

This article is published in a peer-reviewed section of the Utrecht Law Review

## Circles of Consensus

### The Preservation of Cultural Diversity through Political Processes

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*'La tol-lerancia es la millor mostra del avens de las costums y 'l camí més dret cap al progrés y la millora'*  
(Tolerance is the best sign of the advance of customs and the most direct way to progress and improve)

Valentí Almirall (1886)

#### 1. Introduction: the Western world-system and the loss of cultural diversity

Since the rise of the modern paradigm, during the 15<sup>th</sup> and 16<sup>th</sup> centuries, Western culture has striven for homogenization at a global level. Based on a certain conception of knowledge (techno-science) and a certain form of social organization (capitalism), it has extended its influence over all continents, imposing its views on other cultures.<sup>1</sup> The capitalist accumulation and the monopoly on knowledge by scientists have together extended towards new territories with the arrival of Europeans in the different parts of the world.<sup>2</sup> (Western) modernity consists of the birth, development and global pervasion of the capitalist

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1 Immanuel Wallerstein has underlined the relationship between techno-science and capitalism in the shaping of modernity. In the preparation of this paper I have used a Spanish translation of one of his works, namely I. Wallerstein, *Geopolítica y geocultura. Ensayos sobre el moderno sistema mundial* [Geopolitics and Geoculture, Essays on the Modern-World System], 2007, p. 302 (Spanish version by E. Vázquez Nacarino; original edition in English: I. Wallerstein, *Geopolitics and Geoculture*, 1991). I see capitalism as a mode of social organization which extends human control over nature through its manipulation and transformation in countable quantity (capital) that is able to satisfy human needs, conceived in terms of quantity as well. For the change that this implies in the understanding of the relation between humans and nature, see J.L. Serrano Moreno, *Ecología y Derecho: principios de Derecho Ambiental y Ecología jurídica* [Ecology and Law: Principles of Environmental Law and Legal Ecology], 1992, p. 87 et seq. Given this idea of capitalism, it is indifferent, from my point of view, in the argumentation I am displaying if the operation of value attribution is made through the markets or through a political decision within the framework of a planned economy. Therefore the so-called real socialism would be a particular manifestation of capitalism, which we can agree to call 'state capitalism'. On the common ground in the relation between society and nature, and a market economy and a planned economy, see A. Gorz, 'Ecología y libertad' [Ecology and Freedom], in *Crítica de la razón productivista* [Critique of the Productivist Reason], 2008, p. 73 (Spanish edition by J. Valdivieso; original edition in French: A. Gorz, *Écologie et liberté*, 1977; the Spanish text used is an abridged selection of the original Spanish translation, published in 1979); and J. Martínez Alier, 'Conflictos ecológicos y justicia ambiental' [Ecological Conflicts and Environmental Justice], 2008 *Papeles de relaciones ecosociales y cambio global* 103, p. 13.

2 As an example, one can mention that the conquest and colonization of America, since the 15<sup>th</sup> century, not only implies its incorporation into the European economy, but the implantation of the European Universal system and, through it, the European idea of (legitimate) knowledge in these new territories. See R. Fornet-Betancourt, 'Ciencia, tecnología i política en la filosofía de Panikkar' [Science, Technology and Politics in the Philosophy of Panikkar], in I. Boada (ed.), *La filosofía intercultural de Raimon Panikkar* [The Intercultural Philosophy of Raimon Panikkar], 2004, p. 122. In fact, European political culture has been the basis of the American post-colonial states, as pointed

world-system, which tends to marginalize other cultures, absorbing or wiping them out.<sup>3</sup> At the end, for the first time, there is a unique world-system, one civilization, and the other cultures have become only marginal fragments associated with it.<sup>4</sup>

Capitalism and techno-science are based on the idea of an abstract and rational subject, with no social or cultural mark. Given this, its universalism comes as no surprise, as it is not a local phenomenon, but a form of life which is characteristic of the human condition, overcoming any other forms of culture.<sup>5</sup> There is a great strife for cultural homogenization in the process of expanding the Western-world system during the modern era, inspired by the curse of Babel, which depicts diversity as punishment, as something which is intrinsically bad.<sup>6</sup> In fact, the expansion of Western modern culture around the world is seen as the advance of civilization against other (old-fashioned and obsolete) cultures.<sup>7</sup> It is clear that this implies the threatened disappearance of them all. Therefore, the link between the expansion of Western civilization and the loss of cultural diversity seems to be very clear. For this reason, a great deal of human know-how is associated with certain forms of life and ecosystems which are now threatened by globalization, but this knowledge can be useful, as I will try to argue.

The modern version of Western culture advocates a certain pattern of relations between society and the environment, based on a radical separation between human and non-human aspects and the control of the former over the latter, the so-called traditional anthropocentrism.<sup>8</sup> It is not the aim of this paper to explain, in great detail, the consequences of this cultural pattern in causing the present environmental crisis, but it is obvious that capitalist accumulation combined with new technologies based on the advances of Western modern science have radically transformed our environment, generating new problems and threats that we are currently forced to face up to.<sup>9</sup> In contrast, it can be stated that '[c]hthonic notions of property are (...) those of a chthonic life, and the human person is generally not elevated to a position of domination, or dominium, over the natural world'.<sup>10</sup> For this reason, among others, the so-called chthonic traditions, more or less those that can be described as belonging to indigenous or aboriginal peoples, can be seen as an alternative source of knowledge to find solutions in the present situation.

In this context, one of the clearest consequences of the process of the standardization and systematic exploitation of nature by modern technologies to feed the process of capitalist accumulation is the loss of biodiversity. The evolution of the economic global system tends to diminish life forms on Earth. That begins to cause some problems and makes more of them foreseeable. Therefore academics, public officials and political leaders have focused, during the last few years, on the loss of biodiversity – eventually interacting with climate change –, as one of the more important environmental and sustainability issues. Given this situation, it seems safe to state that, at least partially, the loss of biodiversity depends on the

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out by P. Ortiz-T, 'Entre la cooptación y la ruptura: la lucha por el derecho a la autodeterminación de las nacionalidades indígenas del centro sur amazónico del Ecuador' [Between Cooptation and Culture: National Minorities' Struggle for the Right of Self-determination in the Amazon Area South of Ecuador], in M. González et al., *La autonomía a debate. Autogobierno indígena y Estado plurinacional en América Latina* [Autonomy in Discussion. Indigenous Self-government and the Plurinational State in Latin America], 2010, p. 464.

3 See, for example, J. Estermann, *Filosofía andina. Estudio intercultural de la sabiduría autóctona andina* [Andean Philosophy. Intercultural Study on Autochthonous Andean Wisdom], 1998, p. 33; C. Walsh, 'Interculturalidad, plurinacionalidad y decolonialidad: las insurgencias político-epistémicas de refundar el Estado' [Interculturalism, Plurinationalism and Decolonialism: Politico-Epistemic Insurgences for the Refoundation of the State], 2008 *Tabula Rasa* 9, p. 137.

4 See Wallerstein, supra note 1, p. 151.

5 See, in this sense, M. Pietsch, *La revolución industrial (I)* [The Industrial Revolution], 1965, p. 10-11 (Spanish version by A. Ros; original edition in German: M. Pietsch, *Die industrielle Revolution*, 1961).

6 I. Moreno Navarro, 'Quiebra de los modelos de modernidad, globalización e identidades colectivas' [Breakdown of the Models of Modernity, Globalization and Collective Identities], in J. Alcina Franch & M. Calés Bourdet (eds.), *Hacia una ideología para el siglo XXI. Ante la crisis civilizatoria de nuestro tiempo* [Towards an Ideology for the 21<sup>st</sup> Century. Before the Civilization Crisis of Our Time], 2000, p. 107.

7 For example, legal theorists tried to build a hermeneutical pattern for the law of the nations distinguishing between civilized, semi-civilized and non-civilized peoples, as in the case of Franz von Liszt (*Völkerrecht*, 1898) or James Lorimer (*The Institutes of the Law of Nations*, 1883-1884). This distinction serves to justify the control of the former over the latter, and the progressive elimination of the remnants of 'non-civilized' cultures which subsist in the capitalist-world system. See A. Irazzo Dosdad, 'Religión y Relaciones Internacionales. Genealogías' [Religion and International Relations. Genealogies], 2006 *Foro Interno* 6, p. 56; and J.A. Carrillo Salcedo, *El Derecho internacional en perspectiva histórica* [International Law in Historic Perspective], 1991, p. 38-39.

8 See, on traditional anthropocentrism, J. Alder & D. Wilkinson, *Environmental Law & Ethics*, 1999, p. 50 et seq.

9 On this question, as a classic reference, see the L. White, 'The Historical Roots of Our Ecological Crisis', 1967 *Science* 155, pp. 1203-1207. Complementary on the relationship between ecological crisis and technical and economic development, see R.A. Falk, *This Endangered Planet*, 1971, p. 1.

10 See H.P. Glenn, *Legal Traditions of the World*, 2007, p. 66.

loss of cultural diversity associated with certain forms of life and the loss of knowledge beyond the space of a techno-scientific Western-centred point of view. One could say that the same process which leads to a significant loss of biodiversity is related to the loss of cultural diversity within the human species, because these different cultures, now threatened, have interacted with the environment, protecting and taking care of the biological assets of the Earth that are now also threatened.<sup>11</sup>

## 2. The value of cultural diversity

Beyond the hegemonic Western capitalist-scientific approach to all human concerns, the diversity of cultural forms can be considered as a source of solutions to contemporary problems, providing alternative paths to find an answer to present and future concerns for the whole human community. Moreover, that is so because it provides a wide range of tools for interpreting and understanding reality which are valuable in order to face up to the local and global challenges which we encounter, because knowledge generated, developed and preserved by Western modern culture is somehow the memory of the human species and this gives it —or, better, them, as we can best talk of ‘forms of knowledge’— a value for humanity as whole.<sup>12</sup> Indeed, human diversity, just as biodiversity, is a source of tools for as well as the perspectives and understanding of life), which can be a source of solutions as well, given problems that humanity as a whole nowadays faces.<sup>13</sup>

Let us consider, for example, the question of cultural diversity in the field of languages. We can see that each of them defines and creates a certain environment, attributing names and describing situations, storing a great deal of information about the world and patterns of interpretation in how to react, given certain situations. In short, each language is a unique information system concerning a certain interpretation of the environment and certain parts thereof which has a value not only for its speakers, but for the human species as a whole, as a reservoir of tools, ideas and solutions.<sup>14</sup> This can be transferred analogically to the different cultures considered as a whole. Related thereto, one can say that the preservation of biodiversity is linked to the preservation of cultural diversity, and, in fact, it is widely accepted that traditional knowledge contributes to preserving biodiversity.<sup>15</sup> Concerns about preserving biodiversity must take into account the complexity, plurality and richness of cultural forms and the diversity of the understanding of life, human as well as non-human, as a means to face up to the situation in question. In fact, the foundations of protecting biodiversity are analogous to those for protecting cultural diversity.<sup>16</sup>

Particularly among all manifestations of cultural diversity beyond Western modern patterns, so-called chthonic legal traditions must be considered regarding the preservation of biodiversity. These chthonic traditions were and are ‘living close to the land’, providing a model for ‘limiting technology’, which is one of the most important challenges in contemporary developed countries, where the possibilities of technology have highlighted the necessity of controlling its use through social decisions.<sup>17</sup> In fact, this is the main feature of environmental law. As H.P. Glenn has underlined, ‘chthonic law is environmentally friendly, in a way which most ecological debate in the west does not fully reflect’, in the sense that ‘you and your kind have to live entire lives which accord as much respect to natural things as

11 For the same reasons that people become concerned about the loss of biodiversity, analogically they have to be concerned about the loss of cultural diversity, as underlined by Moreno Navarro, *supra* note 6, p. 129; and J.C. Velasco, ‘El Multiculturalismo, ¿una nueva ideología? Alcance y límites de la lucha por las identidades culturales’ [Multiculturalism. Towards a New Ideology? the Extent and Limits of the Fight for Cultural Identity], in Alcina Franch & Calés Bourdet, *supra* note 6, p. 151.

12 For the idea of chthonic and traditional forms of ‘knowledge’ as a memory of the human species, see V.M. Toledo, ‘¿Por qué los pueblos indígenas son la memoria de la especie?’ [Why are indigenous people the memory of the species?], 2009 *Papeles de relaciones ecosociales y cambio global* 107, pp. 27-38. On this question, it has been forcefully stated that indigenous knowledge ‘representa la herencia y diversidad de la humanidad’ [represents the heritage and diversity of humanity] (see V. Reyes-García, ‘Conocimiento ecológico tradicional para la conservación: dinámicas y conflictos’ [Ecological Traditional Knowledge for Conservation: Dynamics and Conflicts], 2009 *Papeles de relaciones ecosociales y cambio global* 107, p. 40).

13 This is the point of view of the UNESCO Convention on the Protection and Promotion of Cultural Diversity. See Art. 2 (<<http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>>, last visited 1 December 2011).

14 For example, see J. Vernet et al., *Dret lingüístic* [Linguistic Law], 2003, p. 25.

15 For example, see Reyes-García, *supra* note 12, p. 40.

16 See J. Alcina Franch, ‘La crisis civilizatoria de nuestro tiempo’ [The Civilization Crisis of Our Times], in Alcina Franch & Calés Bourdet, *supra* note 6, p. 25; U. Moulines, ‘Assaig d’una teoria (semi-)formal de les nacions’ [Essay on a (Semi-formal) Theory of Nations], 2006 *Quaderns de filosofia i ciència* 36, p. 16.

17 On limiting technology by chthonic law, see Glenn, *supra* note 10, p. 66.

to yourself'.<sup>18</sup> For the same reason, the 'chthonic tradition thus avoids both mistreatment of animals for scientific purposes and the ferocious (western) debate as to how to criticize it'.<sup>19</sup>

Therefore, it is clear that the preservation of cultural diversity can provide us with solutions particularly regarding the environmental crisis which we are currently facing. The possibilities offered by this cultural diversity in order to provide solutions, perspectives and alternatives advocate its preservation. This would be a utilitarian point of view, but, we must further consider the intrinsic value of this knowledge, as a manifestation of human communities and individuals, being an expression of human creativeness. So I think that we must consider the value of this threatened knowledge not only from the perspective of its usefulness for us, but having a link with human dignity, as a expression of human forms of life developed during centuries and feeding the lives of many people.

For all this, given its intrinsic (expression of human creativeness) and its utilitarian value (a source of cultural and biological responses to the current and future concerns of human groups and humanity), it is important to preserve the plurality in the understanding of the world which is now threatened, beyond Western modern civilization and more or less linked to the preservation of biodiversity. As has been said about linguistic diversity, the decrease therein implies 'a reduction and impoverishment of the thought and the knowledge of the humanity'.<sup>20</sup>

### 3. Cultural diversity in the modern-world system

#### 3.1. *The assimilationist approach*

Given the fact that Western modern culture has seen itself as a universal manifestation, it is absolutely normal that it has tried in the past to wipe out any other cultural expressions as being retrograde and obsolete. So the first answer of the modern-world system to cultural diversity in the process of expanding Western civilization has been what could be called the 'assimilationist' approach. Any form of diversity would have to disappear into the one and only universal culture, where the reason as a characteristic feature of the human species has reached its maximum expression. This kind of politics has been promoted on the basis of the equal rights of all persons, implying a progressive suppression of diversity within the common [Eurocentric] citizenship.<sup>21</sup>

The International Labour Organisation (ILO) Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (C107) is an outstanding example of this approach. The ILO was created in 1919 as an autonomous entity within the Society of Nations and its mission was to promote social justice at the global level on the basis of international labour provisions. In 1946, after the Second World War, it became a specialized agency of the newly formed United Nations.<sup>22</sup> From the 1920s onwards, the ILO began to work on issues related to indigenous peoples, thereby adopting different conventions with reference to their situation regarding labour relations.<sup>23</sup>

Finally, Convention no. 107 represents the broadest approach to indigenous questions at the global level. Its treatment of the question is strongly influenced by the idea of the superiority of Western modern culture and by considering indigenous peoples as marginal, more or less condemned to dissolve into the respective nation state. The treatment of questions such as the application of general legislation to indig-

18 Ibid., p. 73.

19 Ibid., pp. 73-74.

20 See Vernet et al., supra note 14, p. 26.

21 See A. Burguete y Cal Mayor, 'Gobernar en la diversidad en tiempos de multiculturalismo en América Latina' [Governing with the Diversity in Times of Multiculturalism in Latin America], in X. Leyva et al. (eds.), *Gobernar (en) la diversidad: experiencias indígenas desde América Latina. Hacia la investigación de co-labor* [Governing (with) the Diversity: Indigenous Experiences from Latin America. To a Co-working Research], 2008, p. 21; C. Sánchez, 'Autonomía y pluralismo. Estados plurinacionales y pluriétnicos' [Autonomy and Pluralism. Plurinational and Pluriethnic States], in González et al., supra note 2, p. 274; R. Torres Galarza, 'Diversidad y globalización: los derechos en su laberinto' [Diversity and Globalization: Rights in the Maze], in E. Leff (ed.), *Justicia Ambiental: Construcción y Defensa de los Nuevos Derechos Ambientales Culturales y Colectivos en América Latina* [Environmental Justice. Building and Defense of the New Environmental, Cultural and Collective Rights in Latin America], 2001, p. 69.

22 See <<http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>> (last visited 24 November 2011).

23 See G. Gaona Pando, *El sistema universal de los derechos humanos y la protección del medio ambiente por los pueblos indígenas* [The Universal Human Rights System and the Protection of the Environment by Indigenous Peoples], Tarragona: Universitat Rovira i Virgili [unpublished Master's thesis], 2010, p. 49.

enous peoples (Article 3), propriety (Article 11), removal (Article 12), or national agrarian programmes (Article 14) are examples of this perspective.<sup>24</sup> Anyway, this convention is significantly progressive, given the almost complete ignorance by legal provisions of the rights and situations of these peoples. In any case, its perspective can be considered as having been superseded, given the fact that Convention no. 107 has been substituted, since 1991, by the Indigenous and Tribal Peoples Convention (C169), which is more oriented towards the real preservation of these threatened communities.<sup>25</sup>

### **3.2. The isolationist approach**

Beyond the assimilationist approach, another means can be discerned, always from the perspective of the superiority of Western modern civilization and its global projection. We can call this the 'isolationist' approach. In this case, the 'other' cultures are confined to a separate territory in order to preserve their singularity, but isolated and prevented from taking a significant part in the evolution of the whole, treated more or less as a remnant of the past. This has been the case of Indian reservations in the US.<sup>26</sup> These reservations, seen as 'separate lands', became (vulnerable) islands of chthonic people.<sup>27</sup> As these Indian reservations in the US demonstrate, normally the isolationist point of view is traditionally viewed as a temporary post on the road to assimilation.

The isolationist approach is analogous to the original policies on nature protection, through institutions such as national parks. The interest in 'untouched' wild areas arose during the Industrial Revolution, given the progressive disappearance of 'natural' areas because of the expansion of human exploitation. Since the last third of the 19<sup>th</sup> century public policies have been adopted in the majority of Western developed countries to preserve some places in their 'natural' state, because of their particular value.<sup>28</sup> Generally, this protection was provided by establishing national parks, or similar areas, after the Yellowstone National Park was established in 1872.<sup>29</sup> These policies implied a deeply ingrained 'museumization' of these preserved areas in that they were isolated from the rest of the territory.<sup>30</sup> This kind of perspective has been superseded by a holistic point of view which considers the isolation of protected areas as being insufficient, because the environment works as a unity. So partial provisions addressing the preservation of islands of nature within a progressively degraded environment are not enough, not only for the whole, but for the conservation of these islands as well. In fact, these partial strategies imply a hidden banalization of the preserved areas.<sup>31</sup>

The same could be said about humanity. The incommensurability of different cultures implies 'the impossibility of human communication, radical untranslatability, and this is denied by all human experience, and possibly by the very idea of being human.'<sup>32</sup> Therefore, if the assimilationist point of view is not fair from the viewpoint of the intrinsic value of human diversity and not sound from the point of view of its usefulness, it is very difficult to justify this isolationist approach, given the fundamental human experience of communication. Here, too, the intrinsic value is denied, isolating people, believing in a frozen cultural configuration as if cultural traditions were absolutely stable. But within them there are elements of change, given their human nature, and, moreover, any tradition has some level of an exchange of in-

24 See the text of the convention, <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C107>> (last visited 24 November 2011).

25 See the text of the convention, <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>> (last visited 24 November 2011).

26 A great deal of information on Indian reservations and Indian policies in the US can be found on the webpage of the Bureau of Indian Affairs (established in 1824, during the Monroe administration). This bureau has been used as a federal instrument in relationships with aboriginal peoples (<<http://www.bia.gov>>, last visited 24 November 2011).

27 See Glenn, *supra* note 10, p. 83.

28 See J. Jaria i Manzano, *La cuestión ambiental y la transformación de lo público* [The Environmental Question and the Transformation of the Idea of Public], 2011, p. 142 et seq.

29 See for example T.M. Hoban & R.O. Brooks, *Green Justice. The Environment and the Courts*, 1987, p. 2.

30 See G. D'Ignazio, 'La tutela del ambiente y la protección de las áreas naturales en Italia' [The Environmental Protection and the Protection of Natural Areas in Italy] (Spanish version by C. Herrera Castaño), in G. Ruiz-Rico Ruiz (coord.), *Derecho comparado del medio ambiente y de los espacios naturales protegidos* [The Law of Comparative Environmental and Protected Natural Spaces], 2000, p. 155.

31 See J. Ros, 'El uso y disfrute de los espacios protegidos y de interés: política forestal y de parques naturales. La protección de la biodiversidad dentro de una estrategia de desarrollo sostenible' [The Use and Enjoyment of Protected Areas and Areas of Interest: Forest Policies and Natural Parks. Biodiversity Protection within a Strategy of Sustainable Development], in J. Grau Rahola & J.E. Llebot (coords.), *Política ambiental y desarrollo sostenible* [Environmental Policies and Sustainable Development], 1999, p. 227; and J. Tort Donada, 'La preservació del medi i del paisatge a Catalunya. Unes reflexions des de la geografia' [The Preservation of the Environment and Landscape in Catalonia. Geographical Reflections], 2000 *Revista de Catalunya* 154, p. 19.

32 See Glenn, *supra* note 10, p. 45.

formation with the outside.<sup>33</sup> Therefore isolation is a clear violation of the intrinsic value of different human cultures. Moreover, this utilitarian value is at least put at risk, given the implied marginalization and potential disappearance of diversity which lead to isolationism. In short, it seems that the assimilationist and the isolationist points of view, both based on cultural prejudices about the superiority of Western civilization, are erroneous.

#### 4. An integrationist approach to cultural diversity

There is another way of dealing with cultural diversity, starting from respect for and consideration being given to the different human communities and their cultures. This point of view denies assimilation within the Western hegemonic culture and the isolation (and marginalization) of the 'other' cultures. We can call this point of view 'integrationist'. First of all, we are no longer entitled to assume Western superiority, which is more or less implicit in the assimilationist and isolationist approaches, and therefore we can no longer separate humanity into 'primitive' and 'advanced' societies.<sup>34</sup> For the value attributed above to different forms of human life and creativeness and to cultural richness, its preservation cannot be limited to a folklorist point of view.

Cultural diversity has to be preserved within a fair global dialogue, giving political density, i.e., ways of participation in the relevant decision-making processes and in public political discussions, to individuals and groups which hoard the cultural heritage of humanity beyond hegemonic culture. That means the recognition of the self-determination (within certain limits) of different human groups characterized by their cultural singularity and their aspiration to political status. According to this line of reasoning, I therefore propose a political approach to the preservation (and enhancement) of cultural diversity, through finding means of political empowerment and participation, giving voice and say to points of view which are different from the hegemonic Western capitalist-scientific position. Without the acceptance of this 'equality' of points of view in the political debate, it is probably impossible to preserve this cultural heritage and we are condemning these peoples to folklorization, banalization and eventually their disappearance.<sup>35</sup>

This integrationist approach to cultural diversity is based in two main arguments. First, I start from the essential equality of all human beings and groups. There is no point of view which has more value before having finished a certain debate, so we must guarantee that different perspectives are considered in the debates and the decision-making processes. This assertion of the (primary) equality of human beings and cultures is a condition for any real dialogue between human beings and human groups. So we must find a way by which to allow different cultures (individuals and groups) to participate in the political debate and not to treat them simply as citizens in the context of a democratic state, because if we do that, we are stimulating a (hidden) assimilation. It is not a question of arithmetic democracy, but of seriously taking into account the diversity of perspectives, based on different conceptions of the world, of intrinsic value and of unquestionable interest for the rest of humanity.

The second argument is freedom, understood as the possibility for groups and individuals to make a real choice within the framework of a system of rules which has been designed to take their points of view into account. If this possibility of making a choice does not actually exist, we are surely endorsing assimilation without saying it. Therefore, we have to give individuals and groups the choice to take part in the decisions that affect them, within the framework of a multilevel dialogue where different interests are considered (local and global; individual and collective). People(s) would have to be treated as subjects, not as objects in the political process, giving them the opportunity to be agents of their destiny, not merely patients.<sup>36</sup> It is not a simple matter to determine the rules for such a dialogue, but it seems to me that it is the only real option we have for preserving cultural diversity.

33 Ibid., p. 31.

34 In this sense, *ibid.*, p. 31.

35 See Sánchez, *supra* note 21, p. 277.

36 A. Mora Rodríguez, 'La racionalidad de la economía capitalista y la vida digna de las personas' [The Rationality of a Capitalist Economy and the Dignified Lives of Persons], 2008 *Papeles de Relaciones Ecosociales y Cambio Global* 107, p. 23.

In any case, it is indispensable to recognize the political status of communities defined by cultural singularity (self-determination) so as to allow them to take part in the dialogue.<sup>37</sup> This intercultural and fluid dialogue, integrating non-Western cultural manifestations, would be an example of the cooperative principle, which can be considered as one of the main foundations of environmental law at the global level, together with the polluter pays principle and the precautionary principle, and would probably be a good basis on which to work within the context of plurality.<sup>38</sup> This approach allows us to go beyond cultural chauvinism in order to build the framework for an actual intercultural dialogue.

A possible way to make a fair dialogue possible, where all the different cultural perspectives have their own stance, is to define circles of consensus having a different range, where partial consensus can be reached. For example, in a given nation state the rules for distributing political decisions have to be defined allowing for certain matters to be decided by circles of cultural belonging, other than territorial circles, and other than being reserved for the highest level, through processes which allow the participation of different interests (cultural, economic, etc.). In this case, we would be defining different circles of consensus for different matters, but combining them, within a geometry of mutual inclusion.<sup>39</sup>

Any superior level defines the possibilities of the lower ones. So 'national' decisions limit decisions within groups or territories. For this reason, they have to be limited to questions of 'national' interest and subject to superior limits for preserving diversity (imposed at the international level?). For example, upper circles of consensus should not leave unprotected minority groups to face powerful forces which overcome them, as has happened with the significant and recent phenomenon of the so-called bio-piracy, where market rules of the global economy harm small communities in the US or Africa, for example.<sup>40</sup>

In any case, it is important to underline that the traditional democratic means (representative or direct) are insufficient to channel cultural diversity in a given context, because its arithmetic conception of democracy cannot integrate qualitative perspectives which are necessary to deal with cultural diversity and, more generally, with the complexity of contemporary societies.<sup>41</sup> With this, it seems obvious that we must accept a certain (internal) erosion of the traditional idea of sovereignty, understood as a solid and homogeneous power exerted by a unique subject (the people).<sup>42</sup> But I am not proposing to bury all of the Western political tradition, which is particularly rich and, probably, given its universal vocation, suitable for providing answers or at least the starting point for them.

At the moment of designing the rules of intercultural dialogue at the different levels of consensus, we have to turn to Western (enlightened) values and assumptions, such as equality, human dignity, democracy, freedom, etc., but we will probably have to introduce references to other conceptions of the world and society to be sufficiently inclusive so as to avoid cultural chauvinism and the worst features of our culture that have caused the ecological crisis (dominium, absolute rights, welfare understood

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37 In fact, indigenous movements in Latin America have striven for autonomy and the recognition of their self-determination in recent years. See W. Assies, 'Pueblos indígenas y reforma del Estado en América Latina' [Indigenous Peoples and Reform of the State in Latin America]. In W. Assies et al. (eds.), *El reto de la diversidad* [The Challenge of Diversity], 1999, p. 30.

38 This principle has been included, for example, in the Rio Declaration on Environment and Development of 1992 (see, in particular, principle 10; <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163&l=en>>, last visited 24 November 2011). For a panoramic vision of the cooperative principle, see R. Schmidt, *Einführung in das Umweltrecht* [Introduction to Environmental Law], 1992, pp. 7-8.

39 The demarcation of the circle of consensus is not easy beyond formal borders, because the stakeholders concerning a certain decision can be undetermined. For this, see C. Belshaw, *Filosofía del medio ambiente*, 2005, p. 85 (Spanish version by I. Gutiérrez González and A. Vijande Martínez; original edition in English: C. Belshaw, *Environmental Philosophy. Reason, Nature and Human Concern*, 2001).

40 See E. Bravo, 'Conocimiento ecológico tradicional para la conservación: dinámicas y conflictos' [Ecological Traditional Knowledge for Conservation: Dynamics and Conflicts], 2009 *Papeles de relaciones ecosociales y cambio global* 107, pp. 72-73.

41 See R.L. Jagmetti, 'Der Bürger im Entscheidungsprozeß' [The Citizen in the Decision-Making Process], in *Staatsorganisation und Staatsfunktionen im Wandel. Festschrift für Kurt Eichenberger zum 60. Geburtstag* [State Organization and State Functions in a State of Change Changing. Festschrift for Kurt Eichenberger in his 60<sup>th</sup> Birthday], 1982, p. 365 et seq.; and J. Untermaier, 'Représentation et pesée globale des intérêts en droit français de l'aménagement du territoire et de la protection de l'environnement' [Representation and the Weighting of Interests in French Territorial Planning and Environmental Law], in Ch.-A. Morand (ed.), *La pesée globale des intérêts. Droit de l'environnement et de l'aménagement du territoire* [The Global Weighting of Interests. Environmental and Territorial Planning Law], 1996, p. 144.

42 See X. Arbòs & J. Vernet i Llobet, 'Los nuevos federalismos y el constitucionalismo del siglo XXI' [New Federalism and the Constitutionalism of the 21<sup>st</sup> Century], in M.A. Aparicio (dir.), *La Descentralización y el Federalismo. Nuevos modelos de Autonomía Política (España, Bélgica, Canadá, Italia y Reino Unido)* [Decentralization and Federalism. New Models of Political Autonomy (Spain, Belgium, Italy and the UK)], 1999, pp. 261-271; Glenn, supra note 10, p. 51; S. Clarkson & S. Wood, *A Perilous Imbalance. The Globalization of Canadian Law and Governance*, 2009, p. 28.

in terms of consumerism).<sup>43</sup> So, when we design the rules of intercultural dialogue for the definition of upper consensus, we have to deal with Western enlightened values in a certain way:

- Given the dual effort of the Enlightenment (emancipation and rationalization), we have to underline the values associated with the former (the equal position of all human beings) and give them priority before the values associated with the latter, where Western superiority affirms itself.<sup>44</sup>
- Given the consequences of the paradigm of the dominium over nature, characteristic of Western modernity, we have to demarcate the space of human rights based on an idea of care and responsibility (before our contemporaries, before future generations, before other forms of life (not human)).<sup>45</sup>

Therefore we can inspire ourselves in the rules used to regulate processes to cope with less acute levels of diversity in Western culture, that is, the Western federal tradition, being careful when using them. Federalism is interesting at this point, because of two reasons: (i) its grassroots approach to the foundations of power; and (ii) the recognition of political status for communities different from the nation state. Anyhow, we have to reach a new frontier for federalism, with fluctuating borders to answer complex questions, and taking into account the point of view of people beyond the Western hegemonic culture – and, therefore, alien to certain procedures and mechanisms. But in the past federalism has showed its capacity to change. In fact, it was the fruitful invention of the founding fathers of the United States in order to answer the new challenges posed by the independence of a number of colonies of certain European powers outside Europe. From then until now federalism has been more or less flexible, compared with the rigidities of the unitary nation state according to the French pattern.<sup>46</sup>

In any case, the federal tradition is inspiring by its definition of upper and lower levels of government, which define concentric circles of consensus, marking successive borders for the decisions taken at lower levels, and for its concern in allowing the participation of lower levels of government in the wider decision-making processes.<sup>47</sup> Starting from here, perhaps we could find channels to define more complex circles of consensus to cope with cultural (and this also means political) diversity. The reinforcement of cultural federalism at different levels, the overcoming of mechanical majorities as a source of legitimacy, and the design of legal frameworks to establish different circles of (cultural, social and political) consensus could be a way of substantially preserving cultural diversity.

So, the integration I am proposing implies giving political density and capacity to take and share decisions (self-rule and shared rule) to communities representing the cultural diversity beyond the Western hegemonic culture. At the state level, this can be described as a plurinational state structure.<sup>48</sup> Particularly because of their vulnerability and particular worth, it is important to give this political recognition and this possibility to take part in decision-making process at a higher level to communities belonging to chthonic traditions. Here one can think of flexible political structures based on pluralism and cooperation in order to provide a response to cultural diversity, on the one hand, and the fact that humanity and its different groupings (cultural, social, political, etc.) share a destiny, on the other.

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43 The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions seems to have a similar point of view, limiting expressions of cultural diversity to respect for human rights and starting from the equal dignity of all cultures. See particularly Art. 2 (<<http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>>, last visited 1 December 2011).

44 On this dualism, see A. Touraine, *Critique de la modernité* [Criticism of modernity], 1992, p. 55.

45 For a limited conception of rights, particularly associated with the idea of responsibility, there are interesting and significant contributions in Switzerland. In the literature, this is remarkable for its precociousness, J.P. Müller, *Elemente einer schweizerischen Grundrechtstheorie* [Elements of a Swiss Theory of Fundamental Rights], 1982, pp. 5-6. Art. 6 of the Constitution, introduced with a total revision in 1999, is also remarkable: 'All individuals shall take responsibility for themselves and shall, according to their abilities, contribute to achieving the tasks of the state and society' (see <<http://www.admin.ch/ch/e/rs/c101.html>>, last visited 24 November 2011).

46 See for example A. Auer et al., *Droit constitutionnel Suisse. I. L'Etat* [Swiss Constitutional Law], 2000, p. 296.

47 *Ibid.*, p. 298 et seq..

48 See N. Pacari, 'Naturaleza y territorio desde la mirada de los pueblos indígenas' [Nature and Territory from the Point of View of Indigenous Peoples], in A. Acosta & E. Martínez (eds.), *Derechos de la Naturaleza. El futuro es ahora*, 2009, p. 36.



## 5. An example of the integrationist approach? New constitutions of Ecuador and Bolivia

Of course, the type of multilevel and egalitarian dialogue I am proposing is not an easy matter in a concrete system. Anyway, with their limitations, it is interesting to devote attention to recent constitutional experiences in Ecuador and Bolivia, as both countries have made valiant attempts – specially, the latter – to integrate indigenous traditions and individuals into the political process, starting from the constitution. They have both intended to provide a response to deep cultural diversity (Western-Creole hegemonic culture and indigenous plurality), starting from the wide and deep notion of social justice (environmental justice) guiding the process for the emancipation of individuals and groups, and intending to design effective tools to guarantee fair dialogue between them. Therefore, admitting that developing countries make important efforts in order to preserve their cultural heritage, particularly through cultural clauses in their constitutions, the cases presented here are somehow special, because of the political density attributed to cultural diversity.<sup>49</sup>

### 5.1. The Ecuadorian Constitution of 2008

The Preamble to the Ecuadorian Constitution starts from the recognition of nature as is understood in the *kichwa* culture, the most important (in terms of numbers) of the indigenous peoples present in Ecuador. So, despite the fact that the constitution is drafted in Spanish, the colonial language spoken by most Ecuadorians, the reference to nature is formulated in *kichwa* (*‘Pacha Mama’*), announcing a certain holistic conception which leaks through all the constitutional text. But the most important reference to indigenous cultures, concretely to *kichwa* culture once again, is the concept of *‘sumak kawsay’* (Spanish: *‘buen vivir’*; English: *‘good living’*).<sup>50</sup> This idea represents, at least in theory, a new pattern of relations with nature (*Pacha Mama*) and a new conception of the ethical foundations of the political system, delimitating rights and demanding an almost sacred respect for nature and traditional communities.<sup>51</sup>

Anyway, the introduction of these two important *kichwa* ideas in the constitution could be somehow rhetoric, given the wide recognition of rights according to the most advanced (from the human point of view) conceptions of Western modernity, and also given the recognition of rights for nature itself, certainly in its indigenous impersonation of *Pacha Mama*.<sup>52</sup> For the second point, it seems clear that the treatment of environmental questions seems to be more according to the (Western) tradition of deep ecology than to a real indigenous tradition.<sup>53</sup> Regarding the former, it has to be underlined that indigenous people had a secondary role in the constitutional process, superseded by urban groups, the most influential in the drafting of the text.<sup>54</sup> So, hidden behind the *sumak kawsay*, we will probably only find a wide recognition of social rights, inspired once again by Western ideas and addressed to satisfy the demands of the (culturally Western) urban population.<sup>55</sup> I have no objection in recognizing the important novelties of the Ecuadorian Constitution, but they are probably less indigenous than they pretend to be.

Anyway, the constitution refers to the rights of indigenous peoples.<sup>56</sup> In real terms, it consecrates the right of indigenous peoples to maintain, develop and reinforce their identities, particularly regarding an-

49 On the cultural clauses in constitutions, see P. Häberle, ‘Die Verfassung «im Kontext»’ [The Constitution ‘in the Context’], in D. Thürer et al. (eds.), *Verfassungsrecht der Schweiz / Droit constitutionnel Suisse* [Swiss Constitutional Law], 2001, p. 19.

50 I quote the official Spanish text of the Ecuadorian Constitution (<[http://www.asambleanacional.gov.ec/documentos/constitucion\\_de\\_bolsillo.pdf](http://www.asambleanacional.gov.ec/documentos/constitucion_de_bolsillo.pdf)>, last visited 24 November 2011). There is an unofficial version in English on the following webpage: <<http://pdpa.georgetown.edu/Constitutions/Ecuador/english08.html>> (last visited 24 November 2011).

51 See Art. 74, where this is particularly clear.

52 See Art. 10, and then Art. 71 et seq.

53 Deep ecology is a tradition in Western thought. Its origins can be traced to Aldo Leopold (1887-1948), who understood the community of life as a supreme object of protection. This community of life would be integrated by soils, water, plants, animals and, finally, the Earth as a whole. On Leopold, see Belshaw 2005, supra note 39, p. 85 et seq. Deep ecology goes further, opposing the ideas of separation, superiority and domination over nature by humans. On deep ecology, *ibid.*, p. 284 et seq.. Deep ecology is based on the Eight Points formulated by Arne Naess and George Sessions after camping in Death Valley in California. The Eight Point Platform is widely available on the web (for example, see: <<http://home.ca.inter.net/~greenweb/DE-Platform.html>>, last visited 24 November 2011).

54 This information was provided by my colleague Marco Aparicio, Professor of constitutional law at the University of Girona (Catalonia, Spain), who was particularly involved in the constitutional process in Ecuador.

55 On this subject, see M. Aparicio Wilhelmi, ‘Nuevo constitucionalismo, derechos y medio ambiente en las constituciones de Ecuador y Bolivia’, 2009 *Revista General de Derecho Público Comparado* 9, p. 1; R. Ávila Santamaría, *El neoconstitucionalismo transformador. El estado y el derecho en la Constitución de 2008*, 2011, p. 254 et seq.

56 On the provisions of cultural diversity and the rights of indigenous peoples, see M. Melo Cevallos, ‘Los Derechos Indígenas en la Nueva

central traditions and forms of social organization, and it allows them to develop their own legal cultures. Therefore, indigenous peoples are entitled to draw an inner consensus according to their respective traditions.<sup>57</sup> Moreover, they are entitled to preserve the propriety of their common lands and to participate in the management of natural resources treasured by them, particularly applying their practices in biodiversity management.<sup>58</sup> Nevertheless, these rights, in a very strict way, are given the wide competences of the central government regarding natural resources.<sup>59</sup>

The substantive rights of indigenous peoples are recognized next to indigenous autonomy as an institutional framework, but the unitary nature of the state has to be underlined. In fact, establishing indigenous autonomous circumscriptions is left to the law of the state.<sup>60</sup> For this reason, it can be stated that, despite the advances in the recognition of indigenous peoples and cultures, they have not attained any real self-determination within the constitutional framework. The recognition of indigenous jurisdiction is also within the limits of the law of the state.<sup>61</sup>

Regarding the shared rule, a series of procedural rights are specifically recognized as belonging to indigenous peoples, which partially work to guarantee the substantive rights previously mentioned. The most important thereof is the right to previous consultation concerning plans and programmes with regard to the exploitation and commercialization of non-renewable resources located on their lands.<sup>62</sup> Sadly, experiences since the entry into force of the constitution do not allow for a great deal of optimism, since this previous consultation has been denied any content by the national authorities.<sup>63</sup> On the other hand, it is too early to say something about the real effectiveness of the right of representation in the official institutions and the previous consultation procedure at the legislative level.<sup>64</sup>

Finally, we must refer to the peoples '*en aislamiento voluntario*' (in voluntary isolation) who, according to the constitution, have to be protected by the Ecuadorian state, particularly regarding the preservation of their isolated situation.<sup>65</sup> This is particularly important in the case of very small communities in the Ecuadorian Amazon, but it is doubtful whether this isolation is voluntary and, if not, how to deal with these particularly vulnerable communities.

In conclusion, the expectations raised by the Constitution are deceiving in their details, limiting the possibilities of self-rule and shared rule for indigenous peoples and embedding them – admittedly with a wider recognition than in the past – in the nation-state structure of Creole-*Mestizo* origin. Maybe it could be said that we are facing a particular point in the process of evolution where the recognition of the political status of indigenous peoples will be increasingly deeper as time goes by.

## 5.2. The Bolivian Constitution of 2009

The Bolivian Constitution is more clearly committed to indigenous cultures, given the protagonist role that indigenous peoples assumed in the process of its drafting.<sup>66</sup> The Preamble separates itself from habitual (Western) references in constitutions by adopting a style which one could call chthonic: 'In times immemorial mountains were raised, rivers moved, lakes were formed. Our Amazon, our Chaco,<sup>67</sup> our

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Constitución' [Indigenous Rights in the New Constitution], in *Nuevas Instituciones del Derecho Constitucional Ecuatoriano* [New Institutions of Ecuadorian Constitutional Law], 2009, pp. 97-109.

57 See Art. 57, Sec. 1, 9 and 10.

58 See Art. 57, Sec. 4, 5, 6 and 8, with special reference to bio-piracy in Sec. 12.

59 See Art. 260, particularly Sec. 11.

60 See Art. 257.

61 See Art. 171.

62 See Art. 57, Sec. 7.

63 On the previous consultation procedure, introduced in the constitution by the aforementioned Convention C169 of the ILO, see W. Guaramanda Mendoza, 'La Consulta Previa y el Derecho a la Resistencia' [Previous Consultation and the Right to Resist], in *Nuevas Instituciones del Derecho Constitucional Ecuatoriano* [New Institutions of Ecuadorian Constitutional Law], 2009, pp. 141-185. The author puts consultation rights and the right to resist into perspective, as recognized in the Constitution, and makes a very critical analysis of the real effectiveness of the constitutional provisions in this area.

64 See Art. 57, Sec. 16 and 17.

65 See Art. 57, in fine.

66 For a contextual analysis of the drafting of the Bolivian Constitution, see Errejón Galván, I. (2009). 'La Constitución boliviana y la refundación del Estado. Un análisis político' [The Bolivian Constitution and the re-foundation of the state. A political analysis], *Papeles de Relaciones Ecosociales y Cambio Global*, 107, at 117-127.

67 The great plains between the Andes and the Paraná and Paraguay rivers.

Altiplano<sup>68</sup> and our plains and valleys were covered with greenery and flowers. We populated this sacred Mother Earth with different faces and have understood since then the plurality that is in all things, and our diversity as beings and cultures. So we formed our peoples, and never understood racism until we have had to suffer it since the disastrous times of colonialism.<sup>69</sup>

Starting from this concept, the constitution includes clear references to indigenous cultures, particularly of the Bolivian Altiplano, in numerous articles. It is intended as a synthesis between indigenous traditions and Western (enlightened) values, as Article 8 demonstrates. On the one hand, '[t]he state assumes and promotes the following as ethical moral principles of the plural society: *ama qhilla*, *ama llulla*, *ama suwa* (do not be weak, do not be a liar, do not be a thief), *suma qamaña* (living well), *ñandereko* (harmonious living), *teko kavi* (good life), *ivi maraei* (land without evil) and *qhapaj ñan* (a noble way or noble life).<sup>70</sup> But, on the other hand, '[t]he state supports itself concerning the values of unity, equality, inclusion, dignity, liberty, solidarity, reciprocity, respect, complementarity, harmony, transparency, equilibrium, equality of opportunities, social and gender equity in participation, common welfare, responsibility, social justice, the distribution and redistribution of products and social goods, for good living.<sup>71</sup> This constitutional reconciliation shows, in my opinion, the good intentions of the authors of the constitution and the difficulties in fulfilling the different values incorporated in the document at the same time.

The same difficulties can be seen in articulating the powers of the state, because, at the same time, Bolivia is a 'unitary' state and is 'intercultural, decentralized and with autonomies', and is founded in 'the plurality and the politic, economic, legal, cultural and linguistic pluralism, within the process of the integration of the country'.<sup>72</sup> So, one may say that the authors of the constitution seem to have had in mind the necessity of deeply integrating the cultural diversity existing in the country, but have been prisoners of the traditional centralist mentality, which is hegemonic in Latin American constitutionalism, with the relative exceptions of Mexico and Brazil. For example, the so-called right to self-determination of the original indigenous nations and peoples ('*naciones y pueblos indígena originario campesinos*') is recognized 'within the framework of the unity of the state' and 'according to the constitution and the law'. Therefore, we are confronting a reality which is similar to the Ecuadorian case, where the political status of indigenous peoples takes a back seat to the interest of the unity of the state.<sup>73</sup>

Anyway, there are very interesting provisions in the constitution regarding cultural diversity and indigenous peoples: communitarian democracy associated with indigenous peoples,<sup>74</sup> the inclusion of their institutions within the structure of the state,<sup>75</sup> electoral districts for indigenous peoples,<sup>76</sup> or the recognition of indigenous jurisdiction and, therefore, of indigenous law.<sup>77</sup> Moreover, there are provisions which are similar to the Ecuadorian Constitution, particularly related to the management of resources and regarding peoples in voluntary isolation.<sup>78</sup>

All of this indicates the interest of the political and legal process in Bolivia, since the passing of the new constitution, in order to observe an innovative strategy to seriously integrate cultural diversity in a given political structure. It probably cannot be considered as a fulfilment of the deep approach to cultural diversity as formulated here, but the Bolivian Constitution is, in my opinion, the best existing example of the kind of things I try to propose in this paper. At the same time, it is important to note the important limitations in the way in which an authentic political status for indigenous communities (self-rule and

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68 The high plateau in the Andes.

69 I quote from the official Spanish text of the Bolivian Constitution (<<http://www.presidencia.gob.bo/download/constitucion.pdf>>). I have not found an available English version. The translation is therefore my own.

70 See Art. 8.

71 Ibid.

72 See Art. 1.

73 Some scholars have defended the idea that there is a real recognition of indigenous peoples as political subjects (for example, see C. Romero Bonifaz, 'Los Ejes de la Constitución Política del Estado Plurinacional de Bolivia', in *Miradas. Nuevo Texto Constitucional*, 2010, p. 22). Important constitutional provisions (particularly Art. 7) seem to contradict this point of view.

74 See Art. 12, Sec. II, Para. 2.

75 See Art. 30, Sec. II, Para. 5.

76 See Art. 146, Sec. VII.

77 See Art. 179, Sec. I and II; and Art. 190 et seq.

78 See Art. 30, Sec. II, Para. 9, 10, 11, 16 and 17; Art. 32; and Art. 42.

shared rule) is recognised: for example, the attributions of the central state regarding natural resources, and the submission of indigenous autonomy to the law of the state.<sup>79</sup>

## 6. Challenges to the deep approach

Until now, we have seen the main virtues of the integrationist approach in the treatment of cultural diversity compared, above all, with its rivals – assimilation and isolation – and the problems associated with its implementation, as the cases of Ecuador and Bolivia have shown. Now it is necessary to obtain a complete picture, as far as possible, in order to pay attention to some of the principal problems that the integration approach has to face. They can probably be summed up as three problems.

### 6.1. The ‘Realpolitik’ objection

We must consider the limitations of local processes of political emancipation in order to take cultural diversity seriously into account when this ‘seriousness’ implies a real impact on economics (for example, measures on bio-piracy which probably conflict with international patent law; or measures on resources management by indigenous peoples which probably conflict with external economic pressures and with compulsory rules derived from GATT). The concept of a supraconstitution, understood as the real limitations derived from the rules of the global economy that the different states have to take into account, even at the constitutional level, is useful in obtaining a theoretical pattern in order to understand the situation, given the fact that most cultural diversity occurs in poor countries which are easily vulnerable to international pressure.<sup>80</sup>

So we can see the situation as a clash between indigenous emancipation (the preservation of cultural diversity) and economic rationalization (a supraconstitution, rules of the global economy). For this reason, it is improbable that an individual initiative in a certain country can be completely successful. Beyond that, it would be necessary to embody a progressive global change in order to integrate other cultures into the relevant decision-making processes at any level. Without that, this richness would be threatened as was the case during the global expansion of the Western-world system up until our times. Along this path, one can nowadays find the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), which particularly allows the parties to adopt measures to protect their cultural expressions.<sup>81</sup> But this is still a very limited response at the global level.

According to this, important pressures continue with an extractivist model, because of the need of integration into the international markets. The recent evolution of politics in the examples used in this paper shows, as has been the case in the past – for example, regarding the provisions on indigenous matters in the Colombian Constitution of 1991 – that the preservation of social and economic structures within the framework of a global world system prevents real changes in cultural integration within the political system.<sup>82</sup>

### 6.2. The non-desired assimilation

Integration implies changing the rules for exchanging information between different cultural systems in order to prevent the progressive extinction of the most vulnerable thereof. But if it is true that this model aims to preserve cultural diversity, it is also true that maintaining this exchange of information can be lethal for some of the most vulnerable cultures. We are not aiming for such a result, but the risk is inherent in any exchange between cultural systems. That means that we would limit ourselves to integrating minority cultures in the decision-making process, without intending to absorb them, but in order to do this effectively we have to design some counter-majoritarian strategies in order to prevent the risk of non-desired assimilation.

79 See Art. 290, Sec. II; and Art. 297 et seq.

80 For the concept of a supraconstitution, see Clarkson & Wood, *supra* note 42.

81 See Art. 8 (<<http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>>, last visited 1 December 2011). On this perspective, see also C.B. Graber, ‘The new UNESCO Convention on Cultural Diversity: a Counterbalance to the WTO?’, 2006 *Journal of International Economic Law* 9, no. 3, p. 558 et seq.

82 See Sánchez, *supra* note 21, p. 271.

In fact, among isolated peoples (the peoples '*en aislamiento voluntario*', in the language of the Ecuadorian and Bolivian Constitutions) there are 'no pure chthonic traditions in the world today. Since the expansion of western and Islamic traditions, all chthonic peoples have recently seen their total information base expand, incorporating western or Islamic ideas, or both.'<sup>83</sup> But the disappearance of pureness – if that has ever existed somewhere – is one thing, while the disappearance of a complete tradition is something else. With regard to that and assuming its risk, one cannot return to isolation models and weight has to be put on the design of strategies to reconstruct the balance between the actors in the system.

However, and related to the following point, one must consider the case of certain (hypothetical) communities which can be precious for the whole humanity in their present state and could be put at risk of non-desired (for us, not for them) change when contacted. In this case, we have a conflict between the emancipatory foundation of the preservation of cultural diversity and the utilitarian point of view. This is in principle, as the decision to contact is ours, not theirs. Therefore if there are sufficient reasons to preserve them in their present state, the (great) majority could decide to avoid contact and to create a cultural sanctuary by this decision. In this case, we are not talking about voluntary isolation, but about an induced one.

### **6.3. Future generations, heritage and democracy**

Deep down, my proposal in this paper is to design a democratic and federal system for dealing with cultural diversity, defining different levels (circles of consensus) where the participants decide on processes and content, with the limits being imposed by upper circles, where the counter-majoritarian strategies for protecting more vulnerable communities have to be established. But, what happens with future generations? What happens if a certain community takes a decision as to which consequences will imply harm for future generations? Well, this leads us to reinforce the counter-majoritarian strategies at the upper levels of consensus, providing protection not only to vulnerable communities of the here and now, but to the human beings of tomorrow. This is not an easy matter, as majoritarian pressures towards development and the exploitation of natural resources in territories belonging to minoritarian groups demonstrate in the case of Ecuador and Bolivia. Anyhow, it seems to me that this has to be intended, starting from the fact that we know nothing about the future and not very much about the consequences of our actions in the long term.

So we have to establish maximum limits to prevent all communities, even the weaker ones, from making harmful decisions for the even weaker future generations. The model for that could be the limitations for the *pouvoir constituant* implied by the *ius cogens* at the international level, as has been explicitly laid down in Article 139 of the Swiss Federal Constitution.<sup>84</sup> This is only possible starting from the idea of global governance, with accountability and participation at different levels of decision-making in order to ensure the fairest possible dialogue. In any case, the preservation of natural and cultural heritage seems to be currently a limit on democratic decisions for any circle of consensus, giving way to the idea of cultural sustainability, which complements sustainable development.<sup>85</sup>

## **7. Conclusion**

In my opinion, it is clear that, also from a utilitarian point of view, strategies to preserve cultural diversity in a deep (political) sense have to be intentional. In order to do this, in this article I have proposed giving cultural minority groups political density, that is, to define spheres of autonomy for differentiated communities and to give them the ability to take their own decisions (self-rule), and to allow them to take

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83 See Glenn, *supra* note 10, p. 80.

84 On this, see D. Thürer, 'Verfassungsrecht und Völkerrecht' [Constitutional Law and International Law], in D. Thürer et al. (eds.), *Verfassungsrecht der Schweiz / Droit constitutionnel Suisse* [Swiss Constitutional Law], 2001, p. 183 et seq.

85 As is well known, the idea of sustainable development was introduced by the UN report *Our Common Future* (<<http://www.un-documents.net/wced-ocf.htm>>, last visited 24 November 2011), drafted by the World Commission on Environment and Development. The bibliography on this controversial notion is immense. For its significance, its implications and its critics, see Alder & Wilkinson, *supra* note 8, p. 127 et seq..

part in the decision-making processes at upper levels in order to share responsibility in defining the rules shared with other communities at higher consensus levels (shared rule). In short, that means establishing differentiated spaces of political decision-making (circles of consensus) where autonomy and integration are possible, through flexible political structures based on pluralism and cooperation.

Despite this, it has to be recognized that a network of circles of consensus which effectively deal with cultural diversity require a deep cultural change in the hegemonic thinking structures within the domain of politics and law, because of the requirements of flexibility and plurality that this implies. In fact, it seems impossible to do that without a progressive change in the relevant decision-making processes at the global level, providing real opportunities for different points of view beyond the assumptions of Western science and economics. Anyhow, even if this were possible, we would still have to face up to the eventual loss of cultural diversity due to voluntary assimilation and the dangers for future generations in present political decisions, even when they are justified for particular 'cultural' reasons. In such cases, we will have to design a balancing-test procedure to deal with them. In any case, these problems do not seem to be definitive objections to the proposal made in this paper.