

*Article history: Received 2 July 2015; accepted 30 October 2015*

## “Old” natives and “new” immigrants: beyond territory and history in Kymlicka's account of group-rights

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### Abstract

According to Will Kymlicka, only historically and territorially bound “national” groups can engage in a “nation-building” process. Recently arrived immigrant groups cannot, as they have neither been able nor willing to do so. In this paper I argue, first, that such empirical facts are insufficient for the normative conclusions Kymlicka defends; and second, that if his ultimate goal is to achieve better “terms of integration” for immigrants, he cannot deny them the right to attempt their own “nation-building”. As an illustration, the paper describes Kymlicka's own thought-experiment of Chinese immigrants in Canada pursuing a nation-building-process equivalent to the Québécois. It explores how criteria for advocating group rights other than history and territory – merit, participation, or need – avoid treating old and new minorities in an arbitrarily asymmetric manner.

**Keywords:** Kymlicka; immigrants; national minorities; history; territory

### Introduction

Imagine that the Chinese in Canada claimed the same rights as the Québécois. This would involve among other things a public administration and schools run in Chinese or a regional Chinese parliament with wide-ranging autonomies. However, some might reply, none of the institutions needed to sustain Chinese culture in Canada have been created so far. Such scepticism notwithstanding, this example can be revealing for discussing the underlying normative question: on what grounds are the rights of “old” minorities, as the Québécois, different from “new” immigrant groups, such as the Chinese? The answer, for some, lies in the fact that the Québécois – and not the Chinese – have a history on their territory.

Will Kymlicka holds such a view in this thought-experiment (Kymlicka, 2001: 160). In his theory, only “historical” national groups<sup>1</sup> have a right to political self-determination and can engage in a process of “nation-building”. Immigrant groups have waived this right upon leaving their homeland. Indeed, Kymlicka argues, they have neither been able nor willing to take up such a

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<sup>1</sup> I take them to include the majority, national minorities as well as indigenous peoples on a given territory.



process.<sup>2</sup> Barring the Chinese in Canada from this right is a *normative* argument which hinges on *empirical* premises as the following: immigrants' preferences and which group has arrived first on a territory – e.g. the Québécois in Canada.

This paper analyses Kymlicka's conclusion of this thought-experiment. To do so is both necessary and fruitful. His typology of groups – national, indigenous, and immigrant – in diverse societies has, on the one hand, served as a benchmark for the moral or normative<sup>3</sup> entitlements of minorities since the appearance of *Multicultural Citizenship* in 1995. On the other hand, Kymlicka's empirical facts of history and territory serve as explicit criteria for the differentiation between old and new groups. Nevertheless, in this paper I will be disapproving of these criteria and argue that they are inconclusive for the analysis of group-rights – history and territory are morally contingent factors beyond the control of individuals that privilege national groups unfairly over immigrants. And even if Kymlicka claims that immigrants have had no interest in being granted more rights, this preference cannot be based on an artefact of the social, cultural and political conditions determined by the national group. Given that Kymlicka's goal is an inclusive and fair coexistence between groups immigrants are justified in claiming more rights, even for projects as ambitious as “nation-building”.

In the following section, I will critically assess Kymlicka's account and focus on three aspects: (i) how history and territory prioritises “old” national over “new” foreign minorities; (ii) what this implies for immigrants in national substate minorities; and (iii) why recognition of all minorities matters. In the last section, I will be discussing the potential of criteria for collective rights other than history and territory: merit, participation, and need. While none replaces history and territory altogether, a sharper focus on need in particular is a better warrant for Kymlicka's own goal: inclusion.

### **Kymlicka's multicultural agenda**

#### *History, territory, and minorities enjoying priority*

Kymlicka has traditionally focussed on the status of “old”, i.e. settled “homeland” minorities rather than “new” groups who have immigrated recently.<sup>4</sup> Issues involving immigrants are, as a consequence, discussed mostly in contrast to “national” minorities. And this focus is due to the fact that most

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<sup>2</sup> “The historical evidence is that the capacity and motivation to undertake such an ambitious nation-building project is only found in national minorities, rather than immigrant groups” (Kymlicka, 2001: 159).

<sup>3</sup> For the purpose of this paper I will use the terms “moral” and “normative” interchangeably as attributes about how the world *should* be according to our best ideals – which are not the same as existing laws.

<sup>4</sup> Cf. Kymlicka (2007, 2011a, 2011b). As to the limitations of this approach, cf. Parekh (1997: 62): “[Kymlicka's] theory is unduly heavily mortgaged to his moral preferences. It would also seem that it is deeply embedded in and in part an articulation of the Canadian political reality. While this political context and the concomitant historical experiences give it a focus and vitality, they also limit its wider application.”

conflicts in the world coincide with the presence of national minorities. Immigrants, in turn, are not as violent and organised as national minorities:

“[T]he presence of migrant workers is rarely a source of civil war or ethnic insurgencies. Even when migrant workers are mistreated and exploited, as they are in much of the world, they rarely take up arms, or seek to overthrow the state” (Kymlicka, 2007: 175).

Does this passage imply that immigrants would need to take up arms to achieve similar rights as “homeland” minorities? Kymlicka provides two observations: first, no recent immigrant group has voiced demands of self-determination, and second, the international community has pursued only “half-hearted” attempts in this direction.<sup>5</sup> His response turns thus around how things *are*. But why *should* immigrant minorities have less rights?

According to Kymlicka, it is because they have not been on their host society's territory for long enough.<sup>6</sup> National groups, in turn, have an independent and continued history which has given rise to their distinct cultural traits.<sup>7</sup> And this historical “societal culture” provides the members of groups “with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres” (Kymlicka, 1995: 76). Having a culture is thus essential to lead an autonomous life. Without the background of a “territorially concentrated” (*ibid.*) historical culture, individuals would make their choices from “nowhere” – a logical and empirical impossibility. And since immigrants cannot re-create their societal culture in the hosting country, they are better off adapting to the “mainstream” culture, at least in public life (Kymlicka, 1995: 96).

This account of a societal culture shaped by history aims thus at protecting territorially bound national minorities from the pressure of more dominant groups.<sup>8</sup> Immigrants, however, experience the same pressure even if they are

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<sup>5</sup> Cf. Kymlicka (2007: 175). Such attempts are, e.g., the 1990 UN Convention for the Rights of Migrant Workers. More generally, there is a consensus in normative and legal theory that *a* set of rights for migrants exists – only few question, e.g., the right to family unification. But the concrete scope of these rights tends to be controversial, i.e. whether it extends to the core or wider family (Carens, 2013: 179ff.).

<sup>6</sup> Kymlicka (2007: 226): “...liberal multiculturalism does attach importance to facts of history and territory.”

<sup>7</sup> Kymlicka (1995: 19): “I am using ‘a culture’ as synonymous with ‘a nation’ or ‘a people’—that is, as an intergenerational community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and history.”

<sup>8</sup> Torbisco Casals (2006: 8) points out that the principle of territory was introduced after the French Revolution: as the new basis for granting citizenship, it has replaced feudal privileges of inherited social rank (clergy, nobility, and “serving” estate). My motivation is similar in spirit. If territory and history justify group-rights then certain groups are favoured analogous to the feudal

not in “their” territory, regardless of whether they live in a region of the national majority or minority. However, Kymlicka's priority of national groups due to their territorial history clashes with his general concern of protecting weaker groups. If the aim of his theory is to protect minorities from the discretion of majorities, then the history of those groups should play no role. To wit, the majority could theoretically also be an immigrant group which does not pressure other groups.

In practise – and in contrast to the theoretical *normative* conclusion –, national minorities appear to better defend their culture than immigrants. And this brings us back to the starting point which is the blurred distinction between reality and morality. It is not clear where Kymlicka's statements are to be placed:

“The assumption that national minorities are the potential cause of, or pretext for, geo-political conflict has been omnipresent in all of the international deliberations (...) As a result, discussions of national minority rights are heavily ‘securitised’, in a way that precludes recognition of, or even discussion of, the ‘common normative considerations’ that connect indigenous peoples and national minorities” Kymlicka (2011a: 202).

If Kymlicka is concerned about the spill-over effects of national minorities' reputation on the “normative” claims of other groups, why does he stop short of immigrants? It is not clear why they are categorically less vulnerable than indigenous groups. But more generally, even if national minorities involve more violence, this fact cannot justify the priority of their rights over those of other groups. Under ideal conditions of mutual fairness – and this is the playing field Kymlicka (1995: 99) seems to have chosen – violence is not legitimate. The priority of the rights of national groups, justified in this manner, thus falls. But is there no other way to accommodate immigrants within host societies – if they so wish at all?

*Minorities within minorities: artefacts and limited identities*

According to Kymlicka, immigrants are entitled to “polyethnic rights”. These encompass, e.g., public funding for cultural practises, exemptions from laws which disadvantage certain religions (e.g. wearing helmets for Sikhs), or the right to bilingual education. These rights serve “to promote [fairer] integration into larger society, not self-government” (Kymlicka, 1995: 31). Moreover, immigrants should take part in “negotiating” (or rejecting) the aspirations of some national minorities to become independent if they live in their territory (Kymlicka 2011b). For the Scottish independence project, for instance, to be successful and legitimate, Pakistani immigrants should voice their conditions for joining this project (ibid.). In fact, any citizenship idea, be

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nobility: the right kind of citizenship, so justified, is “an inherited status that greatly enhances one's life chances” (Carens, 1987: 252).

it in favour or against the independence of substate national minorities, has to be more inclusive of immigrants, Kymlicka argues.

However, this inclusiveness is limited. Immigrants can adopt the discourses of two mutually exclusive groups: either the substate minority or the majority nation-state.<sup>9</sup> Beyond their “polyethnic” rights, immigrants thus have to adapt their own identity to fit either discourse of recognised “nations” and eventually integrate into the dominant national minority or majority.<sup>10</sup> And the space for multiple identities is restricted due to Kymlicka's “monolithic” and homogenous vision of intra-group identity:

“By making the concept of a societal culture (with monolingual speakers on a mononational territory) as the empirical and normative starting point, Kymlicka tends to homogenize cultures through a rather dubious and biased bottle-neck” (De Schutter, 2005: 30).

The bottle-neck being that the importance of a societal culture resides in the membership in *a* locally dominant group, and not one's own culture. But if this is true, then “it is unclear how he can stop at polyethnic rights, and not proceed to self-government [for ethnic immigrants]” (Choudhry, 2002: 62). If polyethnic rights protect *immigrants'* distinct culture, why should they still integrate into *a* mainstream culture, be it majority's or national minority's?

Now, in practical terms, a certain convergence and a common cultural basis to guarantee everyday interaction among the members of a society seem necessary. But this argument is compatible with immigrants having no less rights than national minorities – having *a* common language is what matters. And to decide this question on the basis of history and territory systematically and unfairly handicaps immigrants. But polyethnic rights do not make things easier: they have to remain “consistent” and serve the integration to the mainstream, i.e. limited to “the private sphere—at home and in voluntary association” without involving “the establishment of distinct and institutionally complete societal cultures” (Kymlicka, 1995: 78).

Alternatively, implementing a right to national self-determination for immigrants might be too costly as it would imply a change in the institutional language, the adaptation of curricula, and require nationals to learn a new

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<sup>9</sup> Kymlicka (2011a) works with the same implicit assumption. However, there might be no alternative because groups compete with each other. That is, in order to sustain its cultural practises over time, a group needs a high degree of “institutional completeness”, i.e. its own media, charities, commerce, churches, schools, etc. (Breton 1964; for the nature and completeness of immigrants' institutions: Choudhry, 2002; for an overview of the recent general literature: Léger, 2014: 424-425). But even if there is such competition, no group should unfairly be privileged at the cost of another. And my argument is that considerations of history and territory unfairly favour national groups over immigrants.

<sup>10</sup> Cf. Young (1997). According to her, “ethnic” migrants have no choice than to assimilate to the national territorial culture – the sovereignty over which is under dispute in the regions under discussion here.

language, etc. Cost of transition, however, is a poor normative benchmark – it perpetuates deeply entrenched injustices (Carens 2000). This is why I use the term “normative” throughout this paper as transcending these costs.<sup>11</sup> History and territory describe best how certain groups have achieved their status, but they are not decisive for the question as to which group *should* enjoy how many rights.<sup>12</sup> Otherwise, individuals turn into slaves of past actions of their ancestors – factors beyond control and hence beyond their liability, blame or praise. This arbitrariness of history and territory is problematic.

One argument, however, might trump all previous considerations. What if immigrants genuinely preferred to integrate into the national group where they emigrated to? In the UK, for instance, immigrants generally feel quite “British” (Kymlicka, 2011b: 284). Indeed, immigrants themselves might, upon leaving their homeland, *voluntarily* accept to integrate into the society of arrival.<sup>13</sup> However, this assumption is controversial<sup>14</sup> and it is critically addressed more in detail elsewhere (Choudhry, 2002). For now, consider the following counter-argument: Kymlicka's argument is based on an artefact.

An example of such an artefact is when immigrants identify with the dominant group to achieve another goal, e.g. overcome their relative socio-economic disadvantage. But feeling “British” does not make one less disadvantaged. Their expressed preferences to integrate might thus not be “manifestations of the natural phenomenon under investigation” (Hilpinen, 2011). And the phenomenon under investigation here is their *genuine* will to integrate. The declared self-perception as “British” is an artefact of the dominant social arrangement just as “a path through a forest (...) can be an unintended product of people's habit of following the same route when they walk through the forest” (*ibid.*). But there might be paths to overcome

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<sup>11</sup> Kymlicka himself seems to understand “normative” in such a manner when he suggests that his argument applies only “in a just world [of ideal theory]” (Kymlicka, 1995: 99). My present account stands thus in line with Kymlicka's own “left-wing liberal egalitarianism” where “[morally arbitrary] inequalities which are not chosen or deserved—are unjust and should be rectified” (Kymlicka, 1998: 132).

<sup>12</sup> History and territory are inadequate normative factors even for justifying individual aspirations or the viability of institutional change because “they unduly limit our sense of the possible” (Choudhry, 2002: 67).

<sup>13</sup> “[Immigrants] voluntarily relinquished their national membership, and the national rights which go with it” (Kymlicka, 1995: 62). Voluntariness is central to distinguish immigrant from national minorities. According to Kymlicka, only the latter “are involuntarily incorporated members” (Kukathas, 2003: 580). This characterisation of immigrants as *voluntary* is crucial because it does not demand for any rectification or any recognition within “luck egalitarianism” – the philosophical tradition of his theory.

<sup>14</sup> “[M]any immigrants do not come voluntarily: children, refugees, displaced persons fleeing war or famine, all move less because they want to than because they are forced to by others or circumstances. Equally, some national minorities have every opportunity to choose voluntarily between living as adherents of a minority culture or as cosmopolitans. (...) [I]t is not the voluntariness of their choices that (...) provides the basis for their differential treatment in a multicultural society” (Kukathas, 2003: 580).

disadvantage other than identifying with the majority. Alternatives which are not considered due to an unjustified fixation with existing national groups.

How to get to the bottom of their preferences then? Individuals need to be able to make decisions free of constraints and limitations.<sup>15</sup> And the options Kymlicka's theory offers are unnecessarily limited. His account does not guarantee immigrants' genuine consent to integration. Surely, life is full of constraints and not all are illegitimate. But my account describes an ideal which we should aim to implement in our everyday practises. And conceiving immigrants' rights in dependence of those of national minorities – but not on their own – is no step in this direction. This does not mean that Kymlicka's categorisation is useless. New and old minorities are treated differently in public administration on grounds he has laid out. However, these practises do not have to inform our *normative* demands.

#### *Recognition, fairness, and integration*

In Kymlicka's reasoning, individuals have special rights through their belonging to a collective. And this membership needs to be defined by objective criteria such as history and territory. Such an account calls thus for a contextual, case-specific, and “targeted” analysis of each group. This contrasts with universal and “generic” rights and duties attributed to members of all groups (Kymlicka, 2007: 199ff.).

This distinction is useful when we attempt to mediate between individual and collective rights. A woman, for instance, might have to choose between following the traditions of her religious community and her right to gender-equality. But she might consent to the specific gender role her religion prescribes as a matter of her autonomy.<sup>16</sup> This line of reasoning stands in the tradition of a debate on the “politics of recognition” (Taylor 1995). A central premise is that individuals can and do identify as members of a group. And this identity deserves to be recognised and protected. Depending on this specific background, issues of fairness or distribution should be dealt with differently (cf. Eisenberg; 2005, 2009).

Kymlicka's account is similar. Any minority right is one of “external protection” from possible interventions – even if the majority considers it

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<sup>15</sup> Asking why other immigrant groups have not managed to re-create their culture to the same degree as the Cubans in Miami, Rubio-Marín (2003: 172) concludes: “From this it does not follow that they would not do so, were they given the option and were they to find the right environment.”

<sup>16</sup> Cf. Eisenberg (2005: 52ff.). One could argue that this sort of assumption is equally prone to the artefact objection I made earlier-on: how to guarantee that a woman's choice, for instance, to wear a niqab is not the result of her being socialised by her community into endorsing this oppressed role? The presence of safe and achievable exit options is indeed primordial for a *real* choice – and there is no *real* alternative for immigrants to either feel “British” or “Scottish” in Kymlicka's theory.



tricky, the woman from our example could not be forbidden to abide by the traditional rules of her group. But this conception excludes anti-liberal “internal restrictions”, i.e. the oppression or unequal treatment of an individual member in the name of the culture of her group.<sup>17</sup> This is why in Kymlicka’s liberal theory, individuals can choose the culture they belong to, demand change within or, as a last resort, actively opt out of it (Kymlicka, 1995: 33-45).<sup>18</sup>

This is an argument about the internal functioning of groups and not about its relative position compared to other groups. It would thus be possible – and indeed more coherent and liberal – to leave it to immigrants to choose between integration and political self-determination and to weigh their costs and benefits.<sup>19</sup> However, Kymlicka is unequivocal on this possibility: “immigrant groups are not ‘nations’, and do not occupy homelands” (Kymlicka, 1995: 14).<sup>20</sup> “And they never will...” I am tempted to add in line with his reasoning. The problem is that even if immigrants have left their homeland, even if they prefer to integrate, and even if they do not voice a clear demand for self-determination as national minorities – even then, they should not, explicitly or through unintentional institutional design, be hindered from pursuing a national project peacefully. Not doing so is to mistake an “is” for an “ought” – which is an inverted normative logic (Choudhry, 2002: 67ff.).

Therefore, Kymlicka’s contextual analysis grounded on facts of history and territory favours national groups over immigrants. This does not match, however, his overall goal of empowering minorities and ensuring a “fairer integration” of immigrants in the receiving society (Kymlicka, 2001: 162ff.). Yet, one might reply, this is still better than a Hobbesian state of nature and no objective criteria at all for judging competing claims between groups. If this is true, are there better alternatives then?

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<sup>17</sup> “[A] liberal view requires *freedom within* the minority group, and *equality between* the minority and majority groups” (Kymlicka, 1995: 152). The subordination of women, e.g., does thus not stem from group rights. Note that “[e]xternal protections are legitimate only in so far as they promote equality between groups, by rectifying disadvantages or vulnerabilities suffered by the members of a particular group” (ibid.). In principle, immigrants hence qualify for external protection from national groups.

<sup>18</sup> However, if an immigrant in Canada decides not to be, e.g., Chinese anymore, she does not automatically become Canadian. Group-belonging is not only an individual choice but also a matter of collective recognition – merely deciding to be Canadian does not make one hold a Canadian passport with all its rights and duties.

<sup>19</sup> It is another question of whether engaging in a “nation-building” process would be in the interest of immigrants or how many would eventually take it up. One of the cornerstones of liberal theory, however, is that nothing is said about what a *good* decision involves. Liberalism guarantees the right conditions for autonomous choices – being barred from certain choices on arbitrary grounds does not enhance that goal.

<sup>20</sup> More generally, this possibility would clash with Kymlicka’s distinction between “contextual” and “generic” analysis: “Any attempt to articulate liberal multiculturalism as if it were purely a matter of generic minority rights is doomed to failure. The logic of multiculturalism cannot be captured in the form (...) ‘all persons belonging to minorities have a right to X’” (Kymlicka, 2007: 79).



### **Beyond history and territory: alternative criteria for minority rights**

Before discussing a list of such alternative candidates, note that criteria of group identification do not have to be of ethnic nature to be objective.<sup>21</sup> Instead they can be based on institutional or cultural facts, e.g. religion, language, or collective history. Assuming that objective criteria are feasible and desirable, I shall not argue that history and territory are no grounds to differentiate groups and their rights but rather that they *alone* are not. Combined with criteria of merit, participation, and need, a fairer account of group rights can be achieved. The goal of this section is thus mainly to highlight the intuitive possibility and rough limits of such a plurality of considerations.

#### *Merit: recognition needs to be deserved*

Several Western States naturalise foreigners who serve in their armed forces.<sup>22</sup> The idea is that an individual can *deserve* to become a national.<sup>23</sup> Although this case is about individuals entering a collective – and not about the rights of collectives themselves – its underlying logic can be useful for the current discussion: recognition is conditional of contributions also in fields other than national defence – improving the balance of the social security system, excelling in construction or engineering, mediating of conflicts or filling gaps of the internal labour market, e.g. nursing or elderly care. These are all potential considerations on the basis of which individuals of certain groups could deserve (more) rights.

Such an account is clearly less prone to the arbitrariness of considerations of history and territory – immigrants can actively improve their situation. However, not all immigrants might qualify as soldiers, nurses, engineers, or mediators. Not all will have the necessary talent. And considerations based on talent are ultimately as unchosen and arbitrary as reference to history and territory. Arguably, considerations of merit are *less* exclusive as some immigrants will have the necessary talents. What is sure is that contributions to public goods other than national security deserve rewards similar to those granted when serving in the armed forces. Take the Chinese workers who have worked, often under critical conditions, in the construction of Canadian railways throughout the last two centuries (the “coolies”). They, and their descendants, would have deserved to be naturalised, granted cultural or even

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<sup>21</sup> Theoretically, choosing a group identity can be based on non-objective criteria. In a perfectly liberal society they might be totally subjective to the point that there was no group identity anymore. In Marx' (1845) Communist utopia, “to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticise after dinner [is possible] ... without ever becoming hunter, fisherman, herdsman or critic.”

<sup>22</sup> The French Foreign Legion is well known. Eligibility to French citizenship follows after three years of service or after being wounded in combat. But other states, e.g. the US or Spain, know similar rules.

<sup>23</sup> In political philosophy, it is more common to speak of considerations of “desert” rather than merit, but for the purpose of simplicity I will not delve into this technicality.

political self-determination depending on the sacrifice or risk of their contribution. The list could be supplemented with more contemporary examples (e.g. health care).

*Participation: interaction as a sign of genuine interest*

In legal theory, there are two well-known principles about how citizenship can be acquired: *ius sanguinis* and *ius soli*. Whereas the first is historical (citizenship is inherited from one's parents) and the second is territorial (citizenship comes from the State where one is born), a third principle is discussed in the literature: the “genuine, effective link” of integration<sup>24</sup> – candidates for naturalisation need to prove a link with the local society and culture based on participation and integration.<sup>25</sup> This way of acquiring a new nationality allows individuals to express their preferences beyond historic and territorial considerations. This legal concept is thus instructive as an alternative criterion for granting rights.

In this spirit, members of an immigrant group could serve the public good by getting involved in community councils, civil rights movements, sports or cultural associations, NGOs or the like. Such a criterion is less prone to the arbitrariness of history and territory or even talent. That is, such participation depends on sacrificing personal time in a common project where different tasks are available, e.g. administration, public relations, education. Individuals of a certain group can take responsibilities according to their capabilities.

These are the advantages. The major drawback, however, is that immigrants have to bring an *additional* effort to achieve the rights of locals. Whereas non-participative nationals still enjoy the privileged rights of their group, immigrants have to bring themselves in to achieve a better status. Moreover, group-participation is a double-edged sword: in its negative form, all immigrants can be lumped together and in the positive, only the individual effort is rewarded with more rights or naturalisation. That is, those members of the immigrant group who do participate are reduced to those who do not.<sup>26</sup> This might tear a group apart into the participative ones and those who are not, and lead to a dilemma: either one's people are left behind or one renounces to a better status. Nationals do not impose such a choice on their own members. If the definition

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<sup>24</sup> Cf. Adjami & Harrington (2008). The origin of this way of conceiving nationality, as well as the specific wording quoted here, are found in the so-called “Nottebohm-case” from 1955: *Lichtenstein vs. Guatemala* (ICJ), according to: <http://www.icj-cij.org/docket/files/18/2674.pdf>, last retrieved: 31/08/2015.

<sup>25</sup> In practical terms, this clause is usually combined with the requirement of legal residence of a minimum duration within the hosting State. It is thus not a perfectly independent alternative to history and territory.

<sup>26</sup> This account is deliberately simplified in order to provide an outline of the alternatives discussed above. Notably, it makes abstraction from national advocacy movements in favour of immigrants.

of participation is too easily manipulated and too sensitive to the mentioned problems, then we are well-advised to look for a better criterion.

*Need: the most inclusive and just option*

Next to positive contributions which can lead to greater recognition, there are also criteria which arise from negative considerations, e.g. incurred harm or socio-economic disadvantage. Those in need should be granted greater recognition since they belong to a group whose members require assistance.<sup>27</sup> Surely, there will be poor and rich – the more and less needy – among immigrants as well as within national minorities. But if members of a certain group have a significant and systematic need then this group has to be protected and their situation improved. And I take it that poverty is still one of the main motivations for many to migrate in the first place. This makes them vulnerable and in need of assistance at different levels: economically as they take low-paying jobs, socially as they tend to cluster in tough neighbourhoods, health-wise as they engage in risky professions, psychologically as they experience acculturation and alienation, etc.

Now, why would a right to political self-determination improve their situation? If at all, it would seem in the interest of the privileged to get rid of the needy. The point of this paper, however, is not its *actual* implementation but rather the claim that immigrants' categorical exclusion from such rights is untenable as we have seen in the prior sections of this paper. Recognising that – in principle – immigrants are entitled to the same rights as national groups might tackle some causes which lead to immigrants being in need in the first place: e.g. discrimination, exploitation, and exclusion. And for this purpose it is essential that members of national groups *see* the arbitrariness of their privilege and *act* to minimise its impact – which is the goal of this paper.

Need has furthermore a cross-cultural character which goes beyond national boundaries. It inclusiveness has a major intuitive appeal: few question that, e.g. disabled people need assistance or that both a local professor and settled foreign fruit-picker are entitled to unemployment benefits. Need can also account for the claims of national minorities towards the majority. If they can prove to have been discriminated and marginalised due to their origin, they can appeal to the need of self-government as a remedy for the wrong-doing. Referring to history and territoriality (alone) does not help in this context. Need is a better alternative.

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<sup>27</sup> The normative issue is more complex. The non-needy who pay the assistance cannot always be held responsible for their need. However, such net contributors are not entitled to any privilege that accrues from their not being in need – or, only to the extent that it benefits the worst off (Rawls 1971). Despite being a historical criterion, need is the most promising candidate for granting rights because it addresses *negative* arbitrary outcomes, rather than being based on *positive* arbitrary privileges.

### Taking stock: a Chinese "national" minority in Northern America?

Recall the initial thought-experiment of this paper. Kymlicka states that it is possible for "an immigrant group within the United States or Canada — say, the Chinese — (...) *in theory* (...) to become a national minority, if they settle together and acquire self-governing powers" (Kymlicka, 2001: 160).<sup>28</sup> But as none of Chinese public institutions have been created so far, Kymlicka concludes, they are entitled merely to polyethnic rights and not to political self-determination as *actual* and established national minorities.

However, the state of affairs should result from our normative ideals and not vice-versa. Even beyond strictly normative considerations, I have argued here, Kymlicka's priority of national minorities has several drawbacks: (i) it implies that violence is a promising strategy for groups to obtain more rights, (ii) it assumes rather than proves that immigrants genuinely prefer to integrate into the hosting culture, and (iii) it fosters the exclusion rather than the "fair" integration of immigrants by unduly limiting their identities to locally dominant and historical "nations" – they can either be "British" or "Scottish".

I have discussed three alternative objective criteria to history and territory: the Chinese in Canada should be granted more rights if they a) *deserve* it based on their substantial contributions to a public good, e.g. serving national armed forces; b) have *participated* in democratic or social processes of the host society, e.g. by fostering trade relations with the Chinese homeland; or c) share characteristics of *need*, e.g. socio-economic disadvantage and marginalisation. It is true that these considerations are historical on their own: whether one has the right talent to contribute or a recognised need are both arbitrary results. This is why I advocate a fair plurality of different considerations without prioritising history and territory, where agents have more control over the outcomes. Arbitrariness is central only in its negative form – those who have suffered harm are prioritised over those who already benefit from belonging to a privileged group.

### Acknowledgements

I thank the participants and organizers of the EURAC workshop on "Old and New Minorities" held in February 2015 in Bozen (Italy) for valuable comments on an earlier version of this paper. My argument has improved substantially thanks to the feedback provided by Paula Casal, Enric Bea Seguí, Marcos Andrade Moreno, and the referees of this journal. I would also acknowledge funding provided by the Swiss National Science Foundation – SNF.

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<sup>28</sup> In fact, he expands that immigrants would need to behave just as the English, Spanish, or French colonisers did in the New World to achieve this goal. This analogy of his is unfortunate as it endorses my earlier point on incentivising violence. It also illustrates the arbitrariness of drawing a line of *whose* history guarantees more rights on *what* territory and *when* it does not.

## References

- Adjami, M. and Harrington, J. (2008). "The Scope and Content of Article 15 of The Universal Declaration of Human Rights", *Refugee Survey Quarterly*, 27 (3): 93-109.
- Breton, R. (1964). "Institutional Completeness of Ethnic Communities and the Personal Relations of Immigrants", *The American Journal of Sociology*, 70 (2): 193-205.
- Carens, J. H. (1987). "Aliens and Citizens: The Case for Open Borders", *Review of Politics*, 49: 251-273.
- Carens, J. H. (2000). *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness*. New York: Oxford University Press.
- Carens, J. H. (2013). *The Ethics of Immigration*. New York: Oxford University Press.
- Choudhry, S. (2002). "National Minorities and Ethnic Immigrants: Liberalism's Political Sociology", *The Journal of Political Philosophy*, 10 (1): 54-78.
- De Schutter, H. (2005). "Nations, Boundaries and Justice: on Will Kymlicka's Theory of Multinationalism", *Ethical Perspectives: Journal of the European Ethics Network*, 11 (1): 17-40.
- Eisenberg, A. (2005). "Identity and Liberal Politics: The Problem of Minorities Within Minorities." In: A. Eisenberg and J. Spinner-Halev (eds.) *Minorities Within Minorities. Equality, Rights, and Diversity*, New York: Cambridge University Press.
- Eisenberg, A. (2009). *Reasons of Identity*. New York: Oxford University Press.
- Hilpinen, R. (2011). "Artifact". In: *Stanford Encyclopedia of Philosophy*. Retrieved from <http://plato.stanford.edu/entries/artifact/>, last access: 18/02/2014.
- Kukathas, C. (2003). "Immigration". In: LaFollette, H. (ed.). *The Oxford Handbook of Practical Ethics*. New York: Oxford University Press.
- Kymlicka, W. (1995). *Multicultural Citizenship. A Liberal Theory of Minority Rights*. New York: Oxford University Press.
- Kymlicka, W. (1998). "Liberal Egalitarianism and Civic Republicanism: Friends or Enemies?". In: A. L. Allen and M. C. Regan (eds.) *Debating Democracy's Discontent. Essays on American Politics, Law, and Public Philosophy*, New York: Oxford University Press.
- Kymlicka, W. (2001). *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*. New York: Oxford University Press.
- Kymlicka, W. (2007). *Multicultural Odysseys. Navigating the New International Politics of Diversity*. New York: Oxford University Press.
- Kymlicka, W. (2011a). "Beyond the Indigenous/Minority Dichotomy?" In: S. Allen and A. Xanthaki (eds.) *Reflections on the UN Declaration on the Rights of Indigenous Peoples*. Oxford: Hart Publishing.
- Kymlicka, W. (2011b). "Multicultural Citizenship Within Multination States", *Ethnicities*, 11 (3): 281-302.
- Léger, R. (2014). "Non-territorial Autonomy: Reply to Chouinard", *Ethnopolitics: Formerly Global Review of Ethnopolitics*, 13 (4): 418-427.
- Marx, K. (1845). *German Ideology*. Retrieved from <http://www.marxists.org/archive/marx/works/1845/german-ideology/ch01a.htm#a4>, last access: 10/02/2014.
- Parekh, B. (1997): "Dilemmas of Multicultural Theory of Citizenship", *Constellations*, 4 (1): 54-62.
- Rawls, J. (1971). *Theory of Justice*. Revised edition 1999. Cambridge MA: Harvard University Press.

- Rubio-Marín, R. (2003). "Exploring the Boundaries of Language Rights: Insiders, Newcomers, and Natives." In: S. Macedo and A. Buchanan (eds.) *NOMOS XLV: Secession and Self-Determination*. New York: New York University Press.
- Taylor, C. (1994). "The Politics of Recognition." In: A. Gutman (ed.) *Multiculturalism. Examining the Politics of Recognition*. Princeton NJ: Princeton University Press.
- Torbisco Casals, N. (2006). *Group Rights as Human Rights: A Liberal Approach to Multiculturalism*. Amsterdam: Springer.
- Young, I. M. (1997). "A Multicultural Continuum: A Critique of Will Kymlicka's Ethnic-Nation Dichotomy", *Constellations*, 4 (1): 48-53.