeit*), the other notable example is the basic law of the State of Israel. This is not a coincidence as both are constituted through the same Mitteleuropa organic definition of nationhood

<sup>55</sup> Kalypto Nicolaidis *European Demoicracy and its crisis*, (2012) *Journal of Common Market Studies*, December 2012, <http://onlinelibrary.wiley.com/doi/10.1111/jcms.12006/abstract> accessed 28 December 2012

like Cheneval, she argues that the concept is best understood distinct from both “national and supranational versions of single demos polities. She further argues that the concept of ‘demoicracy’ can serve both as an analytical lens for the European Union and as a normative benchmark. Consequently, the normative discussion must follow different lines of argumentation from the ones utilised to evaluate democracy in nation states. Here also, the Union of states and citizens has entirely escaped the morphology of the nation state. For that it is necessary to include as components of the community of demoi, intermediate categories, such as ethnic and national minorities, and dispersed communities that are culturally different from their respective titular nations in the context of the nation state.

The discussion on the European Union is refreshing and thought provoking, but it has to be considered an initial step, it is necessary to enlarge the characteristics of the participant demoi, to enhance democratic mechanisms of inter-national and inter-cultural representation.

For all its shortcomings and deficiencies, the European Union remains albeit reluctantly, a beacon of hope in expanding democracy in light of the failure of popular sovereignty and national self determination. A Commonwealth of Demoi holds the promise of expanding democracy through the incorporation of modalities of territorial and non territorial representation of minority communities, something that the ideals of popular sovereignty and national self determination have failed to do. In the meantime the democratic deficit of the nation state continues to hold up democratic values, forcing democrats into unpalatable contradictions to the chagrin of liberals.

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