

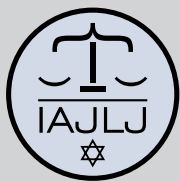
JUSTICE

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MULTICULTURALISM AT IAJLJ ROME CONFERENCE



הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים (ע"ר)
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President's Message

Meir Linzen

My previous President's Message that appeared in *Justice* dealt with the Pittsburgh synagogue shooting. Sadly, as I write my message for this issue, news has come in of yet another atrocious attack on American Jewry, this time at Chabad of Poway, about 25 miles north of San Diego. There is no doubt that antisemitism in the United States is on the rise, as derogative rhetoric escalates to physical harm and merciless butchery. Not only in the United States, but in Europe as well, we witness a surge in antisemitic activities. In my position as the President of the IAJLJ, I see the core action of our organization to be legal action to combat antisemitism. In order to support this effort, we have created within the organization a distinct Center headed by Advocate Avraham Yishai, located in Jerusalem. Its mission is to combat antisemitism by legal means. In this Center, we decide which cases are appropriate for legal action whereby we would contest both the inciters and the platform through which they operate. We know that vicious words lead to violence, and it would be naïve to think otherwise. It is impermissible to use freedom of speech as a moral accessory, in the face of social media where hateful dialog on the web leads to hate crimes in general, and to antisemitic acts in particular.

On January 17, 2019, our organization submitted a letter of complaint to the International Criminal Court in The Hague, protesting against the Palestinian Authority and

Fatah leaders' complicity in crimes against humanity and war crimes. Though the Palestinian Authority is a legitimate body recognized worldwide and by Israel itself following the Oslo Accords, the fact that considerable funds of the Palestinian Authority's budget are transferred to prisoners who have committed terrorist acts and to the families of terrorists killed while perpetrating acts of terror, points to this body's outright support of terrorism. As we see it, this is a violation of international law.



In November 2018, we held our annual conference in Rome titled "Controversial Multiculturalism." At the conference, we discussed a troubling phenomenon that has arisen in response to ensuring that multiculturalism prevails. It seems that pockets in minority communities in Western countries show little tolerance of others, and might hold a zealous protective attitude with respect to their own beliefs that impinges on the liberty of the majority. During the conference, we were graciously received by Pope Francis whom we thanked for his continued effort to combat antisemitism. We also discussed ways in which our organization and the Vatican might be able to cooperate in the future.

I write this message to you on the eve of Holocaust Remembrance day, and the 71st anniversary of the independence of the State of Israel. These two days strongly symbolize what our organization strives to ensure—that another Holocaust will never occur, and that the Jewish people will always have a homeland.

Liberalism, Multiculturalism, and the Nation State: Where Do We Go from Here?*

Alexander Yakobson

I start by posing a question: what should be the liberal attitude – liberal in the broad sense of the term – to multiculturalism at a time when multiculturalism is much less popular than it used to be, and moreover when liberalism itself seems to be much less popular than it used to be – partly on account of multiculturalism. Liberalism is nowadays attacked by its critics because, among other things, it is alleged to be too supportive of radical ideological multiculturalism that is undermining the nation state. This, then, is the triangle with which I deal here: liberalism, multiculturalism and the nation-state. In addition to our first question, I ask: where do we go from here?

“State Neutrality”

It is worth emphasizing that when people criticize multiculturalism – I am referring to people from the broad democratic mainstream, including pronounced liberals – in recent years, they refer mainly, if not exclusively, to radical ideological multiculturalism that implies cultural neutrality of the state. This means that the state should be neutral between different cultures and not connected to a specific one. This is the version of multiculturalism that I believe is most criticized. The claim is that this is what is undermining the cohesion of the community. Not everybody accepts this radical definition of multiculturalism, but it is not unfair to say that more radical trends in multiculturalism do tend to go in this direction. According to this view, it is not legitimate for a state to have any cultural identity. I think that, in fact, every critic of multiculturalism from the democratic mainstream supports less radical versions of what can be called multiculturalism; if one wishes to avoid this term, this can be referred to as cultural pluralism or cultural freedom. If multiculturalism is criticized, it is not because people are in favor of any kind of “monoculturalism.” Everybody in the democratic mainstream realizes that minorities should have their cultural rights respected and that culture is not something that the state can just regulate as it can regulate traffic. Everybody understands that culture is a very important

part of human personality and if we want human beings to be free and equal, then a liberal democratic state must respect cultural rights to a large – though not unlimited – extent. It is important to emphasize that it is not debated in the democratic mainstream that people – including minority communities – should enjoy significant cultural rights. What is now considered a conservative position on cultural pluralism would perhaps have been considered a radical liberal position several decades ago. This is what often happens when there is a reaction against the achievements of liberalism. This reaction may be angry and sometimes ugly, but even so, its proponents are not necessarily in favor of rolling things back to where they had been before. Most achievements of liberalism in the long run are no longer disputed, except by radical illiberal forces outside the mainstream – although it should be noted that these forces have grown stronger and more vociferous. The main issue that must be addressed is state neutrality in culture – as opposed to civic equality and cultural freedom.

Before discussing the main thrust of my argument that liberalism should not support this idea, it is important to note that the idea that liberalism should require state neutrality in culture is not a frivolous one, and there are good grounds for accepting it. The problem is that there are better grounds for opposing it. The grounds for accepting the idea of cultural neutrality of the state is that intuitively people say that this is actually a natural outgrowth of the principle of civic equality. If we take for granted that people should be treated equally, with equal rights and dignity, then it is not illogical to say that if a state treats different cultures differently, then, by implication, people do not enjoy full equality. It can be argued that in such a situation there is, at any rate, an emotional or symbolic inequality, since that state prefers

* This text is from the transcript of the author's presentation at the IAJLJ Rome Conference, and it basically appears as delivered. For specific references to the relevant constitutional provisions, see <https://www.constituteproject.org/>.

a majority culture to a minority culture, and those who belong to the minority culture feel disadvantaged in a certain sense. However, the idea of cultural neutrality of the state, though it seems intuitively to be a natural extension of the principle of civic equality, cannot be sustained for the simple reason that it is not a reality in the democratic world, and moreover, at least partly, it is an impossibility. The pretense in descriptive and even normative documents, that a liberal democracy requires – is conditional upon – cultural neutrality, and more specifically, religious neutrality, cannot be sustained. It is untrue that in the free, liberal, democratic world, the state is neutral or virtually neutral. The areas of state non-neutrality are too significant and decisive for it to be realistic to pretend that this is an actually existing norm in the democratic world. In this regard, I will address two issues: language and religion. One should also consider the values that are most characteristic of certain communities, as opposed to other ones, often in the context of religion.

State Neutrality and Language

When one says that the state should be neutral in matters of culture, what does this imply with regard to language? If a liberal state truly wanted to be neutral in language, the best solution would be to adopt Esperanto as the universal language that truly does not discriminate between cultures, backgrounds and historical memories and to which everybody is equally attached or unattached. Clearly, state neutrality in language is not feasible. In most cases, at least in Europe, there is a single language that is regarded as the official, or the national language of the country. Even if a state has several national or official languages, often one of them is the “first among equals.” If two or more languages have equal status, then there will still be linguistic minorities whose language lacks official status (as happens in Indian states, where, despite genuine efforts to accommodate linguistic diversity, huge populations speak languages that are not recognized as official on either the national or state level). Even in Switzerland, with its pluralism of official languages, each canton has its own language. Clearly, the ideal of the cultural neutrality of the state is unattainable when it comes to language. What does this imply regarding the validity of the entire ideal of cultural neutrality?

It is a false pretense to claim that language is just a technical matter. Everybody knows that language is a very basic and crucial trait of culture. It is widely considered to be a major characteristic of peoplehood, of a modern national identity. As a rule – though not

invariably – different peoples speak different languages, and most national movements use national language as a banner. It is therefore natural for a nation state to have an official language, or a first official language, and I believe this should be the case with Israel (though I strongly oppose removing the status of Arabic, the language of a large national minority, as the second official language). It is useless to pretend that a modern state can be neutral in this vital sphere.

It is usually assumed that state “non-neutrality” in religion is particularly problematic, while there is a wide realization of the fact that states are attached to particular languages. In our secular age where religion is not as important to many people as it used to be, while language is important to everyone, state “non-neutrality” on language may well be more offensive than lack of religious neutrality. Thus, under contemporary conditions, it cannot be assumed that state “non-neutrality” in religion is necessarily more problematic from the viewpoint of minorities, than lack of neutrality in the matter of language. I must emphasize that I am speaking about state neutrality as regards religion – not about religious freedom and civic equality that certainly remain as crucial as ever.

State Neutrality and Religion

Regarding state neutrality in religion, it is often said that it is a distinctive feature of European liberalism to espouse this principle and strive for its adoption by every liberal state. However, there are glaring examples of religious “non-neutrality” on the part of the state in numerous European liberal democracies. We see strong examples of this in European constitutions, in countries that are subject to the European Convention on Human Rights. One example of this appears in the Constitution of Ireland, where it speaks in the name of the Holy Trinity, even after several constitutional amendments that have secularized this constitution to a considerable extent. The Constitution of Greece also starts with the invocation of the Holy Trinity.

The Constitution of Norway was amended in 2012, specifically with regard to the status of the Lutheran church. Its new text thus reflects “state of the art” constitutional norms in what is undoubtedly a liberal democracy. The old text, adopted in the 19th century, defined the Lutheran church as the state church. This has now been removed, but the constitution still says that the Lutheran church is “the people’s church” of Norway, and that the king or queen of Norway must belong to it. Moreover, there is a new article (2) that proclaims that “our values will remain our Christian and humanistic

heritage. This Constitution shall ensure democracy, a state based on the rule of law and human rights.”

Somewhat pedantically, one could claim that the provision for the monarch to be a member of the Lutheran church is a violation of civic equality. I believe, however, that this is too pedantic: the office of king or queen is a traditional institution that, by definition, does not conform to the usual rules of democracy; it is only legitimate because it is powerless politically. There is no civil right of a Norwegian citizen to become king; therefore, there is no violation of a civil right. The king is a symbolic head of state. It is precisely for this reason that what is symbolized by this provision is exactly the opposite of state neutrality. This is a clear message that the Norwegian people’s sense of who they are is connected with the Lutheran Reformed Church, and this is reflected in the constitution of the Norwegian state.

Moreover, contrary to what is often assumed, strict secularism, French style, can in some ways be much more offensive to religious minorities than the soft preference given to Christian tradition that is practiced in countries like Norway. It is absurd to claim that the ban on the hijab in state schools in France serves the principle of state neutrality, as is stated in the report recommending this law. Clearly, a large number of people in France feel that their particular culture is disrespected because what is banned is a traditional mainstream feature of the Muslim religion. Unlike the burka that covers the whole face, the hijab does not stand for Muslim fundamentalism, it stands for traditionalism.

State neutrality in matters of religion, French style, is intrinsically non-neutral between religions. This sounds like a paradox but, I believe, follows naturally from the different characters of the religions in question. The usual argument in France is that religion is essentially a private matter, and therefore people should keep their expressions of faith privately and not demonstrate them publicly. Of course, those who say so think of Christianity – not Islam or Judaism – when they say “religion.” Christianity, and above all, the modern liberalized and secularist version of Christianity, but to some extent traditional Christianity as well, is indeed more private than Islam and Judaism, which include a very strong legalistic element. Islam and Judaism are based on codes of law. They seek to regulate a much wider range of human activities and aspects of public life (including how people, and above all women, should dress in public) than Christianity. Therefore, since the French Republic believes that religion is a private matter, it allows itself to ban public displays of religiosity, including dress. Dress, however, including headgear, is

religiously significant in Islam and Judaism, unlike in Christianity. If all the people in France were (modernized) Christians and post-Christians, then the ban on public displays of religiosity would indeed be “neutral.” Therefore, the French kind of secularism of *laïcité* is more problematic from the viewpoint of those outside the mainstream. This is a paradox, since the whole idea of cultural neutrality was invented for the benefit of minorities. The result is that if you proclaim the state to be neutral because religion is a private matter, you end up discriminating against minorities or, at least, you put them in an unfavorable position, thereby causing an opposite effect.

The *Lautsi* Case and its Implications

There is another problematic, unintended consequence of the principle of cultural neutrality that is demonstrated by the famous *Lautsi* case in Italy. This case was brought, eventually, to the European Court of Human Rights (ECHR) by a non-Italian born woman whose two children attended Italian state schools. She protested against the Italian regulation that requires the presence of crucifixes in public schools. This regulation may come as a surprise to those who think Europe is generally secular and religiously “neutral.” Italy is a secular state whose constitution proclaims full freedom of religion and equality. While the term “secularism” does not appear in the text of the constitution, the Italian constitutional court has repeatedly ruled that the state is secular and, therefore, should be religiously neutral. At the same time, there is still a regulation in force since the 1920s that there should be crucifixes in public school classrooms. This woman claimed that this regulation is against secularism and state neutrality. The local and higher administrative court rejected this petition. She went to the European Court of Human Rights, which at first accepted her petition and ruled that it is contrary to the European Convention on Human Rights. The full chamber session of the court later overruled that decision and allowed the Italian Republic to retain the crucifix in the classrooms.¹

The ECHR’s reasoning is a very modest one. The Court does not delve into ideological questions. It says that the crucifix is clearly a religious symbol but this does not necessarily make it illegal under the European Convention on Human Rights, since there is no actual religious coercion and no brainwashing. The Italian school system as a whole is not oppressive to minorities; among other

1. *Lautsi and Others v. Italy*, E.C.H.R. (2011).

things, the Court notes that it accommodates Muslims and Jews on their holidays. The Italian state proved that it does not oppress the minority pupils, in which case the Court says they are allowed to give preference to the symbol connected to the culture of the majority of the Italian people.

The Italian state submission goes beyond these arguments, however, because it had to prove that the regulation does not offend against secularism, which is enshrined (through the case law of the constitutional court) in Italy's constitution. The European Convention, on the other hand, merely speaks of religious freedom and does not mention secularism, nor has it been interpreted by the Strasbourg Court to require it. Italy thus argued before the European Court that the crucifix appears in the classrooms of Italian state schools not as a religious symbol but as a cultural symbol of the Italian people.² While religious by origin, today, it is a national, cultural symbol of Italy. Of course, this line of argument implies that Italian peoplehood itself is not neutral between religions, so the principle of state neutrality does not fare well if one tries to secularize the crucifix.

The reasoning of the Veneto Administrative Court, whose judgment is extensively quoted in the ECHR ruling,³ goes beyond that. It was not content to say that the crucifix is a symbol of Italian culture and history – this probably sounded too narrowly particularistic for it. It was looking for a more universal and neutral secular defense of the crucifix. It claimed that the crucifix is a symbol of compassion, love, empathy, humanism, pity, liberty and democracy and, ultimately, in effect, of secularism, and that all these values of Western civilization are symbolized by this ultimate symbol of human suffering as a message of what not following these values can lead to. It stressed that it is particularly important that people of non-European backgrounds in Italian schools should be subjected to this message of love and compassion and all the humanistic values of Christianity that are, by nature, universal. For this reason, there is nothing sectarian about the matter and, certainly, nothing discriminatory.

One has to read this in order to believe it, but the Court actually claims that Christianity, unlike any other religion, cannot exclude others without denying itself, since true Christianity puts charity above faith itself. The Italian judges admit that, historically, this has not always been the case, as all kinds of offenses against charity have been committed in the name of Christianity. Now they proclaim that all religious symbols are exclusive by nature except the crucifix, which by virtue of being Christian, is inclusive of the entire human race.

Obviously, this pseudo-universalist argument is much more offensive, from the viewpoint of non-Christian minorities, than a frank acknowledgment of the fact that the crucifix is both a Christian symbol and a cultural symbol of the Italian people, since Italian culture is influenced by Christian tradition. There is, in my view, nothing wrong in saying to a minority: we ask you to respect a symbol of the majority culture, by accepting its prominence in the public sphere, while the state, of course, accepts your right to be different. We do not claim that your particularity is a deviation from some universal moral standard just because we shy away from acknowledging that the state is influenced by the majority culture. The citizen of a liberal state should not be offended by the fact that the state has an official attachment to another culture precisely because the state is liberal, and its citizens are not under any obligation to share its attachments. In such a case, there should be no pretense of neutrality and no perceived disrespect to anyone's beliefs.

When you try to claim, because you are forced to by the rhetoric of neutrality and strict secularism, that the crucifix is not a religious symbol or even an Italian or Western symbol, but a universal symbol of compassion, love, and humanism, you send a highly offensive message to minority students. The message is that it is not that you are outside the mainstream culture of the nation, but rather, that you deviate from universal moral standards. If your religion does not accept this symbol of universal compassion, then you are exclusionary while we are inclusive. This is certainly not for what the principle of state neutrality, as an extension of civic equality, was invented.

Conclusion

Therefore, I think the liberal point of view, as a matter of principle, should give up the unrealistic idea of state neutrality and should frankly admit that a modern state is not necessarily neutral. This does not mean, of course, that there is anything wrong in espousing, for example, religious neutrality as part of a particular constitutional tradition, but there should be no pretense that this is a universal liberal-democratic norm. As their first priority, supporters of liberal democracy everywhere should concentrate on defending equality and freedom, which are the core liberal values. It is not superfluous or trivial

2. *Id.*, §33-41.

3. *Id.*, §15.

to say that freedom and equality need be defended, because, unfortunately, there is now an attack on these values in quite a number of places. I will mention three. There was an outrageous referendum in Switzerland that passed a constitutional amendment explicitly banning minarets, which is now an article of the Swiss Constitution. They took a specific religion and singled it out for a ban, and this is clearly unacceptable. There are now proposed laws in Denmark aimed at putting pressure on the Muslim minorities to integrate. The aim of integration is, of course, legitimate, but the measures envisaged in those bills are beyond what is permissible in a liberal society. You do not need neutrality in order to reject such measures: freedom, equality and human dignity are quite enough.

No Israeli who discusses such matters nowadays should ignore the fact that our Knesset has just passed a nation-state law that is clearly offensive to the principle of equality, and not of neutrality. Of course, the Jewish state, as such, cannot pretend to be neutral. It is acceptable that it is not neutral, but it must respect freedom and equality. I believe the nation-state law is clearly in violation of this principle, but I need to stress that contrary to what has been asserted, it is not a legal violation of this principle but a symbolic attack on it. The authors of the bill refused to include civic equality alongside describing Israel as a Jewish state. This is outrageous and unprecedented. There is no constitution anywhere in the free world, and hardly in the non-free world, that speaks of a connection between the state and the identity of the majority people without simultaneously stressing civic equality. Obviously, attributing a national character to a state, where the national identity does not include and does not purport to include all of the state's citizens, creates the possibility of interpreting this national character as giving legitimacy to discrimination against national minorities, and it is the business of a democratic constitution to reject such an interpretation explicitly. It should be stressed that this law does not say anywhere that civic equality may be violated in the name of the Jewish character of the state. While its authors, or at least some of them, may well have

wished to create an atmosphere in which this would be possible, there is no likelihood at all, in my view, that the Israeli Supreme Court will allow anything that it judges to be contrary to civic equality to pass under the pretext of the Jewish character of the state. This holds true as long as the Court adheres to the basic legal principles that, up to now, have guided both its more liberal and more conservative judges. This, too, some of the authors of the nation-state law would wish to change, but I hope they will not be successful in realizing this hope. A country's constitution is not merely a legal document to be interpreted by judges; it is the nation's credo. Therefore, the nation-state law is a grave matter,

The Court has ruled repeatedly that the Jewish character of the state cannot be interpreted as allowing discrimination between citizens based on ethnicity or religion and I do not believe this will change because of the passage of the blatantly unbalanced nation-state law. I do not believe that either the Swiss ban on minarets, or some of the Danish proposed legislation, would pass muster in the Israeli Supreme Court if it had to rule on their conformity to Israel's basic laws – and this is true after the passage of the nation-state law no less than before it. Civic equality is still a constitutional norm in Israel, via the Basic Law: Human Dignity and Liberty, which has been interpreted as forbidding discrimination (as an offense against human dignity), and this norm is enforced by the judiciary. Nevertheless, the very passage of the law emphasizing the Jewish character of the state, while refusing simultaneously to publicly commit to full civic equality, is an offense, not against neutrality, but against the principle of civic equality that should be upheld universally by liberals and democrats. ■

Alexander Yakobson is Associate Professor of Ancient History at the Hebrew University of Jerusalem. His main fields of research are democracy, popular politics, public opinion and elections in the ancient world, democracy, national identity, nation-state and the rights of national minorities, religion and state in Israel and in Western democracies.

Cosmopolitan Democracy as a Method for Addressing Controversies*

Daniele Archibugi

A Journey to Montenegro

I visited Montenegro once. It was in August 1995, the most politically torrid summer of the Balkans. The Yugoslavian civil war was at its peak and the investigation of the Srebrenica slaughter that occurred just the month before was ongoing. The occasion to undertake such a journey was very challenging: I was invited to lecture in a summer school, funded by the Soros Foundation, devoted to discussing conflict resolution in ethnically mixed areas. Montenegro was spared by the civil war but, as part of the Yugoslavian Federation, it was seriously affected by economic sanctions and drugs; food and oil were scarce.

The only route to Montenegro was by boat, from Bari to Bar. It took a full night to reach my destination even though the two shores of the Adriatic Sea are just 200 kilometers apart. The boat was full of angry and frustrated Balkan folks: most of them tried to reach the Italian side to escape the war. They carried dubious papers and were implacably rejected by the Italian border police. When we reached the Bar port, I was picked up by a bus, although I was the only passenger. They explained that they had a smaller car, but because of the sanctions, no gasoline was available, and they therefore had to use a diesel fuel vehicle.

The summer school was held in what appeared to have once been a luxury hotel. It was a building with several floors, the only tall building in the landscape. There were rumors that Marshall Tito himself used to spend his summer holidays there. The hotel desperately needed maintenance, but at least all the lifts worked properly. There were no tourists in that dark season; the hotel was open but only occupied by the school's participants. The waiters were mostly young men from nearby Albania, and still, in 1995, I could not spot any sign of ethnic animosity between the Serbs and the Albanians. The waiters were delighted to have some guests, even if they were less affluent than those of the past. They served abundant and tasty food, but every day it was the same soup: a clear indication that the area was not starving, but that they could rely on local supplies only.

The participants were the most noteworthy aspect of the school. The Soros Foundation selected them from young men and women who had already experienced some forms of activism in non-governmental organizations. About half of them originated from the territories of the former Yugoslavia. The other half came from all over Europe, and a few from North America. Many of them were selected from areas with ethnic or religious conflicts: Protestants and Catholics from Northern Ireland, Greeks and Turks from Cyprus, Spanish activists from the Basque countries and Cataluña, Palestinians and Israelis, Rom minorities from several countries.

At the time, the book I co-edited with David Held on cosmopolitan democracy was just published.¹ We cultivated major hopes that the end of the Cold War could lead to more international cooperation and that international organizations could be reformed to become more authoritative. Many hoped that the Yugoslav civil war would be the first example showing that with the end of the East-West rivalry, local conflicts could be easily managed through negotiation and arbitration. I prepared my class presentations and I was ready to give a typical top-down lecture on the principles and practice of self-determination.

When I finally met the participants, I could not speak for more than one minute at a time. I was interrupted by students asking for definitions and clarifications, complaining that the ideas illustrated in my slides were daydreams. In a while, the situation degenerated, and the students started to quarrel among themselves. While the class was held in English, the quarrels were conducted in a variety of idioms and there was no evidence that what somebody was shouting at everybody was actually understood by anybody.

* Address at *IAJLJ Rome Conference: CONTROVERSIAL MULTICULTURALISM* (Nov. 8, 2018).

1. Daniele Archibugi & David Held (eds.), *COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW WORLD ORDER* (Polity Press, 1995).

I had a fresh vision of the Tower of Babel. The concept of “self-determination” itself erupted passion and anger in the room and one and all believed to be victims, avengers and prophets. I still remember a lady in her mid-20s with a fresh Serbian degree in architecture who said in broken English: “My younger brother was conscripted in the army and has died,” but not even such an emotional fact managed to silence the audience. I still wonder what she wanted to add. Another student from Cyprus recalled that his first life memories were the Turkish planes bombing his native town, and that he never returned there.

The only sensible thing I managed to do was to stop the conversation and send the students to the beach: no young person could resist such an invitation on a hot summer day in the Mediterranean seashore. Before dissolving the session, I opened my briefcase, where I had the viewfoils about a few contested cases of self-determination claims I had prepared at home. I divided the class in groups and distributed the homework: hand-outs with data for each area and, above all, with the claims made. These claims included linguistic minority rights, religious tolerance, quotas reserved for population groups, re-drawing of borders to repair abuses of power of the past, and so on. I asked each group to prepare a self-determination plan for one of the contested areas. I recommended that they think in terms of solutions rather than problems. The guiding principles were rather elementary: any peace plan to sort out self-determination conflicts could be acceptable under two conditions:

- 1) It should minimize political violence;
- 2) It should guarantee and protect human rights and minority rights.

I urged students to look at a possible future rather than at the wrongdoings of the past. Each team should also explain why its proposal was fair and plausible. Students were quite eager to undertake the task, but before dismissing them, I added another relevant requirement: “Nobody should be part of the group discussing his or her own nation.” Many students complained and said that they were there to discuss their homeland. However, with the prospect of gaining access to the beach, they accepted the requirement. Later in the afternoon, the groups started to work in the hotel hall, the garden, and the beach and they continued their discussions until late. I could eventually relax, and listened to what the various groups were discussing.

The class met again the following day. The members of each group presented their proposal, and what they suggested made sense. It was rather easy for me to

intervene and ask “can this principle be generalized and could you do the same for your own nation?” The recurrent answer for the latter question was “our case is different,” and this allowed me to ask why it was different and if everybody else agreed with it. It was now possible to start a decent conversation.

Learned Lessons about Conflict and Conflict-Resolution

This experience taught me three lessons. The first is that people who are directly involved in a conflict lose their critical understanding. Their wisdom becomes distorted and partisan and they are no longer able to judge objectively. The participants in a conflict involving self-determination are more like football fans who do not even try to be objective since they are anxious to defeat the other side and win, rather than just play well. To recover a balanced perspective, it is useful to induce the individuals involved to look at the same problem from the opposite perspective or even to force them to wear the other side’s shoes.

This does not guarantee that everybody will then become more inclined to accept a fair deal. Conflicts and their resolutions are related inextricably to the power in the hands of the contenders. Irrational feelings certainly do not help, but the fact that one side has enough power to impose an unjust settlement is often a sufficient condition to induce the strong side to impose its arrangements, even if unjust. If we think about apartheid in South Africa, for example, the supporters of the regime did not even try to justify their rule on the grounds of principles of justice. There is not much that can be done to persuade individuals and groups that they should voluntarily renounce a privileged position if they have the power to get away with it. Looking at the problem from another perspective may help remove some of the emotional components from the agenda. Whenever opponents are obliged to look at the same dispute from a reverse angle, they are more likely to reach conciliation and accept a third party’s assessment of their case (see the following section).

The second lesson is that even if it is useful to engage in a conversation with opponents, this does not imply that the two sides are equally responsible for the outbreak of the conflict in the first instance or for the crimes committed. In most conflicts, both sides violate basic human rights norms, and this is one of the very reasons why conflicts should be prevented in advance. However, it is likely that the stronger contender is in a position to infringe on the human rights of the weaker side. This is

often overlooked since the winner is also “the owner of truth,”² but this should not impede a critical reading of the abuses committed by both sides. The willingness to engage in conflict resolution should not hide the fact that there are oppressors and oppressed and that they cannot be put on the same level. In South Africa, both supporters and groups opposing apartheid committed crimes, but they cannot be placed on the same level.

The third lesson is that oppressed communities or minorities should not be idealized. The fact that their human rights are violated, and generally violated more than those of the oppressing political community, does not necessarily imply that they have superior ethical standards. There are many historical cases where factions that were long oppressed have proven even more ferocious toward their previous oppressors once they gain power. Already in high school, I supported the rights of the Cambodian people against the American invaders and I still believe that it was justified to demand the withdrawal of U.S. troops from Cambodia. Still, the Khmer Rouge regime proved to be much more genocidal than the American army. This is not always the case and we do find cases where the previously oppressed evolve into reliable rulers after their victory. The case of South Africa under the leadership of Nelson Mandela shows that these transitions are sometimes possible.

These three lessons can be synthesized into three proverbs: a) no-one can be a judge in his own case; b) the wrongs of the oppressed are not equal to those of the oppressors; c) the weak side is not necessarily the good side. These three lessons cry out for better ways to manage conflict, namely the call for external parties able to assess conflict and to provide long-lasting settlements that are satisfactory for all parties involved.

The Third Party: Can an External Institution Help in Conflict Resolution?

Legal theorists have often discussed the relevance of a third party in conflict resolution. The third party is an institutional entity with the purpose of facilitating a dialogue among belligerents. Most conflicts end because there are third parties that are instrumental in acting as negotiators and mediators. Following Norberto Bobbio,³ we can distinguish three different third party categories.

The first category is simple mediation. The mediator acts as a conciliator among different sides. The mediator is limited to the role that the contenders are willing to entrust to him or her. The mediator generally does not invest his or her own resources (either military or economic) in the conflict resolution. The effectiveness of

the mediator is associated with the moral and political authority that the mediator has accumulated and is able to spend in a conflict. A mediator can listen to the parties, identify the potential concessions that the contenders are willing to make, and provide suggestions that can broker a deal. In this context, the mediator is neutral, considers the force available to the contenders, and then makes suggestions that can limit the use of violence. A mediator who moves beyond this role and takes the side of one of the contenders has become an ally of one of the fighting factions and often loses the authority to broker a deal.

There is a lot to be learned from attorneys in family or corporate law since they often are excellent mediators in very emotional cases (think, for example, of the emotions emitted during divorce negotiations). There is, of course, a basic difference between these mediators and those who act in cases involving international disputes. Family and corporate mediators try to find shortcuts that avoid going to court but operate in a context in which courts are available. Mediators in international conflicts cannot rely on courts or must deal with courts, such as the International Court of Justice, that have no power.

The second category is the referee. A referee should apply a common code of conduct that the parties have shared *ex-ante*. He or she is not neutral but impartial.⁴ Regardless of the power in the hands of the contenders, his or her decisions should be taken on the grounds of what is dictated by the agreed upon code of conduct. The more the code of conduct is widely shared, also across other parties not involved in a specific context, the more the work of the referee is likely to be recognized. The referee does not have the resources to impose his or her decisions and the parties may be reluctant to acquiesce. Still, the rulings of the referee are there even if not enforced and they provide a warning to the belligerents who have accepted both the code of conduct and the referee. When the rulings of the referee are not accepted, the negligent

2. Expression by Primo Levi, *I SOMMERSI E I SALVATI* [THE DROWNED AND THE SAVED] 5 (Einaudi, 1986).
3. Norberto Bobbio, *IL TERZO ASSENTE. SAGGI E DISCORSI SULLA PACE E LA GUERRA* [THE THIRD ABSENT: SAYINGS AND SPEECHES ON PEACE AND WAR] (Torino, 1988); See also Pierpaolo Portinaro, *IL TERZO. UNA FIGURA DEL POLITICO* [THE THIRD: THE FIGURE OF A POLITICIAN] (Milano, 1986) for a broader analysis.
4. See Mary Kaldor, *NEW AND OLD WARS* (Polity Press, 2012) for the difference between neutrality and impartiality.

party loses authority and legitimacy in international affairs.

The third category is the judge. He or she has not only a code of conduct that is either shared by or imposed on the members of a community, but also has the power to enforce the ruling. The parties to the dispute can like or dislike the verdict but they are forced to accept it. In principle, the judge should be even more impartial than a referee. The rulings of a judge, however, are often even more controversial than those of a referee. This might be because the contenders have less of an exit possibility. A contender who is unhappy about the decisions taken by a referee may withdraw from the procedure. The International Court of Justice, for example, is closer to being a referee than a judge, and it sometimes happens that states decide to abandon the hearings when they perceive a pending unfavorable ruling. The existence of a proper judge does not contemplate that a party may withdraw from the case: such a case would imply a proper secession or a civil war. Both options have very high costs, which generally lead to the acceptance of a ruling even by the proponent for whom it is unfavorable.

Is there a trend to turn from mediators to referees, and from referees to judges? In the international arena, this has often been the case, but we have also seen cases of total failures in which massive attempts of third parties to sort out controversies have ended in failure. In other cases, the solution for long-standing conflicts has been paved by enlightened third parties. Within states, the evolution has been more controversial, and most states were created as forms of imposition of one side over the others.⁵ Only after executive power was firmly established, was it possible to slowly generate independent judicial institutions. Regardless of what has happened within states, in international relations a different path is desirable, where progressively the third party becomes more authoritative, more daring, and also more powerful.

Cosmopolitan Democracy as an Alternative to *Realpolitik*

The hope that conflicts can be mitigated and perhaps even solved through the recourse of the good offices of third parties, of course, is very much against the idea that power is the decisive element in international relations. Cosmopolitans understand that power and interest do shape political outcomes and often mince justice. It is sufficient to watch television news to get ample evidence about it. However, claiming that power and force are the sole sources of authority and the only factors that shape conflict resolutions is misleading.⁶ World politics are also influenced by a business community willing to enlarge

its scope as well as by a civil society active in media, social networks, tourism and religion. These business and social groups have vested and explicit interests in peaceful relations among communities and, as Immanuel Kant already indicated more than two centuries ago, more and more persons perceive the violations of human rights in remote parts of the world as violations of their own rights.

Cosmopolitan democracy is an attempt to enlarge the number of players that take part and inform global decisions. Governments alone are no longer the appropriate representatives of a more complex and more integrated community. What is needed, therefore, is to provide these groups with the possibility of having an institutional representation that will hopefully manage to enlarge the number of players generating pressure groups that will naturally act as moderators.

Cosmopolitan democracy has made bold proposals, including the enlargement of the UN Security Council, the limitation of the veto power, the strengthening of international judicial institutions such as the International Court of Justice and the International Criminal Court, and the creation of a Parliamentary Assembly within the United Nations.⁷ Some of these institutions, such as the UN General Assembly and the UN Security Council, reflect the so-called international community and give voice to governments only. Others, such as the International Court of Justice and the International Criminal Court, should in principle be the voice of independent judicial review,

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5. Charles Tilly, *COERCION, CAPITAL, AND EUROPEAN STATES: AD 990-1990* (Blackwell, 1990).
 6. See Joseph S. Nye Jr., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (Public Affairs, 2004), which highlights that power has many different faces.
 7. The literature on these proposals is growing despite the rather meager policy success that has been achieved so far. See Daniele Archibugi, *THE GLOBAL COMMONWEALTH OF CITIZENS. TOWARD COSMOPOLITAN DEMOCRACY* (Princeton Univ. Press, 2008); Daniele Archibugi and Alice Pease, *CRIME AND GLOBAL JUSTICE. THE DYNAMICS OF INTERNATIONAL PUNISHMENT* (Polity Press, 2019), Jo Leinen & Andreas Bummel, *A WORLD PARLIAMENT. GOVERNANCE AND DEMOCRACY IN THE 21ST CENTURY* (Democracy without Borders, 2018); Luis Cabrera (eds.), *INSTITUTIONAL COSMOPOLITANISM* (Oxford Univ. Press, 2018); Lucio Levi, Giovanni Finizio & Nicola Vallinoto (eds.), *THE DEMOCRATIZATION OF INTERNATIONAL INSTITUTIONS: FIRST INTERNATIONAL DEMOCRACY REPORT* (Routledge, 2014).

although they are often pressured by national governments, and this affects their autonomy and impartiality. Cosmopolitan democracy calls for the creation of institutions that could be the expression of the people, such as an elected Parliamentary Assembly within the United Nations.

Most international institutions have tried to solve conflicts through non-violent means, thus providing an alternative to war and sectarian violence. The history of warfare since the end of World War II and the building of the United Nations indicate that these institutions have been only partially successful. It is therefore legitimate to search for additional methods and institutions that could be more effective.

Cosmopolitan democracy argues that most of the international institutions are inter-governmental. They have often reinforced separation between communities, especially in conflicts generated by self-determination claims. Cosmopolitan democracy hopes that giving voice to a plurality of players in international affairs – including minority groups, civil society associations, trade unions and business community representatives – will facilitate the emergence of larger political options and therefore expedite conflict resolution.

It is a standard assumption that to make peaceful conflict resolution possible, we need two different types of consensus: global and local.⁸ The pressure of a global and cohesive international community is often the decisive way to open new political opportunities; again, the end of apartheid was possible thanks, in part, to a large international front keen on isolating and putting pressure on the incumbent South African government. This is not always the case, and we have seen that the Yugoslav conflict in the 1990s ended not only when the international community supported a common view, but also when there were sufficient territorial concessions that appeased the Croatian and the Serbian factions.

One of the distinctive tenets of cosmopolitan democracy is to refute the idea that any political community can be identified by a single voice. There are hawks and doves in each conflict area, as well as political parties and groups more or less willing to engage in dialogue and to make concessions. A peaceful outcome is often the consequence of the doves gaining ground and authority, and of their ability to engage in constructive dialogue with likeminded groups in the opposite faction. One of the decisive factors that ended the Cold War in Europe was the ability of the Western peace movement to link with Eastern human rights groups.⁹ These attempts showed that the view popularized by sectarian governments, both in the West

and in the East, according to which the only possible outcome was conflict between the two blocs, was wrong and misleading.

Northern Ireland as a Success Story

An important case where mediation has proven to be successful is Northern Ireland. For several decades, if not centuries, Catholic and Protestant communities have been fighting in Ireland. After the Irish partition of 1921, the contestation continued for decades, despite the very strong cultural, social and economic integration between the United Kingdom and the Republic of Ireland. On the one hand, the UK considered whatever happened in Northern Ireland to be an internal problem and it was reluctant to negotiate with armed groups such as the IRA. On the other hand, Irish resistant groups did not consider the electoral process, widely guaranteed in Northern Ireland as in other parts of the UK, sufficient to deal with their claims. This led to continuous sectarian violence by both sides.

Alternative perspectives to peacefully resolve the disputes, such as those advocated already in the 1970s by Betty Williams and Mairead Corrigan (one Catholic, the other Protestant), co-founders of the Community of Peace People, were shot down by both the British government and by the Irish Republican Army. Not even the joint Nobel Peace Prize that the two women received in 1977 helped these groups to settle the conflict. The change occurred when UK Prime Minister John Major switched strategy in the 1990s, which led his successor Tony Blair to sign the Good Friday Agreement of April 1998. A conflict that looked endemic and never-ending was in less than a decade taken to a political, rather than military, dimension. In 1998, two of the top negotiators, John Hume and David Trimble, received a joint Nobel Peace Prize “for their efforts to find a peaceful solution to the conflict in Northern Ireland.”

Can the same good-practice be generalized to other conflict areas? We are well aware that, so far, positive adjustment conflict resolutions have met more failure than success, especially when issues of self-determination are at stake. However the alternative, namely to persist with conflict, is not producing solutions and it is much costlier,

8. Oliver Ramsbotham, Tom Woodhouse & Hugh Miall, *CONTEMPORARY CONFLICT RESOLUTION* (Polity Press, 4th ed., 2016).

9. Mary Kaldor (ed.), *EUROPE FROM BELOW: AN EAST-WEST DIALOGUE* (Verso, 1991).

besides being ethically devastating.

My hope is that other endemic conflicts, including the Israeli-Palestinian conflict, will be able to learn from the Northern Ireland case. I do hope that ventures such as the West Eastern Divan Orchestra, founded in 1999 with the aim “to promote understanding between Israelis and Palestinians and pave the way for a peaceful and fair solution of the Arab–Israeli conflict” will have hundreds of imitators across universities, media, factories, schools

and neighborhoods. I also hope that their founders, Daniel Barenboim and Edward Said, will soon be considered to be forerunners of a peaceful, cooperative and long-term political reality, like Betty Williams and Mairead Corrigan, rather than mere daydreamers. ■

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Multiculturalism and International Criminal Justice

Robert Roth

The multiculturalist dimension in the functioning of international criminal justice (ICJ) can be summed up in a double challenge: to elevate a regional problem to a global problem; and to deliver universal justice while not neglecting the regional dimensions of the alleged crimes.

As a starting point, a simple observation: two thirds of humanity do not participate in the main institution of ICJ, the International Criminal Court (ICC). These non-participating countries include recognized adversaries of the ICC, like the U.S. and Israel, but they also include – and far more importantly when it comes to multiculturalism or plurality – India and China. This absence may explain why international criminal justice has not succeeded in departing from its Western origin. It is a truism – yet a numerously repeated truism – that “Western justice modalities” are not value neutral.¹ Some critics of ICJ, comparable to the so-called Third World Approaches to International Law (TWAAIL), go further: the ICC “choreographs processes”² of shifting the dealing with major crimes from the local to the global.

The system has certainly made efforts to integrate cultural differences. However, these efforts have not been as serious, focused and constant as they should have been. Furthermore, the treatment of cultural differences has been sometimes tainted by Western arrogance. Nevertheless, some steps have been taken to “globalize” the approach of ICJ and integrate plurality in its treatment of the crimes to which it has been entrusted.

a. An analysis can begin with the Preamble of the Rome Statute of the ICC: “Conscious that all peoples are united by common bonds, their *cultures* pieced together in a shared heritage, and concerned that this *delicate mosaic* may be shattered at any time...”³ The Court’s mission is thus primarily phrased in cultural terms, even if the approach to “culture” here is rather conservative, as it refers to the heritage rather than to the living cultures. The Court is also entrusted with the mission to preserve the “delicate mosaic,” and hence the diversity of cultures.

b. Article 53 of the ICC Statute which establishes the rules governing the prosecutorial activity refers to the “*interests of justice*.”⁴ Scholarly comments on this provision have proposed to consider under the search of the interests of justice the effects of prosecutions and judicial decisions on the societies concerned.

A multiculturalist approach leads to a reformulation of a classical question: shall the definition and application of crimes be modulated according to the cultural context as well as to the socio-historical background? For example, shall a criminal judge in 2019 have to take into consideration and incorporate into his/her judgment the colonial past of countries, assuming of course that this past reflects on the personality of the person he/she has to judge? The question illustrates the tension *within the notion of universal justice*: does universal justice mean applying the same standards for every member of the “*global community*” or adopting a differential approach: Different standards for different cultures?

In conclusion, it is asserted that recognition of diversity or plurality can only reinforce the legitimacy of ICJ. ■

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1. Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NORTHWESTERN UNIV. LAW REVIEW 2 (2005), 539, at 551.
 2. Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* 146 (Cambridge Univ. Press, 2009).
 3. Rome Statute of the International Criminal Court, preamble, Jul. 17, 1998, 2187 U.N.T.S. 3.
 4. *Id.*, art. 53, §2(c), 33.

Do Majorities Have Rights or Interests?

David Goodhart

Most of the world's 156 major countries have an ethnic majority, most of them with 70% or more of the population belonging to the majority. This is still true for most Western countries too, but this is going to change rapidly over the next few decades. People of white European ancestry are already a minority in most major cities of North America, and by 2050 the U.S., Canada and New Zealand will all be majority-minority (with Western Europe and Australia following later in the century).

"So what?" is the response of many liberal-minded people. For others, with stronger national and ethnic attachments, a new age of anxiety appears to be opening up. It is at least plausible to argue, as Christian Joppke¹ and others do, that much of the populist uprising of the past few years is consciously and unconsciously driven by a defense of majority culture.

Yet majorities are the absent center in most liberal democratic thinking. Political progress and much political theorizing for the last two centuries have been focused on limiting and spreading power and thus, in part, on preventing majorities from abusing their dominance. The two great progressive causes of the 19th century in the United Kingdom were extending the electoral franchise to all classes (and women) and securing the equal rights of minorities, Catholics, Jews and non-conformists in Britain. But once the right to join the majority in full citizenship had been achieved, the focus shifted in the mid- and later 20th century to the right of minorities to be *different* from the majority.

The universalist shift of the mid-20th century, exemplified by the United Nations Declaration of Human Rights, proclaimed the moral equality of all human beings and, implicitly, the right of individuals to practice a religion or a distinct cultural life wherever they might find themselves. In the context of significant non-Western immigration into Western societies in the 1960s and 1970s, the message of liberal multiculturalism was "come here and be yourself." As all cultures are valid and worthy of respect, it was argued, it is wrong to force newcomers to adopt the common norms of the majority society beyond obeying the law and paying your taxes.

This may have helped provide a psychological soft

landing to minority individuals, especially from traditional societies, arriving in increasingly pluralistic and liberal Western societies, but it was also creating, in Eric Kaufmann's phrase, an "asymmetrical multiculturalism."² That means minorities have a way of life and a culture that is important to them, indeed that is part of their identity as human beings, and needs legal protection and recognition in liberal democracies. Majorities, however, do not need the same protection for their culture.

Two reasons are usually given in defense of this asymmetry. First, majorities do not need special rights or protections in the way that minorities do because their culture and way of life is already pervasive: the language that is spoken everywhere, the national ceremonies and rituals, the culture and history that is transmitted through the school system, and so on. Second, while ethnic majorities may exist in some abstract sense of a shared ancestry, there is no substantive majority culture or way of life; there is too much value and life-style diversity, too many different sociological tribes, in a county like modern Britain.

Christian Joppke makes both of these points in his paper presented at the IAJLJ Rome Conference (published in this issue). He rejects the idea that there is a dominant ethnicity in a country like France or Germany, but then he also argues that majorities do not, in any case, need protection. "Majorities by definition have the democratic process at their disposal, they don't need the legal process which is the domain of rights."³

There is, however, a certain tension between the argument that majorities do not really exist and that their culture is so pervasive that it needs no protection in the way that minorities are protected. In any case, the traditional defense of asymmetrical multiculturalism has

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1. Christian Joppke, *The Neonationalist Defense of Majority Culture: Themes, Actors, Policies*, 62 JUSTICE (Winter 2018-2019).
 2. Eric P Kaufmann, *THE RISE AND FALL OF ANGLO-AMERICA* 293 (Harv. Univ. Press, 2004).
 3. *Supra* note 1.

been weakened by the demographic facts I mentioned at the very start. In an increasing number of cities, towns and neighborhoods, the majority way of life and its institutions -- shops, pubs, churches -- is no longer dominant.

If there were no such thing as an ethno-cultural majority, then presumably nobody would care about the disappearance of the majority way of life. It is pretty clear, however, that a large minority or even a majority of citizens of the majority group do care about this erosion. This can be ascertained by just asking people or by observing their behavior.

Opinion polls suggest that national identities remain strong and that large majorities want significantly lower immigration, while significant numbers of people complain of feeling like strangers in their own land. Moreover, if one observes patterns of settlement and segregation, it is clear that members of the ethnic majority tend to move to areas where their groups are dominant, just as minorities tend to cluster together.

The democratic dominance of the majority argument is also weakened by the fact that majorities are not self-conscious agents in the democratic process. There are, thankfully, not majority parties and minority parties (though the latter are emerging in some European countries) and, instead, there are Labor, Conservative, Liberal Democrat, and other parties. Majorities have a low political self-awareness, albeit one that is probably rising as their majority status becomes threatened. The fact that majority interests are hard to define and hard to represent in a liberal political system, however, does not mean that they do not exist. Therefore, how should liberal societies think about majority concerns?

White Europeans do not belong to a different species and have similar psychological attachments to cultures and ways of life as do the ethnic minorities in European societies. It is true that those ways of life are very diverse, but that is increasingly true of minorities too, and the strongest attachment to a way of life is usually expressed by the least mobile and least educated members of both majority and minority groups.

Joppke is probably right that legal rights are not the way forward. The state does not belong to the majority, and the legal system, although not color-blind (see anti-discrimination legislation), should remain broadly indifferent to majority or minority status. A legal claim to indigeneness is potentially divisive, though it is not impossible to imagine laws to protect the majority language from being over-shadowed in certain places, and even to protect certain national rituals.

It is more appropriate, however, to think of legitimate majority concerns as interests rather than legal rights -- interests that democratic politics should accommodate and give voice to more than it does at present. What those legitimate interests are will be worked out as part of national democratic conversations that will depend on national circumstances. (For example, if Israel is to remain Jewish and democratic, there will have to be some degree of demographic engineering to ensure a permanent Jewish majority.)

The key interest of anxious majority groups is in a degree of stability in the way one lives. The right to remain the dominant, tone-setting group in any particular neighborhood is obviously not a right that any liberal society could grant. That would require restrictions on where people live, something that smacks of the Soviet Union or *apartheid* South Africa. Furthermore, there is a distinction to be drawn between preserving a majority way of life in specific places, even as the majority loses its majority status, and preserving the overall numerical dominance of the majority, which is clearly not a feasible goal.

Yet the idea of a settled life and a degree of control over one's environment is precisely the goal that modern politics does hold out to citizens, both majority and minority. Stability need not necessarily mean homogeneity, and stability is not only desired by majorities -- look at the resentment among British Caribbeans at the way they are being driven out of "their" Brixton by affluent, liberal whites. Policies to reassure majorities and support their interest in preserving familiar ways of life both locally and nationally could include restricting immigration to ensure a degree of demographic stability; more emphasis on integration of newcomers into common norms than on diversity and difference; managing ethnic settlement so minorities are well spread out and do not cause the majority to decline too rapidly in particular places; preference for sons and daughters in allocation of public housing; public subsidy of pubs and other traditional majority institutions that are disappearing. One might add the encouragement in the public sphere (and in schools) to celebrate a non-chauvinistic version of the national story, much as minorities are encouraged to celebrate their story.

The desire to retain a majority way of life is usually a defensive, not an assertive, sentiment, and it is seldom hostile to minority groups and minority rights. Indeed majorities and minorities usually want the same thing as the Brixton example shows.

Developed democracies that are set to lose their ethnic

majorities in the next few decades are moving into uncharted territory. Nobody knows whether it will be possible to retain a strong sense of public interest and mutual regard, as well as a political democracy and a redistributive welfare state in a society *not* grounded in an ethnic majority. It is therefore best to move with caution and recognize that significant sections of the majority group have a legitimate interest and expressed desire in preserving their culture and way of life. Mainstream politics should reflect, not suppress, this interest. ■

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To What Extent Is Belonging to the Body Politic Plausible Without Censoring Minority Identities?

Dimitris Christopoulos

Trans-Individuality or the Plural Paradox of Singular Cultures

As a concept, multiculturalism has an existentially plural content. It is plural not only in the obvious sense of the coexistence of many cultures in a given society, but also in the sense of the coexistence of many cultures in one. In that sense, despite subjective perceptions of unique and particular identities, a singular culture is plural since it represents a meeting point of other cultures, the convergence of which gives birth to a new one. The new culture, resulting from a synthesis of plural elements, does not necessarily recognize that it is a mongrel creation. It generally prefers to regard itself as an original product. Yet reality goes otherwise.

This is what trans-individuality is about. It has the capacity to engender a new understanding of social relations, a rethinking of the individual and collective as relations and processes of individuation rather than as essences.¹ Individuals are members of the collective, of particular social relations and structures, just as collectives are nothing other than a reflection of the individuals who constitute them. Trans-individuality is not the relation between two constituted terms, between the individual and society, but a relation of relations, encompassing the individual's relation to itself, the process of his or her individuation, as well as the relation amongst individuals, and last but not least, the relation between different collectivities.

People are not happy when they come *tête-à-tête* with their trans-individual nature, when they face a reality that reveals that what they are is an amalgam of different cultures. This is mostly because identities are not based on mere facts, but on myths *and* facts. Many facts are created by myths. What distinguishes a myth from a lie is that the myth has a normative dynamic: it not only says what happened but also implies what must have happened. Therefore, the myth, unlike the simple lie, systematically mobilizes human behavior, unites and divides since it convinces. Religious assumptions are *par*

excellence such myths.

Consequently, the negation of a myth and the revelation of the plurality of a singular culture can turn out to be a traumatic experience. Traumas hurt and individuals prefer to be immune, or at least protected from pain. That is why people tend to believe in myths: a good myth is like a good tale. The more you believe in it, the happier you are, more confident to face others and of course, much more secure about your identity. The myth functions like the safe hug of a mother after a nice tale, when you are ready to close your eyes and sleep in peace. Myths allow us to sleep in peace.

Scratching under the surface of a mythical identity might bring in the air sad stories, disasters, stories that have been occulted and snapshots that are forgotten because, exactly the opposite of the myths, they should have been forgotten. Memory is always selective. It is partial. You remember the crimes that have been done to you. You do not want to know the crimes you committed to become who you are. What you forget is what you deny; it is the object of your denegation in Freudian terms.

Some might say that it is better so. The argument that we should remain sleeping in our myths is governed by an often unrecognizable cynicism: "*we do not bother about what has happened, but what we know has happened is the only truth.*" It is also controlled for an intolerable paternalism: After all, human beings are better immature rather than unsafe under the constant fear of learning what they should not. Knowing it threatens the bonds of social cohabitation. Finally, the argument is deeply *conservative* as it, in turn, promotes a social class based on ignorance and bias. The motto that "the truth we learn only if it does not hurt us" is an obstacle for individual or collective self-knowledge, an obstacle in the course of human thought.

1. Jason Read, *Relations of Production: Combes on Transindividuality*, 23 *HISTORICAL MATERIALISM* 3 (2015).

On the other hand, this conservatism also has its good reasons: in times when violence often replaces rational settlement of disputes in the public domain, any order – even one based on oblivion – is not bad. Yet, there is a major problem here. In contemporary rival communities of class, national and other antagonisms, it is hard to hide something. Others will be there to remind you of your sins. We are exposed objectively to criticisms, even malicious, and to the insults of the deconstruction of our constituent myths. Against this, we cannot claim a generalized right to non-insult. As R. Dworkin writes, in a democracy no one has the right to a general non-violation of his personality. “A right not to be insulted or offended”² is simply unthinkable since it leads to complete censorship and silence.

I argue that integration implies a level of censorship due to the fact that state neutrality is unthinkable. There is always the strong culture *de facto* or *de jure*. The problem is that a general “right not to be offended” leads to complete censorship, therefore segregation and potential deconstruction of the body politic: the triumph of tribalism, the return of holistic societies over individualistic ones.³

Integration, Exclusion and Assimilation

Integration can be defined as a status of adequate access to the fundamental social goods and the effective possibility of exercising rights deriving from them. On the other hand, exclusion is non-access, deprivation. Among the two situations that should not be construed as static but mobile – competing and complementary at the same time – there is no vacuum, but hybrid situations of a twofold nature: situations in which integration and exclusion coexist, not necessarily in competition.

I. Integration

1. *Via recognition*
2. *Via assimilation*

II. Exclusion

1. *Via expulsion – extermination*
2. *Via protection*

This typology shows that multiculturalism and integration into a body politic are not necessarily compliant. The protection of any community – whether it is a historical minority or a migrant community – does not necessarily lead to “integration,” but might well lead to isolation and a clustering identity. As long as “protection” does not lead to emancipation, then segregation is always a vivid option. The second advantage

is that it shows that at the service of the objective of social inclusion, violent policies of assimilation can be and have been implemented. Thus, the good has elements of the bad, and vice-versa.

Accordingly, the question of “multiculturalism or not” cannot be set in terms of metaphysical Manichean terms. This is because multiculturalism, both as a fact and as a political project, has latent functions that are akin to both integration and exclusion. Therefore, the prime question here is who we want and who we do not want to belong to the political community. If we agree on the classic wording that “politics is the struggle (...) to influence the distribution of power (...) among the groups within a state,”⁴ the political question itself is how we perceive the composition of political community and then, how we understand the implementation of this synthesis. This is what sovereignty is about.

The response to the second question – the implementation of the sovereign decision who we include and who we exclude – is necessarily related to the first question – the composition of the political body. Dissociating the two – the composition of the body politic and the means to achieve it – leads to naive moralist rhetoric which is offered for free, yet little food for thought and action can be given. If we agree that we do not want Nazis in our body politic, for example, we need to be ready to answer the question “how.” This is particularly so when we face them. The discussion of the means is both of a moral and of an operational value, but if it is conducted outside the historical context of the goal, then it limits its interest more to theology than to history and political theory.

History as a Compass

Then the practical question appears: can other mechanisms be put in place to build the political community from those historically forged and used? To what extent are we prisoners of our history? To what extent does the past dictate immobile inclusion or

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2. Ronald Dworkin, *The Right to Ridicule*, THE NEW YORK REVIEW OF BOOKS (Mar. 23, 2006), <https://www.nybooks.com/articles/2006/03/23/the-right-to-ridicule/>.
 3. Louis Dumont, *ESSAIS SUR L'INDIVIDUALISME: UNE PERSPECTIVE ANTHROPOLOGIQUE SUR L'IDÉOLOGIE MODERNE* (Univ. Chicago Press 1986).
 4. Max Weber, *POLITIK ALS BERUF: GESAMMELTE POLITISCHE SCHRIFTEN [POLITICS AS A VOCATION]* 396-450 (Duncker & Humblodt 1921).

exclusion recipes? Is it that “the past does not die, it is not even past,” as an American writer said? No! History sets the scene, not the scenario. We choose the scenario. History does not impose every idea or practice and even if sometimes it tends to, we have the right to question it.

In this sense, it is unrealistic to believe that Greece can become Canada in the way of dealing with diversity. On the other hand, it is equally unrealistic to believe that history captures to such an extent that it is repeated. The risk of transforming the tragedy into a farce is well known. If any country wanted to follow the integration or exclusion recipe it used a century ago, it simply could not. We cannot get rid of the past, yet we cannot stick to it either.

As Marx put it, “*History does nothing*, it ‘possesses no immense wealth,’ it ‘wages no battles.’ It is man, real, living man who does all that, who possesses and fights; (...) history is *nothing but* the activity of man pursuing his aims.”⁵ Let us not use history as a pretext for hiding or finding our aims.

Assimilation is not a process of incorporating the weak into the strong culture, but in one way or another has a potential to alienate the strong culture that gradually changes. The effort of migrant populations to show high social adaptability indicators is found in almost all migrant host countries: incentives are common. The results differ. This effort intensifies as much as the strong culture offers a plausible promise of class mobility.

In other words, the only safe recipe for integration should be via assimilation or recognition or both (which is most often the scenario), without breaking the promise of class mobility. This is true from one end of the Pacific to the other end of the Mediterranean. The “blocked and at the same time unblocked” scheme for communities is key to decrypting the complex reality of multiculturalism. The conclusion is that therefore, assimilation can never be linear or certain.

No one can guarantee today that the one-way course of assimilation putting a part – even the largest – of the immigrant population on the integration path will not lead to ostracism and ghettoization of another. Actually, this is what mainly happens. The major problem with assimilation is that it asks too much from the people. In fact, this “traditional” assimilation is all-inclusive, requiring the “full packet:” language, habits, morality, often religion, etc. In return, it generously promises class mobility. In other words, the traditional assimilation model does not simply involve redistribution of moral authority, but also resources: real financial wealth. If it does not, assimilation sells false promises that cannot be kept. Then,

the problem starts.

It is not a historical accident that the European North in the crucial post-World War II years successfully supported its growth with migratory hands that, to a large extent, managed to integrate by assimilating in the dominant culture because of the magical European word and institution: “social state.” Without it, assimilation only with reference to national myths and narratives is not possible. Myths – as exciting as they may be – are never enough: myths might create material, but they are not material. Assimilation free of “welfare state” distribution mechanisms ends up as an authoritarian caricature of coercion and violence that ultimately leads the target group out of the game. Ghettos are merely the result of the frustration deriving from the cancellation of social aspirations. Religious radicalization in the West has much to do with it. Combine the nationalist rhetoric along with the neo-liberal recipe of the dissolution of the social state, and then you see why Europe has no reason to be optimistic today, should it continue this way.

Concluding that, we can easily agree that a minimal “dose” of assimilation is inevitable even in the most tolerant state, because state cultural neutrality is hard to fathom. Yet, it is not free. It costs, sometimes, too much. But regularly, it pays back.

The answer here could be what Balibar calls “Civility:” he proposes that countenancing violence demands something more than a moral discourse of nonviolence that disavows the prevalence of state, structural, and identitarian violence in the contemporary world. It demands novel strategies of “civility,” or what he calls “antiviolence.”⁶

Civility in this sense is certainly not a policy that eradicates all violence, but it removes its extremes, leaving room for politics. A democracy that, far from metapolitical (metaphysical I submit) visions, is constantly struggling to settle the inherent conflicts within its body. If otherness is erased and equality does not appear, then the world is not happy with the political community and has reasons to revolt. If there is nothing to return to people who give up their identities, then the model is not convincing at

5. Karl Marx and Friedrich Engels, *THE HOLY FAMILY* §6(2) (Richard Dixon trans., Foreign Languages Publishing House 1956)(1845).

6. Étienne Balibar, *VIOLENCE AND CIVILITY: ON THE LIMITS OF POLITICAL PHILOSOPHY* (G. M. Goshgarian trans., Columbia Univ. Press 2015).

all and urgently needs revision.

This means more “prudent” assimilation, that is, weak, “thin” assimilation, less coercion. However, the fact that we conclude to minimize the volume of assimilation does not mean that the state is abandoning the political project for an equal membership. Therefore, a certain dose of censorship, particularly self-censorship, is unavoidable for every integration model.

In effect, self-censorship is innate to every human coexistence. As stated, state cultural neutrality is

inconceivable. Yet, there are different levels of state cultural partiality. Maximizing partiality creates addiction to censorship by the dominant culture that might potentially explode the body politic and cause irreparable damage both to human rights and social cohesion. This is the challenge for individual dignity *and* collective security. ■

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The Neonationalist Defense of Majority Culture: Themes, Actors, Policies

Christian Joppke

The topic of this paper is the exact opposite of multiculturalism: not the defense of minority culture but, rather, of majority culture. In this respect, Liav Orgad has aptly observed that the concept of “minority” logically implies and asks for the existence of a “majority.”¹

Just what is a “majority”? It certainly is not a legal concept, and in light of Orgad’s attempt to make it one, it is clear that it cannot become one. The Jewish-Israeli case, which presumably has motivated this attempt, is an exception to the rule. There has been a fascinating debate among Israeli elites as to whether Israel is a “normal nation-state,” for example, as France is “French.”² Of course, Israel is not. This is already visible in the fact that there are two words used to describe the Jewish nation-state: “Israel” for the object, and “Jewish” for its quality or adjectival form. In France, there is only one root word, “France” or “French.” The legal-constitutional formula “Jewish and democratic,” in place since 1985, was a trick to hide that fact; the liberals’ ruse to make Israel as French as France. It does not work, and – irrespective of the extremist religious-nationalist agenda that has been driving the campaign – it is entirely logical and honest (if that moral category is appropriate here) to slash the “democratic” and simply refer to Israel as the “Jewish state,” as it was done in the so-called Nation-State Law of July 2018, despite drawing worldwide and Jewish liberal diaspora criticism.

What is “French,” then, if it is categorically different from “Jewish” (which is essentially “tribal,” as argued with acidity by Zeev Sternhell³)? One interesting proposition is to call it “dominant ethnicity.”⁴ There is difficulty with this proposition though. French or Germans, whatever they are, are not ethnic origin groups. They do not share a belief in “common descent” – this is Max Weber’s definition of ethnicity, which is still the most widely used and plausible definition in the sociological literature.⁵ Only consider these countries’ long-time liberal (as in the case of France) or recently liberalized nationality laws (as in the case of Germany): they have made it possible for people of any ethnicity to acquire French or German (or any liberal state’s) citizenship.⁶

If French or German is not “ethnic,” what is it then? These are merely adjectival forms of French or German passport holders who may be of any ethnicity (and may even believe, as do some German national-team footballers, that Recep Erdogan is their anointed leader). French or German are merely the cultural shells of democracy, cultural shells that – due to an inclusive liberal-democratic logic – have become as elastic and permeable, and, one might add, as devoid of any flavor as a slice of American Wonder Bread.⁷

An interesting but futile rescue operation to give some demographic-sociological flesh to the empty signifiers “German” or “French” is the category of *autochthon* (as opposed to *allochthon*). An official legal-cum-demographic category in the Netherlands, *autochthon* denotes people whose parents were born in the Netherlands. However, in the context of a liberal nationality law, which is the

1. Liav Orgad, *THE CULTURAL DEFENSE OF NATIONS: A LIBERAL THEORY OF MAJORITY RIGHTS* (Oxford Univ. Press, 2015).
2. See Christian Joppke, *SELECTING BY ORIGIN: ETHNIC MIGRATION IN THE LIBERAL STATE* 162-170 (Harv. Univ. Press 2005).
3. *Id.* at 165. (According to Sternhell, Jewish Israelis are “a tribe that has won a state for itself.”)
4. See *RETHINKING ETHNICITY: MAJORITY GROUPS AND DOMINANT MINORITIES* (Eric P. Kaufmann, ed., London: Routledge, 2004).
5. Max Weber, *WIRTSCHAFT UND GESELLSCHAFT: GRUNDRIß DER VERSTEHENDEN SOZIOLOGIE [ECONOMY AND SOCIETY]* 237 (Tübingen: Mohr, 1976) (1922).
6. For those in doubt, witness the 2018 FIFA World Cup’s dubious spectacle of some “German” national-team footballers not only playing badly, but not knowing how to sing (or not wanting to sing, or both) even the politically correct third verse of the German national anthem.
7. See Robert Dahl, *DEMOCRACY AND ITS CRITICS* §9 (Yale Univ. Press, 1989) for the inclusive liberal-democratic logic, which requires the congruence between the subjects and objects of political rule.

case in the Netherlands also, *autochthon* still allows, or even calls for, the “*Mezut Özil*” phenomenon.⁸ But then we are back to square one, of “French” and “German,” and “Dutch,” as empty signifiers, mere conventions to denote the boundaries of the *demos*, or, rather, of *demoi* in the plural.

From a liberal point of view, it is impossible to conclude from the existence and endorsement of minority rights that there must be majority rights also, which is one way – paradoxically the liberal way – to make “majority” a legal reality. This is a logical fallacy that misconstrues what is a “right”: a trump card against majority preferences, as legal philosopher Ronald Dworkin put it memorably.⁹ “Majorities,” by definition, have the democratic process at their disposal and, therefore, do not need the legal process, which is the domain of “rights.”

While this is the end of the “majority rights” matter from a liberal point of view, it is not the end of the matter in the real world. There, the defense of majority culture is not only one but *the* central preoccupation of our current “populist moment,” epitomized by the double Brexit and Trump shocks of 2016.¹⁰

However, “populist moment,” originally the title of a historical study of the world’s first populist movement in late 19th century America,¹¹ is a misnomer for the current condition, a kind of wishful thinking because it is not the nature of a “moment” to pass away quickly? What is happening today has deeper roots and more far-reaching implications than the euphemist notion of “populist moment” conveys. What we are witnessing is the rebellion of those who are in the – relatively – unlucky 75th-90th percentile bracket of Branko Milanovic’s famous “elephant curve”¹² that measures the global income gains between 1988 and 2008, the period commonly referred to as “globalization.” In this unlucky percentile range, there has been little to no income growth over the past quarter-century or so. Its occupants are the much-touted “losers of globalization,” mainly the Western lower middle class. They are still “relative” losers because, globally speaking, they are an upper class. These are people mostly in possession of a job and a modicum of security, but rightly suspecting that this condition might not last, and it is surely no prospect to hold for their children. Their general feeling is one of stagnation and decline. As the Bulgarian essayist Ivan Krastev aptly described the social-structural base of the “new populism,” it “represents not the losers of today but the prospective losers of tomorrow.”¹³

While the core of the Western lower-middle-class grievance is economic, it is an interesting and ultimately

puzzling fact that it is expressed in cultural terms. In a kind of psychic goal-displacement, it is not the economic elites and the neoliberalism that they inflicted upon “their” societies that are targeted (“their” is accentuated because it is the nature of these elites to be able to “opt to leave instead of sharing the cost of staying”).¹⁴ The elites have actually managed to shield themselves, at the political plane, behind Margaret Thatcher’s infamous TINA-dictum: “There is no alternative.” TINA was incidentally ratified by so-called “Third Way” Social Democrats and Socialists, which (outside the UK at least) brought themselves to the point of extinction, and rightly so, because “Thatcher in trousers,” which is historian Eric Hobsbawm’s description of Tony Blair, is an ungainly sight. No, not the economic elites or, to use an old-fashioned but acutely relevant term, the capitalist class, are (or is) blamed for the Western countries’ lower middle class plight. Instead, it is immigrants, especially Muslims, who are attacked, and less as an economic threat (which they are not objectively)¹⁵ than as a cultural threat (which is in the eye of the beholder).

It is worthwhile to look at an interesting recent op-ed titled, “Why must it be populism?” in Germany’s leading newspaper, *Frankfurter Allgemeine Zeitung* (FAZ), written by someone who knows about populism firsthand: Alexander Gauland, leader of the *Alternative für Deutschland* (AfD), Germany’s radical right party that

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8. *Supra* note 6. Mesut Özil is a German professional footballer who plays for Premier League club Arsenal London.
 9. Ronald Dworkin, *Rights as Trumps*, in *OXFORD READINGS IN PHILOSOPHY: THEORIES OF RIGHTS* (Jeremy Waldron, ed., 1984).
 10. See Rogers Brubaker, *Why Populism?* 46(5) *THE. & SOC.* 357-85 (2017).
 11. Lawrence Goodwyn, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* (Oxford Univ. Press, 1978).
 12. Branko Milanovic, *GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION* (Harv. Univ. Press, 2017).
 13. Ivan Krastev, *AFTER EUROPE* 81 (UPenn Press, 2017).
 14. *Id.* at 90.
 15. Richard Freeman, *People Flows in Globalization*, 20/2 *J. OF ECON. PERS.* 157, 145-75 (2006). Economists, like Freeman, agree that there is, at best, a “moderate or negligible relation between immigration and native wages or employment in local labor markets” (*ibid.*). This is because immigrants and natives tend to work in different sectors and to be endowed with different kinds of “human capital.”

entered the federal parliament in September 2017 and that is now the country's main opposition party.¹⁶ According to Gauland's entirely plausible analysis, to which the professional sociologist could at best add some footnotes, "populism" is a response to the rise of a "new urban elite," a "globalized class" that controls economy, politics and culture. This "new class" is culturally "checkered" (*bunt*), containing the liberal professionals who propagate multiculturalism and antidiscrimination, but naturally also the neoliberal free market protagonists for whom "diversity" means business. While culturally varied, socially this class is homogeneous: its members effortlessly change jobs and places, from Berlin, London, to Singapore; they eat in the same restaurants, buy in the same shops, live in the same "hip" parts of creative cities, and send their children to private (international) schools. As Gauland summed it up with a sense of poetry, "The rain that falls in their home countries does not make them wet."¹⁷

There is little mention in Gauland's story about extreme economic distress, apart from "miserably paid jobs" and "shabby pensions" after a life of hard work for "ordinary people." It is indeed the case that those who vote for his party and for similar parties elsewhere in Europe, and also for the Republican Party in the age of Trump, are not the *very* poor or the unemployed; these people do not vote anyway. It is rather those who have a middle-level education, who are too immobile to take advantage of globalization, and who have seen others suffer from its negative effects, often in rural and de-industrializing backwaters. It is more the *fear of* rather than actual *losses from* globalization that drives populist radical right parties across European lands.¹⁸

Instead of economic distress, cultural distress is central to Gauland's auto-analysis of populism: to be snubbed by the cosmopolitans for their provincialism; to crave for the *Heimat*, the cultural habitat that local people see threatened by immigrants. Interestingly, however, here is a second near-absence in Gauland's self-reflection: "immigrants" are mentioned only one time, and obliquely at that, as if he wanted to hide something unseemly from a well-groomed audience (keep in mind the high-brow outlet of Gauland's intervention). In reality, immigrants – more precisely, refugees – are the one big theme of AfD, to whom the party owes its very entry into the German Bundestag, which was not long after the 2015 Syrian refugee crisis. One critic counted no less than 291 parliamentary motions (*Anfragen*) since September 2017 that were related to this.¹⁹ "Connect everything to the refugee and asylum issue," and depict the Federal Republic

in the thrall of unregulated mass immigration, is the AfD and similar parties' recipe of success.

The glaring disjunction between Gauland's self-analysis of populism, which mainly rants against elites but barely mentions immigrants, and his party's actual practice, which is almost only about immigrants, suggests that there is method to this. Gauland cannot but be aware that refugees and immigrants are scapegoated, while the elites who are responsible for letting them in are given a free pass. There may, however, be an element of truth in this omission (or rather target displacement) because, unlike early 20th century's totalitarian movements, today's radical right parties are not anti-system and anti-democratic but remain within the parameters of parliamentary democracy. It may indeed be the case, citing Ivan Krastev again, that unlike the 20th-century revolutions of the "masses," the 21st century's "new revolution" is that of "migration." The latter is "an exit-driven revolution of individuals and families" that, in turn, has "inspired the rise of threatened majorities as a major force in European politics."²⁰

There are two more interesting elements in Gauland's inquiry into the origins of Western populism. First, the multiculturalists are put into one camp with the neoliberals, socially and politically speaking. This naturally deviates from how the multiculturalists like to see themselves, namely, as opposed to what Will Kymlicka has denounced as "corporate multiculturalism."²¹ In reality, neoliberal capitalism has absorbed the multiculturalist opposition. This is for what the ubiquitous "diversity" and "interculturalism" rhetoric stands.²²

16. Alexander Gauland, *Warum muss es Populismus sein? [Why must it be populism?]*, FAZ (Oct. 6, 2018), <https://www.faz.net/social-media/instagram/alexander-gauland-warum-muss-es-populismus-sein-15823206.html?premium>.

17. *Id.*

18. Yascha Mounk, *THE PEOPLE V. DEMOCRACY* §5 (Harv. Univ. Press, 2018).

19. Christoph Butterwegge, *Populismus, sozial und national [Populism, social and national]*, ZEIT ONLINE (Oct. 24, 2018), <https://www.zeit.de/politik/deutschland/2018-10/afd-bundestag-agenda-setting-rechtspopulismus-analyse>.

20. Krastev, *supra* note 13, at 14.

21. Will Kymlicka, *Neoliberal Multiculturalism? in SOCIAL RESILIENCE IN THE NEOLIBERAL ERA* §1.3 (Peter Evans & Michelle Lamont eds., Cambridge Univ. Press, 2013).

Neoliberalism is no longer aligned with conservative nationalism, as it may have been in the days of Thatcher and Reagan. "Neonationalism," a term that is preferable to the vague concept of "populism" (see below), is now the main opposition to neoliberalism, at least in Western Europe and in the United States. This heralds a new "open" versus "closed" cleavage that increasingly pushes aside the classic 19th and 20th century "left" versus "right" cleavage. Secondly, Gauland has seen that the opposition to the new globalized class, which has absorbed and flattened the old left versus right distinction, can only be a "fundamental opposition," a *Fundamentalopposition*, and this opposition may be left or right, but necessarily it has to be "populist." Again, Gauland has got it right. The essence of populism is to be anti-elite, which also links its current expressions with the relative losers on Milanovic's Elephant Curve.

However, left unmentioned by Gauland are the different natures of left and right populism. In its right or neonationalist variant, the populist impulse gets deflected from attacking the elites and their neoliberal model, which are in the end responsible for the lower-middle-class plight in Western lands. Instead, all energy is invested in bashing refugees and immigrants. Here is the main difference between left and right populism: left populism is dyadic, it juxtaposes "the people" and an "oligarchy," as Chantal Mouffe has recently done with great acuity.²³ Right populism is triadic, being anti-elite on a vertical axis yet also anti-conspicuous-other on a horizontal axis. In reality, however, right populists pick the easier fight against the immigrant weaklings and they dodge the trickier fight against fat-cat elites. Now it should be clear why "neonationalism" is the more precise term for the defense of majority culture than the generic "populism," because in left populism, which is strong in southern Europe, there is little anti-immigrant animus and little cultural nationalism.

Having cleared the conceptual brush, the inquiry into the themes, actors, and policies of the neonationalist defense of majority culture can begin. For lack of space, this can be done here only briefly.

Themes. The central theme of so-called "New Right" intellectuals, who have greatly influenced the platform of the French National Front and other radical right parties in Europe, may be called ethno-pluralism.²⁴ It depicts the world as divided into homogenous peoples, which are ontologically prior to and formative of the individuals that they comprise, each people allotted to its own traditional territory and endowed with its distinct identity. Unlike in classic racism and chauvinist nationalism, the

diversity of peoples and cultures is embraced as a positive value. The "right to difference" is even pirated from multiculturalism, being merely transferred from the minorities to the majority: "we" (the majority) have the right to be different too, and "you" (the immigrants) had better practice your difference in your traditional home countries. Interestingly, however, the main impulse in New Right thinking, that makes it less practicable in the world of politics, is not so much against immigrants and Islam, but against liberalism and the flattening of difference by a uniform capitalist civilization. As one of its main protagonists, Alain de Benoist, put it:

Our cities look more like Los Angeles or New York, less like Istanbul or Tunis. The biggest threat to our identity is not another identity, but political universalism in all of its forms, which threatens national cultures and different ways of life and which is about to turn the world into one homogenous space.²⁵

In their opposition to immigrants, who in Europe happen to be predominantly Muslim, "civilizational" themes, most notably the defense of Christian-occidental culture against the Islamic-oriental intruders, has pushed aside the politically unviable ethno-pluralist trope.²⁶ *Abendland* in *Christenhand*, for instance, is a slogan of the

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22. See Luc Boltanski & Eve Chiapello, *THE NEW SPIRIT OF CAPITALISM* (Gregory Elliott trans., Verso, 2017) (2007) and Andreas Reckwitz, *DIE GESELLSCHAFT DER SINGULARITÄTEN: ZUM STRUKTURWANDEL DER MODERNE [THE SOCIETY OF SINGULARITIES: ON THE TRANSFORMATION OF MODERNITY]* (Suhrkamp, 2017).
 23. Chantal Mouffe, *FOR A LEFT POPULISM* (Verso, 2018).
 24. See Alain de Benoist, *KULTURREVOLUTION VON RECHTS: GRAMSCI UND DIE NOUVELLE DROITE [CULTURAL REVOLUTION FROM THE RIGHT: GRAMSCI AND THE NOUVELLE DROITE]* (Jungeuropa Verlag, 2017).
 25. Quoted in Volker Weiss, *DIE AUTORITÄRE REVOLTE. DIE NEUE RECHTE UND DER UNTERGANG DES ABENDLANDES [THE AUTHORITARIAN REVOLT: THE NEW RIGHT AND THE FALL OF THE OCCIDENT]* §8 (Klett-Cotta, 2017) (quoting Alain de Benoist).
 26. See Rogers Brubaker, *Between Nationalism and Civilizationism: The European Populist Moment in Comparative Perspective*, 40(8) *ETH. & RAC. STUDS.* 1191-1226 (2017).

radical right Freedom Party of Austria. Here the intellectual New Right parts ways with radical right parties, because the former (at least per their chief thinker, Alain de Benoist) has rejected Christianity, in the footsteps of Nietzsche, because of its egalitarian “slave morality” and the universalist flattening of difference. Naturally, radical right parties are not religious parties; their Christianity is cultural, not religious, it is in the modus of identity, not belief. As the main interest is the repudiation of (Muslim) immigrants, radical right parties in some traditionally liberal countries, like Denmark or the Netherlands, have even embraced liberal precepts, most notably the equality of the sexes and free speech that they perceive as being violated by putatively “illiberal” Muslim immigrants.

Actors. The main actors in the neonationalist defense of majority culture are the new radical right parties, which in some West European countries appeal to as many as twenty percent of the electorate today (not to mention that in Eastern Europe they often form the government). Even where they are not in the government, via “contagion from the right” radical right parties have increasingly shaped the style and agenda of center-right majority parties and the governments constituted by the latter. A gregarious example is an Open Letter published by center-right Dutch Prime Minister Mark Rutte on the eve of the 2017 national elections that were expected to be won by the populist firebrand, Gerd Wilders, and his PVV party. Attacking the “antisocial” behavior of the countries’ (unnamed) Muslim minority, such as littering and spitting in the street, and their “abuse” of “our freedom,” including harassing gays, intimidating women in short skirts, and calling ordinary Dutch people racists, Rutte flatly told the minorities to “act normal or leave” (*Doe normal of ga weg*).²⁷ Helped or not by his barely camouflaged exercise of Muslim bashing, Rutte won against Wilders in 2017. Apparently, “[p]opulists do not need to win elections in order to enact their policies; they can do so through the very mainstream parties whose votes they threaten to take, infecting them and living off their blood.”²⁸

Policies. The neonationalist defense of majority culture is mostly a politics of symbols and symbolism. The regulation of religious symbols in public spaces, the Islamic foulard as much as the Christian crucifix, is not by accident its main site of intervention. Anti-burka laws, which go along with an alarming restriction of individual freedoms, have exclusively been passed (or are planned to be passed) in countries with electorally significant radical right party presence: France, Belgium, parts of Switzerland, Austria, Denmark, and the Netherlands. On the part of majority

religion, the positive equivalent to the burka and headscarf restrictions are the crucifix ordinances that are in place in several Catholic states, like in Italy or in the German Land of Bavaria. In a spectacular decision of the European Court of Human Rights, *Lautsi v. Italy* (2011), an Italian fascist-era administrative ordinance that stipulates the display of the crucifix in public schools was declared conformant with the European Convention of Human Rights.²⁹ Interestingly, this legal prioritizing of majority religion is achieved through the same culturalization of religion that has long been exercised by radical right parties, in which religion is transformed from a matter of belief into one of national identity.³⁰

However, apart from the burka restrictions, which apply to no more than a few handful of Salafist Muslim women in Europe, and apart from the even more symbolic crucifix decrees that do not impair anyone’s religious freedoms, there are clear legal-constitutional limits to the attempts by political mainstream actors to appropriate the radical right’s defense of majority culture. A telling example is former German Interior Minister Thomas de Mazière’s *Ten Theses about a German Leitkultur*, appositely published in the mass tabloid *Bild-Zeitung*, in April 2017.³¹ This was an obvious attempt to take the theme of majority defense away from the radical right, which had risen meteorically after the 2015 Syrian refugee crisis. It turned out to be one grand failure as it fell off the cliff of liberal constitutionalism to which the Federal Republic, much like any other West European state, continues to be committed. The starting point of De Mazière’s intervention is still entirely plausible, even commendable: a post-national, merely procedural *Verfassungspatriotismus*, as

27. Mark Rutte, *Lees hier de brief van Mark* [Read here the letter from Mark], VVD (Jan. 22, 2017), <https://www.vvd.nl/nieuws/lees-hier-de-brief-van-mark/>.

28. *Europe’s Populists are Waltzing into the Mainstream*, THE ECONOMIST (Feb. 3, 2018), <https://www.economist.com/briefing/2018/02/03/europes-populists-are-waltzing-into-the-mainstream>.

29. *Lautsi and others v. Italy*, E.C.H.R. (2011).

30. See Christian Joppke, *Culturalizing Religion in Western Europe*, 65(2) SOC. COMP. 234-246 (2018).

31. Reprinted as Thomas de Mazière, “Wir sind nicht Burka”: Innenminister will deutsche Leitkultur [“We are not burka”: Interior Minister wants German Leitkultur], ZEIT ONLINE (Apr. 30, 2017), <https://www.zeit.de/politik/deutschland/2017-04/thomas-demaiziere-innenminister-leitkultur>.

prescribed by Germany's foremost public intellectual, Jürgen Habermas, may not be enough to keep a society together – on its premise, Québec would never have wanted to leave Canada. This has been the standard riposte by liberal nationalists against Habermasian post-nationalists, including Will Kymlicka, who very effectively brought up the Québec analogy.³² In their view, there has to be something more, something informal, something cultural, a necessarily particular “identity” that keeps “us” together “in the innermost” (*im Innersten*), to quote from de Mazière’s “Ten Theses.”³³ Their German protagonists call it the *Leitkultur*, only deficiently translated as “dominant culture” because *leiten* is more pastoral than imperial. Upon this, the German Interior Minister recites a Decalogue of substantive communalities and commitments that exceed the merely procedural and universalist constitutional patriotism:

- to shake hands and not to wear burkas (*Wir sind nicht Burka*, is the clumsy and bizarrely ungrammatical title of the pamphlet – it has the smell of the German construction worker’s monkey Turkish, *Ali, mir holen Bier!*);
- a penchant for *Kultur und Bildung*;
- *Leistung*, the one neoliberal while also typically *bundesrepublikanisch* entry in the list;
- religion (in perfect political correctness, not only in

the church but synagogue or mosque variants also!);

- and five or six other incontrovertible things, all of which, notably, are not exclusively “German.”

In confirming that there is not and that there cannot be an exclusively “German” *Leitkultur*, de Mazière’s Decalogue is self-defeating. However, the most important sentence comes at the end: “Can the *Leitkultur* be legally prescribed? Can it be mandatory?” the minister asks. To which he provides the answer himself: “No.” While his intention has been the opposite, the liberal minister (trained lawyer, of course) demonstrates the impossibility of a legal defense of majority culture in the still-liberal state. ■

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32. Will Kymlicka, *MULTICULTURAL CITIZENSHIP* 188 (Oxford Univ. Press, 1995).

33. De Mazière, *supra* note 31.

Majority and Minority Rights in a Conception of Multicultural Nationalism

Tariq Modood

It may surprise some to know that multiculturalism is supportive of the idea that liberal democratic states may promote a national culture (within liberal limits and respecting other group identities), and that this can benefit the society or polity as a whole. The multiculturalist point of departure from liberal or other universalisms is the argument that the liberal state is not culturally neutral – all EU states support a certain language(s), a religious calendar in respect of national holidays, the teaching of religion(s) in schools and/or the funding of faith schools, certain arts, sports, leisure activities and so on. If so, this means that the majority culture already has recognition of some sort – that is what is meant by saying the liberal state is not neutral. Multiculturalism is about extending this valued condition to minorities. Appeals to majority cultural heritage cannot be described as illegitimate *per se*. Rather, the predominance that the cultural majority enjoys in the shaping of the national culture, symbols and institutions should not be exercised in a non-minority accommodating way.

Liberal constraints on nationalism may be enough to ensure non-discrimination and non-coercive assimilation, but multiculturalism goes beyond that to emphasize respect for ethno-racial, ethno-cultural and ethno-religious group identities. This is an opportunity for critically reforming a national identity. Minorities will contest dominant narratives that exclude them or fail to respect them and their contribution, but they do not compete with the majority in a zero-sum game. The process should be seen as a kind of egalitarian levelling up, not a form of dispossession.

While multicultural nationalism acknowledges the legitimacy of the recognition of majority culture, it denies that the majority has the right to deny the accommodation of minorities simply because it runs counter to majority culture or majority preferences, but does not breach any liberal democratic rights. Neither the majority nor the minorities have a unilateral right to impose a cultural identity upon the other in a way that excludes the other from the national identity.

“Rethinking the national story” was the most important,

yet the most misunderstood, message of the report of the Commission on Multi-Ethnic Britain (CMEB),¹ the most fulsome multiculturalist public policy document in Europe. It argued that the post-immigration challenge was not simply eliminating racial discrimination or alleviating racial disadvantage. Rather, the deeper challenge was to find inspiring visions of Britain – which showed us where we were coming from and where we are going; how history had brought us together; and what we could make of our shared future. The Commission did not want to paint the past or the present in rosy, pastel colors, recognizing that conflict and contestation of narratives are ever-present, but insisting that through dialogue and egalitarian commitment, a vibrant new Britishness at ease with itself, beckoned. We had to rethink what it means to be British, to remake our sense of country, so that it would be inclusive of all fellow-citizens. No one should be rejected as culturally alien and not sufficiently British because of his or her ethnicity or religion. Rather, we had to reimagine Britain so that, for example, Muslims could see that Islam was part of Britain; and equally important, so that non-Muslims, especially the secularists and the Christians, could see Muslims as part of the new, evolving Britishness.

That perspective has been partly displaced by community cohesion and post-9/11 agendas, but the idea that an emphasis on citizenship or Britishness is a substitute for multiculturalism is quite misleading. It is, indeed, often overlooked that the theorists of multiculturalism have regarded citizenship as a foundational concept,² and explicitly developed multiculturalism as a mode of integration, albeit, of course, a difference-respecting integration, not assimilation or individualistic integration. Moreover, they have tended to emphasize not just minority identities *per se*, but the

1. COMMISSION ON THE FUTURE OF MULTI-ETHNIC BRITAIN (2000).

2. Will Kymlicka, *MULTICULTURAL CITIZENSHIP* 188 (Oxford Univ. Press. 1995).

inclusion of minority identities in the national identity.³ This is also how the Canadian and Australian governments have understood multiculturalism and it has been the dominant interpretation in Britain as well.

Let me illustrate what I mean by majority-minority relations within what we might call multicultural nationalism.⁴ The Church of England clearly is an institutionalized feature of England's and Britain's historical identity. This is reflected in symbolic and substantive aspects of the constitution. Given the rapidity of changes that are affecting British national identity, and the way in which religion, sometimes in a divisive way, is making a political reappearance, it would be wise not to discard lightly this historic aspect of British identity, which continues to be of importance to many, even when few attend Church of England services. Yet, in my advocacy of a multiculturalized Britain, I would like to see the Church of England share these constitutional privileges, which may perhaps be extended to other faiths. However, multiculturalism here does not mean crude "parity." My expectation is that even in the context of an explicit "multifaithism," the Church of England would enjoy a rightful precedence in the religious representation in the House of Lords and in the coronation of the monarch; this would not be just a crude majoritarianism, but be based on its historical contribution. To this one must add the multiculturalist condition, namely the Church's potential to play a leading role in the evolution of a multiculturalist national identity, state and society. Both the historical and the multiculturalist contributions to national identity have a presumptive quality; where they are complementary, the case for "establishment" is enhanced, and most of all where there is simultaneously a process of inclusion of non-Anglican faith communities and humanists.

That is the multiculturalist way forward rather than a pretense of state neutrality. The principle can be expressed as one of positive inclusion, not of color-blind, faith-blind, or other formal equality. A further illustration is about religious instruction (not merely religious education) and worship in the common school. For example, we should not ask schools to cease Christian religious instruction or worship or celebrating Christmas because of the presence of Muslims or Jews; rather, we should extend the celebrations to include, for example, Eid and Hanukkah. Such separate classes and faith-specific worship need to be balanced with an approach that brings all the children together and into dialogue; indeed, without that it would be potentially divisive of the school and of society. However, where that is in place, voluntary pursuit of

one's own faith or philosophical tradition completes the multiculturalist approach to the place of religion in such schools. If the majority comes to the view that it no longer has a religion or does not want its religion(s) taught in common schools, fair enough. That does not give it the right, however, to veto the religious induction into minority faiths at school if any minority wants it. Similarly, Christians not having any dietary requirements at school does not give them the right to prevent the provision of kosher, halal or vegetarian options for pupils.

These two examples also illustrate an important point about the national culture. The general liberal and civic nationalist approach is to say that diversity requires a "thinning" of the national culture so that minorities may feel included and do not feel that a thick majoritarian culture is imposed on them. My two examples are not a thinning of national culture or of religion in state schools; they are a pluralistic thickening. The multiculturalism in my examples adds to the national culture by not disestablishing the national church, but rather by bringing other faiths into relationship with it. It does not take religion out of schools, but rather ensures that commonality and diversity are both accommodated. In general, a multicultural society requires more state action not only to respect diversity, but also to bring it together in a common sense of national belonging. In many instances, that means adding to a sense of national culture, not hollowing it out. This usually, as the CMEB recognized, requires us to think differently about the country and so may require an appropriate public narrative about the kind of country we now are. ■

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3. Geoffrey Brahm Levey, *The Bristol School of Multiculturalism*, 19(1) *ETHNICITIES* 200-226 (2019), <http://dx.doi.org/10.1177/1468796818787413>.
 4. Tariq Modood, *Remaking the Nation: Immigration, Integration and Multicultural Nationalism*, *ABC REL. & ETH.* (July 25, 2018), <https://www.abc.net.au/religion/remaking-the-nation-immigration-integration-and-multicultural-na/10214338>.

Affirmative Action and Diversity in American Universities*

Peter H. Schuck

For 40 years, the U.S. Supreme Court has upheld race-based affirmative-action programs based solely upon a so-called “diversity rationale.” The premises underlying the diversity rationale for race-based affirmative action, however, are empirically tenuous and theoretically implausible. Policies justified under that rationale would not survive if the Court seriously applied its “strict scrutiny” standard.

Strict scrutiny is supposed to be, well, strict. Its purpose is to force reviewing courts to be rigorous, skeptical, and demanding enough to challenge the government’s premises, flush out its true motives, and ensure a tight congruence of evidence, legal categories, and policy justifications. Courts apply strict scrutiny when they have strong reasons to think that the state may be playing with fire around highly combustible materials. Racial classifications epitomize this kind of risk.

The Court applies strict scrutiny when assessing race-based policies like affirmative action, whether in higher education, government hiring, or government contracts. The very same Congress that proposed the 14th Amendment to the U.S. Constitution enacted legislation providing for forms of affirmative action favoring the former slaves and perhaps their descendants. I am convinced, however, that it would never have approved of today’s affirmative-action programs, in which most of the potential beneficiaries are actually immigrants or descendants of immigrants. Regardless of whether such programs are constitutional or not, they are undesirable public policy, indeed perverse in practice. Their disadvantages vastly exceed their benefits, and in ways that should cause universities and courts alike to change course.

Many academic advocates of preferences, to be sure, maintain that the Court’s strict-scrutiny standard is too strict, even procrustean, and preferences enacted by legislatures dominated by white officials who create preferences that cannot be claimed by members of their own race should be judged less rigorously. This argument – that such preferences are “benign” because they cannot be claimed by the race (whites) that primarily created

them – has some appeal, although benignity is in the eye of the beholder. The large number of people disadvantaged by preferences – all whites; the 48% of Hispanics, similar proportions of Asians, and 80% of Native Americans who self-identify to the Census Bureau as white; anyone else (dark-skinned Middle Easterners, for example) who is not considered part of David Hollinger’s “ethno-racial pentagon,”¹ and the more than seven million people (many with black ancestry) who consider themselves multi-racial and wish to be identified as such (if they must be racially identified at all) – are unlikely to think of this disadvantage as benign. But rather than adopt this benign-preference argument, the Court has instead diluted strict scrutiny without actually saying so.

A related question is how much deference, if any, courts should accord to the institutions that establish these preference plans. The Supreme Court has failed to explain convincingly why universities that sponsor preferences should receive such deference more than, say, the private employers or municipal procurement agencies whose plans the Court has struck down in the past under strict scrutiny. After all, universities that adopt and structure such programs are responding to the same kind of political, ideological, competitive, social, legal, and institutional pressures that affect employers and government agencies. If anything, the well-documented leftist bias and political correctness of such universities in these matters – on display in their recent backtracking on commencement speakers – should arouse the very suspicion about motives that strict scrutiny is intended to test. It is not enough to say that these plans are created in “good faith.” All the university administrators in these cases are clearly doing

* See Peter H. Schuck, *ONE NATION UNDECIDED: CLEAR THINKING ABOUT FIVE HARD ISSUES THAT DIVIDE US* §5 (Princ. Univ. Press, 2018), upon which this article is based. Full references found therein.

1. David Hollinger, *POST-ETHNIC AMERICA: BEYOND MULTICULTURALISM* (Basic Books, 1995).

what they think best advances their institutional values and interests. The Court has often held, however, most recently in *Fisher*, that strict scrutiny makes the actors' good faith and the purity of their intentions quite irrelevant as a legal matter.

The Court has finessed (or mischaracterized) five crucial questions that bear on affirmative-action policies: the nature of educational diversity; how educational diversity relates to both the "critical mass" idea that schools often emphasize and the ethno-racial stereotypes that they claim to abhor; how courts are to distinguish between valid and invalid preferences; the existence of race-neutral alternatives; and the duration of preference policies.

The Court's superficial treatment of these questions reveals the profound weakness of its affirmative-action analysis.

Diversity and Remediation

The Court has long viewed student diversity as a compelling state interest sufficient to justify admissions preferences, while demanding a rigorous, individualized appraisal of an applicant's actual diversity value. However, the Court has never provided a coherent account of the meaning of diversity value that goes beyond general platitudes. Nor has it explained why the Constitution allows a school to define the desired, favored diversity in narrow ethno-racial terms that exclude even most minorities (other than African-Americans, Native Americans, and the Spanish-surnamed), while treating other non-ethnically-defined kinds of diversity as either much less weighty or wholly irrelevant to satisfying the overriding diversity rationale. Indeed, as Justice Clarence Thomas has pointed out in dissent, the schools seemed not to value the additional diversity that black men, who are greatly under-represented relative to black women, would provide.

The only convincing explanation for those programs in their current form has very little to do with the goal of educational diversity and everything to do with the desire to remedy the historic injustices suffered by African-Americans and Native Americans. This motive, although admirable, is one that the Court has consistently held cannot support the constitutionality of a university's race-based preferences. Any sophisticated observer (surely including all members of the Court) who is not blinded by the rhetorical fog thrown up by the now-obligatory obsession with a certain kind of diversity understands that the schools' true purpose is not diversity but remediation of past injustices inflicted on the now-favored groups. (Even if remediation of past injustices were the

constitutional justification for preferences – a justification that, again, the Court has ruled out – the inclusion of those who are eligible for preferences simply because they happen to have Spanish surnames is incoherent.)

If preferences were really about educational diversity rather than remediation, the programs' benefits would not be limited to these few favored groups. It would instead include religion, political ideology, and other demographics that directly represent the different worldviews with which educational diversity is supposedly concerned. Would an evangelical Christian or a conservative Republican create less diversity value for college students than an applicant whose only special claim to such value is his skin color or surname? The answer, obviously, is no – and this is true whether one defines diversity value in terms of disparate worldviews, interacting with people of unfamiliar backgrounds, encouraging dorm-room chit-chat, or even breaking down traditional stereotypes.

What distinguishes African-American students (at least those descended from American slaves) from these other groups is not their diverse, exotic views but the horrific injustices visited on their ancestors many generations ago, injustices that have left a continuing stain on American life even today. Those injustices should matter a great deal to our society in general, but the Court has always ruled that they cannot justify race-based university admissions. Only diversity considerations can.

Critical Mass

The Court has always insisted that breaking down ethno-racial stereotypes was crucial to achieving the putative goal of educational diversity, and that the "critical mass" of favored minorities intentionally produced by the school's preferences would help to achieve this goal. But this notion of critical mass is incoherent.

First, critical mass by its very nature must be a matter of the *number* or *proportion* of students needed to produce it, yet the Court insists that the Constitution prohibits numerical or proportional quotas and instead requires individualized assessments. Second, the critical-mass criterion is only intelligible if one specifies the level of university activity at which racial assignments are permissible in order to achieve the critical mass. Is the level campus-wide? Program-wide? Each major or only some? Seminars? Lecture courses? Dormitories? Sports teams? The Court has never confronted this question.

Third, the critical-mass goal can be administered only by deferring to the university's judgment on these matters, a level of deference that the Court emphatically rejected

in its recent *Fisher* decision.² The Court has perceived a very close connection between critical mass and stereotype destruction: “[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn that there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.” But how can this possibly be? What alchemy enables the law school to prefer students on the basis of skin color or surname – albeit in the name of diversity – without at the same time strengthening the notions of ethno-racial essentialism and viewpoint determinism?

More to the point, what opaque prestidigitation allows a school to admit minority students with academic records that are (whatever the school’s metric) substantially weaker than those of their (other minority or majority) competitors without thereby reinforcing stereotypes of academic inferiority? Did the Court majority think that the non-preferred students and faculty were somehow so clueless that they would not notice what was going on and draw the logical and stigmatizing inference that the preferred group’s academic performance was inferior? Would these elite educational institutions by definition not attract the most competitive students and faculty? Would such individuals not place a very high (perhaps excessive) value on the coin of their particular realm – academic excellence – partly because they themselves were so well endowed with it?

To recognize the importance that elite schools give to academic factors is emphatically not to say that test scores and GPA are or should be decisive in determining admission. A sensible institution will consider a variety of factors in selecting its student body, although elite schools that hope to maintain their positions will weight academic potential or performance most heavily. But to assert, as admissions officers who defend affirmative action typically do, that people with manifestly inferior academic performance are somehow superior to others with respect to non-academic virtues – leadership, character, community commitments, grappling with obstacles – is to indulge in a patronizing and pernicious stereotype. There is simply no *a priori* reason to believe, for example, that black applicants as a group are more likely to exhibit these “soft” variables than are applicants of other groups. Nor am I aware of any evidence that they in fact do so.

By the same token, one should not ignore the obvious fact that preferences of other kinds exist and that some of them may be unfair or otherwise objectionable. Preferences favoring legacies and athletes, for example, are also widespread even at elite schools, and such

preferences also engender stereotypes about their academic inferiority (e.g., “dumb jocks”). Why, then, do preferences based on these variables not trigger strict scrutiny, while ethno-racial ones do? Their different legal statuses reflect deep differences in the constitutional and historical meanings of these groups and their experiences. These differences in no way justify admission preferences for athletes and legacies, but they do help to explain why the stereotypes that attach to athletes and legacies are far less corrosive and stigmatizing than those that attach to ethno-racial minorities.

The truth is that the schools’ affirmative-action programs could satisfy the Court’s constitutional test for only one reason: The program’s opacity allowed so much room for subjective, discretionary judgments in the undisclosed weighting of the “soft variables” for individual applicants that rejected students could not possibly prove that they were rejected primarily because they were not members of the favored ethno-racial groups. This fact, of course, places the burden of proof squarely on the shoulders of the individuals challenging the preferences – which in turn makes the Court’s actually un-strict scrutiny that much more pivotal in protecting preferences in such cases.

Race-Neutral Alternatives

The Court has insisted that schools that seek to justify their ethno-racial preference programs must give “serious, good faith consideration” to race-neutral alternatives. At the same time, the Court has allowed schools to reject race-neutral admission criteria in favor of ethno-racial ones where those alternatives would not have yielded the number of preferred minority admissions that the institution felt it needed to achieve “critical mass.” This is an answer to the wrong question. The right question is: Given a constitutional presumption against ethno-racial preferences – a presumption so strong that strict scrutiny is required to enforce it – how imperfect must a race-neutral alternative be before the Court will allow the state to reject it in favor of a race-conscious (indeed, *race-determined*) program? There is no clear answer to this question, of course, but the Court does not even ask it, and so it does not consider any alternative approaches.

There are, of course, several alternatives, some of which are essentially race-neutral. None would be perfect, but they would be less problematic than race-conscious admissions. One often-discussed approach, familiar from

2. *Fisher v. University of Texas at Austin*, 136 S.Ct. 2198 (2016).

the many institutional programs that grant need-based tuition assistance, seeks to determine disadvantage or need directly. Extending such programs to schools' initial decisions to admit would be more difficult, of course. Determining economic need directly for a very large number of applicants would be at least as challenging as it has proved to be in the administration of state need-based social-welfare programs. Michael Kinsley, who supports some forms of affirmative action, described the consequences in the *New Yorker*:

Is it worse to be a cleaning lady's son or a coal miner's daughter? Two points if your father didn't go to college, minus one if he finished high school, plus three if you have no father? (or will that reward illegitimacy which we're all trying hard these days not to do?) . . . Officially sanctioned affirmative action by "disadvantage" would turn today's festival of competitive victimization into an orgy.³

Difficult, surely, but not impossible. Richard Sander, a law professor at the University of California, Los Angeles (UCLA), and co-author (with Stuart Taylor, Jr.) of the important book *Mismatch*,⁴ reports that he actually devised and implemented a sophisticated system of preferences for UCLA based on economic need, and that the system worked "exceedingly well. Audits against financial aid statements showed little abuse; the preferences substantially changed the social makeup of the class and never, to our knowledge, prompted complaints of unfairness." Such approaches would have to be assessed and attempted more broadly, of course, but they may offer one race-neutral alternative to affirmative action.

Another possible alternative would be a program in which a school automatically admits students who score in the upper echelons (say, the top 5% or 10%) of their high-school classes. Texas, Florida, and California have adopted such percentage programs (although Texas, unsatisfied with the number of minorities that its percentage plan yielded, added to it a race-based program). Such percentage programs seem to increase racial diversity on college campuses, though they presumably bring to those campuses many students whose academic preparation is relatively poor (given differences among high schools in different communities).

Another race-neutral alternative would not only increase the number of minority students attending selective institutions but also ameliorate a different, more tractable,

and even more socially wasteful kind of problem: A substantial pool of high-school students who are perfectly capable of performing well at selective colleges do not even apply to them, or indeed to any college at all. Caroline Hoxby and her Stanford colleagues have shown that applications by these students, many of whom are minorities, can be increased through better information about how to apply, financial-aid opportunities, and other assistance available on campus.⁵ Moreover, increasing applications from this group can be accomplished at trivial cost – as little as \$6 per student.

Finally, there are ways to reduce the size of ethno-racial preferences without wholly abolishing them. In *Mismatch*, for instance, Sander and Taylor propose that if ethno-racial preferences are retained, their magnitude should not be permitted to exceed in size the preferences (if any) that the same school uses for socioeconomically disadvantaged students of all races.

Whatever the imperfections in these (or other) race-neutral alternatives may be, they pale before the legal and policy defects of ethno-racial preferences. Most important, the Court has demanded precisely this kind of comparison, most recently and clearly in *Fisher*.

The Duration of Preferences

Much has been made of retired Justice Sandra Day O'Connor's stated expectation that "25 years from now, the use of racial preferences will no longer be necessary."⁶ Justice Thomas's recitation, in his dissent, of the grim statistics on comparative academic performance makes such a hope seem unrealistic. The studies of ethno-racial preferences in other societies provide no support for it

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3. Michael Kinsley, *The Spoils of Victimhood*, NEW YORKER, Mar. 27, 1995, available at <https://www.newyorker.com/magazine/1995/03/27/the-spoils-of-victimhood> (last visited Jan. 16, 2019).
 4. Richard H. Sander & Stuart Taylor, Jr., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT* (Basic Books, 2012).
 5. Caroline Hoxby & Sarah Turner, *Expanding College Opportunities for High-Achieving, Low Income Student*, 12-014 SIEPR (2013), pp. 1-55.
 6. Peter Schmidt, *Sandra Day O'Connor Revisits and Revives Affirmative-Action Controversy*, THE CHRONICLE OF HIGHER EDUCATION, Jan. 14, 2010, available at <https://www.chronicle.com/article/sandra-day-oconnor-revisits/63523> (last visited on Jan. 16, 2019).

either, as the economist Thomas Sowell has shown.⁷ To the contrary, they indicate that such preferences, once established, tend to endure and perhaps even expand to new groups and new programmatic benefits.

It is true that six politically diverse states (Arizona, California, Michigan, Nebraska, Oklahoma, and Washington) have banned these preferences by voter referenda, while New Hampshire has done so through statute and Florida through executive order. California's experience, however, after its voters banned ethno-racial preferences suggests that such bans on affirmative action do not end it; they simply drive it underground. The California system engaged in a series of stratagems in the early 2000s expressly designed to circumvent the state's ban. Some of the more egregious ones involved channeling minority students to new "critical race studies" programs with lower admissions standards; awarding special admissions credit for foreign-language fluency to minority students who were already native speakers; adopting "percentage" plans that relied for their efficacy on the continuation of segregated schooling patterns; and using unspecified (and unspecifiable) "holistic" criteria as well as winks and nods by admissions officials.

Moreover, the Court's evident desire to end the debate about preferences – by allowing them to continue but insisting that they will not go on forever – is more or less destined to fail. Viewed most charitably, Justice O'Connor's opinion in *Grutter* attempted to craft a kind of compromise that might resolve this bitter debate once and for all, enabling American society to "move on." If that was her strategy, it has failed miserably so far. Fifty years after government preferences were first established, they are as controversial and divisive as ever.

Indeed, O'Connor's hope to use a Court decision to achieve closure – if that was her intention – was probably doomed from the start. Our national experience suggests that divisive public issues in American life, of which affirmative action is certainly one, are not resolved by Court decision or by any official fiat. History has condemned the Court's attempts to settle such issues prematurely, preemptorily, or *ex cathedra*.

In *Fisher*, its most recent decision on the substance of university affirmative-action policies, the Court made a different attempt to foreshorten such policies. The *Fisher* majority (which consisted of seven Justices) did not explicitly criticize the Court's earlier affirmative action decisions in any way. Nonetheless, it offered what might fairly be called a stern implicit rebuke. *Fisher* required the states (and reviewing courts) to apply those decisions' precepts and tests more rigorously than the lower court

had done when it upheld the Texas program in question.

Specifically, *Fisher* focused attention on the narrow-tailoring prong of the "most rigid" strict-scrutiny standard and on a couple of other requirements that the Court has demanded in earlier cases. To address strict scrutiny, the decision focused on a few important aspects. First, the desired diversity must be achieved with no more use of race or ethnicity than necessary and only after considering all race-neutral alternatives. Second, even in the higher-education context, the state is entitled to "no deference" on the key factual narrow-tailoring determinations of whether the fit between its programmatic means and its diversity-enhancing end is tight enough, and whether there are workable race-neutral alternatives. And third, the state bears the burden of proof on these issues, proof that will probably require a trial rather than being resolved on summary judgment. Looking beyond strict scrutiny, a school must not use diversity as a pretext for "racial balancing, which is patently unconstitutional," and as a result a program must assess applicants as individuals. Perhaps most telling in *Fisher's* analysis was the fact that it ignored the idea of "critical mass," a central pillar of the Court's defense of preferences.

In other words, the Court upheld but seemed to tighten its permissive attitude toward affirmative-action admissions policies. Rather than suggest wistfully that affirmative action might end someday, the majority indicated that it must be constrained. However, this warning by the Court about the constitutional infirmities of ethno-racial preferences seems only to have emboldened their advocates, who immediately hailed the ruling as an unqualified victory, having once again upheld the program. Despite the Court's ruling, very few admissions offices plan to alter their policies.

The Benefits of Diversity

Whatever the constitutional status of race-based affirmative action may be, it is even weaker as public policy, for it fails the essential test that any policy must pass: Its diversity-based benefits are lower than its costs.

I shall make no effort here to formally quantify either the benefits or the costs. Instead, my approach is to take the diversity rationale seriously by clarifying the elements that it must entail, and then to show that the social benefits claimed by the programs' proponents are modest at best and plainly swamped by their costs to society and even

7. Thomas Sowell, *AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY* (Yale Univ. Press, 2004).

to many of their supposed beneficiaries.

What, then, are the diversity benefits that should count in favor of using preferences in university admissions? To answer this essential question, we must address three other closely related ones. What does diversity mean in this context? What is it about any group that accounts for whatever social benefits are conferred by its presence rather than the presence of some other group? Finally, what diversity value is actually generated by the specific groups that affirmative-action programs favor?

Unfortunately, few discussions of diversity and the diversity rationale for affirmative action even address what diversity actually means, much less explain which groups and what kinds of attributes create diversity value. Nevertheless, the ways that affirmative-action programs are designed and defended leave no doubt that program advocates almost always mean ethno-racial diversity. This is true despite the many anomalies, evasions, and confusions that pervade most ethno-racial discourse. For one thing, race today is a spurious category. People of different races have married and had children together in America since colonial times, producing a very large number of mixed-race individuals. In another anomaly, recent immigrants are included in preference programs. "Hispanic" is a language designation, not a racial one. "Asian" refers to many ethnic, religious, linguistic, and national-origin groups with little or nothing in common with one another, and indeed with histories of deep conflict. The category of Native Americans is equally problematic and absurdly broad.

The preoccupation with race by proponents of the diversity rationale is also misplaced because other attributes are at least as predictive of a person's unique experiences, outlooks, and ideas – and hence at least as relevant to the kind of diversity that universities claim to want. According to a study by Northwestern University's James Lindgren of the demographic correlates of viewpoint differences, political affiliation accounts for the largest cleavages, while religion produces roughly the same cleavages as race.⁸ The failure of affirmative-action programs putatively aimed at diversity to base preferences on religion is among the most revealing facts about the programs' true objectives. Indeed, the programs' lack of interest in exploiting our rapidly growing religious heterogeneity for the purpose of campus diversity casts great doubt on the coherence of the diversity rationale as now implemented through these programs. This lack of interest may in turn reflect the remarkably unrepresentative religious composition of university faculties. As University of Texas scholar Sanford Levinson

observes: "One sometimes gets the feeling that ostensible defenders of 'diversity' and 'multiculturalism' have no real idea of how truly diverse and multicultural the United States has become, fixated as they are on the 'traditional' racial and ethnic cleavages within this country."⁹ *A priori* (which is how programs selected the groups to be preferred), does the perspective of a Muslim or conservative Christian applicant not have at least as much diversity value as that of a middle-class black or Hispanic?

So just how many African-Americans or members of other favored groups must be present in order to establish the requisite diversity value? Because diversity value surely depends on various factors, any sensible answer must be context specific. Unfortunately, the law and practice of affirmative-action programs instead offer a wholly reductionist answer to this question. They simply count the number of group members in the relevant community (or their percentage of the community total) and seek proportional representation, at least as a default but often effectively as the final answer.

Defining the relevant community – that which will be used in making the proportionality assessment on which the admission decisions will turn – almost always entails highly controversial judgments, if not arbitrary empirical and normative ones. The relevant baseline for judging proportionality, for example, can only be defined in terms of a number of elusive, hard-to-measure, and internally competing parameters, including group definition, geography, qualifications, attitudes, applicant pool, and others. Rhetoric aside, the task of actually administering affirmative action requires, ironically, that a program first combine many complex determinations that as a practical matter it can only make through almost comically arbitrary judgments, and then coming up with a bottom-line number that is certain to be breathtaking in its simplicity and lack of context. It would be surprising, indeed, if institutions that must process thousands of applications for relatively few slots in a very limited period of time did not pursue a spurious or formalistic kind of diversity: one that means color coding and color counting in service of a predetermined color targeting.

How, then, does a favored group in fact confer diversity

8. James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 YLPR 3 (2005), available at <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1488&context=ylpr> (last visited on Jan. 16, 2019).

9. Sanford Levinson, *WRESTLING WITH DIVERSITY* 49 (Duke Univ. Press, 2005).

value on an academic community? This is the second question we must confront when assessing affirmative action. A group can only confer such value if it possesses certain desired qualities as a group. It follows that a group can only do this if those qualities inhere in all members of the group (or else the group should be redefined to exclude those who lack them). To affirm that a quality inheres in a racial group, however, is to “essentialize” race in a way that utterly contradicts the bulk of our liberal, egalitarian, legal, scientific, and religious values. Together, these values hold that all individuals are unique and formally equal regardless of genetic heritage, and that their race causally determines little or nothing about their character, intelligence, experience, or anything else that is relevant to their diversity value. Indeed, for employers to use racial stereotypes in this way would be flatly illegal – even if the assumptions underlying the stereotypes were true.

The best that can be said of affirmative-action programs’ use of diversity in this way is, as David Hollinger has put it, that they have reproduced “the most gross and invidious of popular images of what makes human beings different from one another” for a putatively benign purpose.¹⁰ They are propagating socially inflammatory stereotypes that, even if they were accurate, invite decision-makers to violate people’s claim (and constitutional right, according to the Court’s affirmative action decisions) to be judged as individuals, not as members of ascribed groups. By parity of reasoning, legitimating the use of this proxy might equally justify racial profiling by police if it were intended to fight crime and were no less accurate than is the crude stereotyping in affirmative-action programs.

What diversity value does a favored group actually confer? Affirmative-action programs attempt to finesse the essentialism difficulty discussed above by assuming certain facts that might make the use of race as a proxy more defensible. They assume, first, that African-American students bring to campus histories and viewpoints that are unique to, and nearly universal among, African-Americans – even though those histories and viewpoints are not racially or genetically hardwired into them. Educational institutions and their African-American members, the programs further assume, should help people of other races to comprehend this experience, and campus diversity can strengthen the foundations of good citizenship in a pluralist democracy. Finally, they assume that race can serve under these circumstances as a rough but serviceable proxy for both diversity value and value diversity.

In their widely discussed 1998 book, *The Shape of the River*, William Bowen and Derek Bok strongly defend

these three assumptions. They conclude that race-neutral admissions would substantially reduce the number of interracial social interactions and hence the socialization skills that both white and black students value and contribute to by attending racially diverse institutions.

This conclusion, however, which is also supported by a study done to bolster the University of Michigan’s defense of its affirmative-action program in the courts, has been challenged from several directions. The first is empirical. A review of survey data shows that most students and faculty place little weight on ethnic diversity as a source of positive educational outcomes, and its regression analysis of peer-group racial-composition effects finds no positive effect on any of the 82 outcome variables used by the American Council on Education.¹¹

The second challenge is comparative. Stephan and Abigail Thernstrom, prominent critics of the Bowen-Bok study and authors of an earlier analysis of American race relations that strongly opposed affirmative action, point to a 1997 national survey in which 86% of white adults reported having black friends, and to a 1994 survey in which 73% said that they had “good friends” who were black.¹² To the Thernstroms, the Bowen-Bok study findings justify a different inference: “By these standards, the elite schools are hardly in the proud vanguard of progress. To the contrary, they are lagging woefully behind.”¹³ Interestingly, both the Bowen-Bok and Thernstrom data on college-age and adult friendships overlook the increasing prevalence of interracial friendships among young Americans even before they reach college, which would suggest that the college experience may be less central to engendering such friendships than either camp supposes.¹⁴

A third challenge to Bowen-Bok examines how the education process actually works on campuses. Terrance Sandalow, in an important review of *The Shape of the River* in the *Michigan Law Review*, maintains that any experiential differences between white and black students

are simply irrelevant to most of what students study in the course of their

10. See *supra* note 1.

11. Peter H. Schuck, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* (Harv. Univ. Press, 2006).

12. Abigail Thernstrom & Stephan Thernstrom, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE – RACE IN MODERN AMERICA* (Simon & Schuster, 1997).

13. *Id.*, 167.

14. See *supra* note 11, p. 167, n. 218.

undergraduate careers. The irrelevance of those differences is perhaps most obvious in the study of mathematics and the natural sciences, but it is no less true of most of the humanities and the social sciences.¹⁵

Sandalow goes on to consider the argument, so crucial to the diversity rationale, that African-Americans are likely to advance different ideas unfamiliar to whites.

This brings us to the third crucial question about the diversity rationale for affirmative action even though the subjects I teach deal extensively with racial issues, I cannot recall an instance in which, for example, ideas were expressed by a black student that have not also been expressed by white students. Black students do, at times, call attention to the racial implications of issues that are not facially concerned with race, but in my experience, white and Asian-American students are equally likely to do so.

For what it is worth, my 35 years of experience in the classroom confirm this account. Recall, as well, that admissions officers almost never ask applicants about their ideas or viewpoints, much less how salient their race is to them. Outside the classroom, of course, race-based differences might encourage empathy and tolerance, but they might also promote greater conflict. Indeed, the simplistic version of the diversity rationale masks a deeper confusion about the diversity value arising out of social interactions. In this view, diversity demonstrates to people that despite our superficial differences, we are really all alike under the skin. The proposition is clearly true in many respects, but the diversity value that the diversity rationale invokes is supposed to grow out of the decidedly *different* viewpoints that diverse people are said to bring to these inter-actions. If we take the rationale seriously, then our similarity under the skin may confer negative, not positive, diversity-value. The very logic of this rationale, after all, dictates that we seek differences under the skin, since it is those differences that constitute the academic payoff to diversity.

These doubts about the “socialization skills” premise of affirmative action are fortified by the dismaying evidence of persistent racial self-isolation on campuses. Orlando Patterson, a leading sociologist of race and an affirmative-action supporter, ruefully notes that “no group of people now seems more committed to segregation than Afro-American students and young professionals.”¹⁶ After carefully interrogating the diversity rationale, then, one is left with serious doubts about its coherence and persuasiveness. There is something to it, surely, but not much. Some advocates, as if recognizing this problem, seek to reconceptualize the diversity rationale into

something else. In philosopher Elizabeth Anderson’s view, for example, diversity is really “another way of talking about integration,” a way that can link diversity to the advocates’ “core social justice and democratic concerns.”¹⁷ In the same spirit, legal scholar Robert Post sees diversity as the seedbed of “a democratic public culture.”¹⁸

This discursive move, however, is really an effort to change the subject; it defends ethno-racial preferences not as a way to enrich the experiences of students and teachers but as a remedy for social inequalities and generalized discrimination. That the Supreme Court has repeatedly prohibited this general remedial justification for racial preferences, of course, is not a conclusive argument against it; the Court, after all, is notoriously fallible. This diversity rationale, as we have seen, is weak even in its own terms. I anticipate that these preferences will make genuine racial reconciliation that much more elusive. I earnestly hope that I am wrong about this. ■

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15. Terrance Sandalow, “Minority Preferences Reconsidered,” *Review of The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, by W. G. Bowen and D. Bok, 97(6) MICH. L. REV. 1874-916 (1999).
 16. Orlando Patterson, THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S “RACIAL” CRISIS, 157 (Basic Civitas, 1997).
 17. Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 NYULR 5 (Nov. 2002), available at <https://www.nyulawreview.org/issues/volume-77-number-5/integration-affirmative-action-and-strict-scrutiny/> (last visited Jan. 16, 2019).
 18. Robert Post, *Affirmative Action and Higher Education: The View from Somewhere*, 23 YALE J. OF LAW & PUB. POL. 5 (2005), pp. 25-32.

Global Migration Crisis*

Amnon Rubinstein & Liav Orgad

Never in history has so much attention been paid to human movement. Global migration yields demographic shifts of historical significance, profoundly shaking up world politics – as shown by the “refugee crisis,” the rise of White nationalism in the United States, and the spreading of the populist right in Europe. Global migration is one of the defining issues of the 21st century, challenging the fabric of Western societies, remodeling the essence of sovereignty, and changing the way we think of borders and boundaries.

There are ten reasons why international migration is one of the greatest challenges of our time. The ten reasons are related to fundamental changes in the patterns of migration in Western societies, and in the world as a whole. Indeed, migration will be at the center of world politics in the years to come.

International Migration

The first reason relates to numbers. The world is on the move: There were 258 million international migrants in 2017, a record of 65 million forcibly displaced people, 50 million irregular migrants, 21 million forced laborers, and 740 million “internal migrants.” While it is true that the percentage of international migrants remains relatively constant – 2.6% of the world population in 1960 and 3.4% in 2017 – it is seven times higher in the developed regions than in the developing regions. On the regional level, international migration has almost tripled in Europe – it climbed from 3.4% of the population in 1960 to 10.5% in 2017 (not including intra-European mobility) – and doubled in North America, from 6.7% (1960) to 16% (2017). On the national level, the numbers are even higher (see Table 1). All predictions show that migration will continue to grow tremendously in the near future. People will have more reasons to move to the developed world and more resources to do so.

TABLE 1: INTERNATIONAL MIGRANT STOCK AS A PERCENTAGE OF THE TOTAL POPULATION BY SELECTED COUNTRIES, 1960-2017

Country	Percentage		
	1960	1990	2017
Belgium	4.8	8.9	11.1
Denmark	2.1	4.6	11.5
France	7.7	10.4	12.2
Germany	-	7.5	14.8
Ireland	2.6	6.4	16.9
Italy	0.9	2.5	10.0
Norway	1.7	4.5	15.1
Spain	0.7	2.1	12.8
The Netherlands	3.9	7.9	12.1
United Kingdom	3.2	6.4	13.4
United States	5.8	9.2	15.3

Source: U.N. Department of Economic and Social Affairs, Population Division, 2017.

Global migration is only one aspect of human mobility. There are about 1.5 billion international border crossings every year. Tourists, students, business people, and temporary workers come and go on a regular basis. Free movement zones, such as the Schengen area and the ECOWAS (Economic Community of West African States),

* This article builds on data presented in Liav Orgad, *THE CULTURAL DEFENSE OF NATIONS: A LIBERAL THEORY OF MAJORITY RIGHTS* (Oxford University Press, 2016, Ch. 1). The data were updated for the IAJLJ Rome Conference on Multiculturalism.

and technology – low-cost flights, high-speed trains, and the availability of apartments via Airbnb – have led to an increase in the number of visitors. Anti-tourism protests are spreading today across Europe. Local residents complain that tourism generates noise, pollution, and traffic, and leads to an increase in rents, decrease in parking spaces, and the ousting of locals. “Tourists go home” is now a popular slogan in European cities. Venice, Dubrovnik, and Barcelona have introduced legal measures to restrict the influx of visitors. In other places, such as Beijing, internal migrants – the Chinese rural residents who move to the big city in search of a better life – are also faced with restrictions on their freedoms and provoke grumbles.

The changing character of migration is a second reason for the perceived migration “crisis.” Until recent decades, migration consisted mainly of labor workers. Today, however, family migration presents the largest share of migrants in the West – more than 50% when excluding refugees and asylum seekers. Family migration has four features: (a) it is usually not temporary; (b) it is more difficult to restrict family migration because citizens have a right to family life; (c) it is likely to increase migration – studies show that family ties in a different country are the most important factors in the decision to move to a new country, more important than wages and human development; (d) it is not discretionary. Countries do not really “select” family migrants based on skills and merits; they arrive on the basis of legal entitlement. In addition, in some countries, migrants are coming from societies that profess a different religion than the majority population. In Europe, when excluding intra-EU movement, 39% of the total migration to the Union comprise people of Muslim faith.

The intensity of these changes is the third reason. The rapid pace of demographic changes we are witnessing now happened in the past only as a result of wars or occupation, not migration. There is a sense of a high traffic load. In just five decades, European states have turned from countries of emigration to immigrant-receiving societies on a large scale. While data do not support the popular claim that Muslims are likely to become a majority by 2030 in Europe – that is fake news – Muslims will become a sizeable religious minority in Austria, Belgium, Britain, France, and Sweden. In the United States, white Americans are expected to be a minority (46%) by 2050; in contrast, Hispanic Americans, a tiny minority in 1960, are expected to reach 30% of the population by 2050. This fast-changing reality generates cultural anxiety in Western societies.

The fourth reason is the fact that migration has also become associated with cultural and security challenges.

There is a growing body of literature on the cultural gaps between migrant and local communities, especially in Europe, dealing with issues such as liberal values (for example, free speech, gender equality, and gay rights); the rule of law vis-à-vis the rule of God; the legitimacy of the use of violence in resolving political conflicts; and the role of religion in the public sphere. The findings are troubling and indicate that these gaps are often wider in second and third generation immigrants than among their parents and grandparents. In addition, violent riots and terrorist acts have made the issue of migration central and visible.

Western Societies

The fifth reason relates to Western demographic changes. In almost all Western countries, the Total Fertility Rate (TFR), the number of children that a woman bears over her lifetime, has dropped below the “replacement rate” of 2.1, which is the fertility rate required for demographic stability (see Table 2). Low fertility rates, combined with high life expectancy, affect the “old-age support ratio,” which measures the number of people of working age (15-64) in relation to the number of people of retirement age (65+). Some states have already reached the point at which the elderly will outnumber the young. This means fewer people of working age and more people in need of welfare stipends, pensions, and healthcare. In fact, if Western states want to maintain their welfare systems, migration is inevitable.

TABLE 2: TOTAL FERTILITY RATE AND OLD-AGE SUPPORT RATIO BY SELECTED COUNTRIES AND YEARS

Country	Total Fertility Rate		Old-Age Support Ratio	
	1955-60	2015-20	2015	2050
Belgium	2.50	1.80	3.6	2.3
Denmark	2.55	1.76	3.4	2.6
France	2.69	1.97	3.3	2.3
Germany	2.27	1.47	3.1	2.0
Ireland	3.58	1.98	4.4	2.4
Italy	2.29	1.49	2.9	1.6
Spain	2.70	1.39	3.5	1.5
The Netherlands	3.10	1.75	3.6	2.3
United Kingdom	2.49	1.87	3.5	2.5
United States	3.58	1.89	4.5	3.0

Source: U.N. Department of Economic and Social Affairs, Population Division, 2017.

The sixth reason relates to the Western identity crisis. From Australia to Britain, France to Germany, countries are struggling with a similar question: how to cultivate a common “bond” that goes beyond the global economy and political liberalism; a bond that is global and yet, keeps a core that distinguishes the “here” from the “there.” In the post-World War II international system, Western countries did not need to set boundaries to their national identity; it was a given, not something that had to be defined. But times have changed. Migration – together with globalization forces, the rise of multiculturalism and, in Europe, the creation of the EU – have led to a reality in which it becomes difficult to know what it means to have a national identity. We are witnessing an interesting phenomenon in which states seek to protect their unique identity, but cannot clearly specify what it is. It includes, at best, a local version of political liberalism and popular culture like films, carnivals, and sports. The very idea of searching for national identity is the clearest indicator of its devaluation. Newcomers arrive in societies that are insecure about the essence of their identity.

The seventh reason relates to multiculturalism – which has become popular in Western societies in the last decades. Cultural group rights – demands for linguistic rights, Shari’a law, and exemptions from general laws relating to school curriculum and food – are the fashion of the day. At the infancy of multiculturalism, there was a clear distinction between “national minorities” and “immigrant groups.” Unlike national minorities that often cannot choose between different ways of life without cultural privileges, migrants can choose. Voluntary migration is exactly this – an expression of choice. Yet the proposition that migrants seek to integrate into the national culture, rather than to maintain their original cultural identities, no longer describes the Western reality. Cultural group rights, originally developed for minorities, are demanded nowadays by immigrant groups in the West.

Multiculturalism is based on some false assumptions. To begin with, it protects only “needy” minorities, whose culture, without legal protection, may be marginalized or excluded. But not every minority group is culturally “needy,” and not all majority groups are not culturally needy. In addition, multiculturalism has failed to distinguish between “illiberal minorities,” which do not seek to change the liberal way of life of a political community (e.g., the Amish), and “anti-liberal minorities,” that seek to use their political power to change the way of life of others, non-members in the group. And last, the idea that all cultures are equal is logically false. There are cultures that do not recognize the idea that all cultures,

not even all individuals, are equal; the existence of multiculturalism thus depends on the premise that the dominant culture recognizes the idea of equality. Paradoxically, it is the expansion of minority rights that gives rise to the revival of “majority nationalism” and puts multiculturalism at risk.

Global Transitions

The eighth reason relates to dramatic geopolitical changes. The global population has rapidly grown – one billion in 1804 to almost eight billion in 2018. This profound growth, however, has mainly occurred in the developing countries: e.g., India, China, Nigeria, Pakistan, and Indonesia. The European population shriveled from 25% of the global population in 1900 to 12% in 2000 and, if current trends continue, only seven percent of the world population will remain “European” by 2050 (see Table 3). This dramatic demographic transition is likely to lead to increased mobility to Europe, that will sharpen the moral panic against migration.

TABLE 3: CHANGES IN THE WORLD POPULATION, 1900-2050 IN PERCENT OF THE TOTAL

Area	1900	1950	2000	2050
World	1,650	2,519	6,071	9,772
More Developed	33%	32%	20%	13%
Less Developed	67%	68%	80%	86%
Africa	8%	9%	13%	26%
Asia	55%	56%	61%	54%
Europe	25%	22%	12%	7%
Latin America & the Caribbean	6%	7%	9%	8%
North America	6%	6%	5%	5%

Source: U.N. Department of Economic and Social Affairs, Population Division, 2017.

Geopolitics has changed not only geographically, but also religiously. Islam is the rising demographic star of the last century. The Muslim population made up twenty percent of the world population in 1990, and it is expected to be 26.4% in 2030. A Pew Research Center study indicates that in 2030, nearly three out of ten children in the world will be Muslim.

The ninth reason relates to global transport. People can live today in one country while retaining close ties with another country; distances are becoming shorter and moving costs are becoming lower. Cheap transport and communications facilitate the existence of “inside-out

communities,” that physically reside inside a country yet culturally remain outside. The forces of globalization narrow the cultural gaps in the world (say, between Europe and India), yet global transport still makes them more visible. Ideas come and go – through free markets, international media, and the Internet – and the notion of cultural exceptionalism faces multiple challenges. The “other” is present not just physically, but also spiritually. Even if a state can control the flow of migrants, it cannot control the flow of ideas and cultures.

The tenth reason relates to digitalization. The concept of national citizenship is no longer sacred and it has even become a commodity that is put up for sale; on some islands in the Pacific Ocean, it is even possible to buy citizenship with Bitcoin. Emerging technologies offer non-territorial forms of political membership that transcend national borders and boundaries, challenging the definition of the “state” as we know it and weakening the state as a primary source of identity and rights. These technological changes occur regardless of migration; however, in this context, migrants are often unjustly blamed for the erosive effects of globalization and migration has become the axis on which contemporary dilemmas in the liberal state meet.

Almost every mass migration in recent history has been perceived as *sui generis*, a new case, and generated fears of “the other.” Is the challenge different this time? The answer is disputable. Some would argue that the current situation is not historically unique. Maybe. If we single out each of the ten changes described here, we may find

historical precedents for each. Yet, the combination of all of them at one point has no precedent. Current debates challenge some of the most fundamental assumptions on international migration and require new approaches to governing migration.

At the heart of the issue are human rights; not only the tragic stories of thousands of people who die every year in an attempt to find a better life, but also millions of people whose lives are at risk in their home country. The Somali poet Warsan Shire powerfully noted: “No one puts their children in a boat, unless the water is safer than the land.” Yet, any future regime must go beyond a humanitarian approach to address the root causes of the crisis. Another wall, smarter border, or criminal sanctions are just an incremental solution to a wider picture; a complete reassessment of the challenges and consequences is essential for global political sustainability. Disregarding the challenges is not only theoretically wrong, but also politically unwise, given the growing popularity of extreme right-wing movements in the West. ■

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Linguistic Rights and Linguistic Policies in Multicultural States

Meital Pinto

The premise of multiculturalism is the protection of cultural, ethnic and national minorities. The idea is to acknowledge, rather than to ignore, the cultural identity of minority groups. One of the instruments to accomplish this is through linguistic rights, which provide legal protection to minority languages.

Language rights are defined as the legal protection of minority languages.¹ The assumption is that the majority language in every multicultural state does not need special legal protection because it is the dominant one in such fields as education, work, and public communication. Speakers of minority languages, by contrast, might be pressured to neglect their languages in favor of the majority language, and their languages may be excluded from the public sphere because they are perceived as the languages of “the others” or “the enemy.”²

There are several justifications offered in the legal and philosophical literature for the legal protection of language. Language has an instrumental value as a means of communication.³ One is more comfortable to communicate using his or her mother tongue. More importantly, language is part and parcel of culture. As the political philosopher Will Kymlicka argues, culture provides a context of choices in which we fulfill our autonomy.⁴

So far, I have mentioned only instrumental accounts of why minority languages are important. I call them “instrumental” because minority members can also communicate and fulfill their autonomy via the majority language.⁵ Sociolinguistic and political theories highlight the intrinsic justification of language rights by the ways in which language constitutes a marker of cultural identity.⁶ The language of a particular culture is best able to express the interests, values and worldviews of that culture. When a specific language is embedded with distinctive cultural concepts and serves as a cultural text in itself, it is only natural that people who speak that language will identify with and take pride in it. The intrinsic justification for language rights is very compelling. For linguistic minority members, it cannot be satisfied via the majority language.⁷

There are different forms of language rights. At one

end of the spectrum, we can identify what I call “comprehensive language rights,” whereas at the other end there are “weak language rights.”⁸ Some states, like Canada or Finland, offer comprehensive language rights by defining one minority language as an official language and giving it equal status to the majority language. The Canadian Charter of Rights and Freedoms establishes that English and French are the official languages of the country and have equal status and equal rights and privileges as to their use in all institutions of the Canadian Parliament and government.⁹ It also establishes the

1. C. Michael MacMillan, *THE PRACTICE OF LANGUAGE RIGHTS IN CANADA* 11 (Univ. of Toronto Press, 1998); REPORT OF THE ROYAL COMMISSION ON BILINGUALISM AND BICULTURALISM: GENERAL INTRODUCTION, BOOK I: THE OFFICIAL LANGUAGES 41 (1967).
2. Denise Réaume, *The Constitutional Protection of Language: Survival or Security? in LANGUAGE AND THE STATE: THE LAW AND POLITICS OF IDENTITY* (David Schneiderman, ed., Editions Yvon Blais, 1991) 37, 46–47.
3. *Id.* at 37, 45.
4. Will Kymlicka, *MULTICULTURAL CITIZENSHIP* 27 (Oxford Univ. Press 1995).
5. Meital Pinto, *On the Intrinsic Value of Arabic in Israel – Challenging Kymlicka on Language Rights*, 20 CAN. J. OF LAW AND JURIS. 143, 160–162 (2007).
6. Joshua A. Fishman, *REVERSING LANGUAGE SHIFT: THEORETICAL AND EMPIRICAL FOUNDATIONS OF ASSISTANCE TO THREATENED LANGUAGES* 21 (*Multilingual Matters*, 1991); Nancy C. Dorian, *Choices and Values in Language Shift and its Study*, 110 INTL. J. OF THE SOC. OF LANG. 113, 115 (1994); Stephen May, *Uncommon Languages: The Challenges and Possibilities of Minority Language Rights*, 21(5) J. OF MULTILINGUAL & MULTICULTURAL DEV. 366, 374 (2000); Denise Réaume, *Official-Language Rights: Intrinsic Value and the Protection of Difference*, in *CITIZENSHIP IN DIVERSE SOCIETIES* 245, 251 (Will Kymlicka & Wayne Norman eds., Oxford Univ. Press, 2000).
7. *Supra* note 5, at 160–162.
8. Meital Pinto, *Taking Language Rights Seriously*, 25 KLJ 231, 233 (2014).
9. See The Canadian Charter of Rights and Freedoms [CCRF], Apr. 17, 1985, Sch. B to Can. Act of 1982, prov. 16–22.

principle of advancement or progression of the equality of status and use of the official languages by parliament or by the provincial legislatures.¹⁰

Section 17 of Finland's Constitution ensures the right to one's language and culture. The national languages of Finland are Finnish and Swedish. The Constitution enshrines the right of everyone to use his or her own language, either Finnish or Swedish, before courts and other authorities, and to receive official documents in that language. It also states that the public authorities shall provide for the cultural and societal needs of the Finnish-speaking and Swedish-speaking populations of the country on an equal basis.¹¹

Almost all states offer weak language rights by allowing each person, through the right of linguistic freedom, to speak his or her preferred language. Some states, like the U.S., offer something in-between: they do not accord official status to any language, but provide legal protection to minority languages like Spanish, in the form of administrative by-laws or specific legislation in the area of education.¹²

Israel stands somewhere in the middle with regard to the legal protection of Arabic. The legal status of Arabic has recently changed. Before July 2018, Arabic was recognized as an official language in Israel in Article 82 of the Palestine Order-in-Council, 1922, titled "official languages." It stated that official notices and forms of the government and local authorities and municipalities "in areas to be prescribed by order of the government shall be published in Arabic and Hebrew."¹³ The problem was that Article 82 was an old statute that dated back to the British Mandate period. When Israel was established in 1948, it adopted Article 82 into its legal system, but since then the Israeli legislator has not provided any clear definition of the term "official language." The Israeli Government also has not prescribed specific orders regarding the use of Arabic in public communications. The result is that Arabic is largely absent from most Israeli public domains such as the media, higher education, government services, and public signs.

Since the establishment of Israel, there has been an ongoing debate about the legal status of Arabic, whether the state has to actively support it, and if so, to what extent. Knesset members from right wing and central political parties have constantly suggested canceling the official status of Arabic and declaring Hebrew as the only official language of Israel. I will only briefly mention the most recent proposal.

Knesset member Avi Dichter tabled the Basic Law: Israel – The Nation State of the Jewish People for consideration

by the parliament in 2011.¹⁴ It was adopted by the Knesset in July 2018,¹⁵ by a vote of 62 for, 55 against, and 2 abstentions.¹⁶ This controversial basic law includes eleven articles.¹⁷ The first four articles are most relevant to the issue of language protection. Article 4 states:

4. Language

- A. The state's language is Hebrew.
- B. The Arabic language has a special status in the state; Regulating the use of Arabic in state institutions or by them will be set in law.
- C. This clause does not harm the status given to the Arabic language before this law came into effect. (Author's translation)

As of December 2018, nine petitions against the Nation-State Law have been filed with the Israeli High Court of Justice.¹⁸ The petitions argue that the law creates a sharp hierarchy between the majority of Israel's Jewish citizens and the non-Jewish minorities, namely the Arab minority. Moreover, unlike the structure of other Basic Laws, such as the Basic Law: Human Dignity and Liberty, or the Basic Law: Freedom of Occupation, the Basic Law: Israel-Nation

10. *Id.*

11. The Constitution of Finland, Jun. 11, 1999, sec. 17.

12. Juan Rubin, *Spanish Language Planning in the United States*, in *SPANISH LANGUAGE USE AND PUBLIC LIFE IN THE UNITED STATES* 133 (Lucia Elías-Olivares, Elizabeth A. Leone, Rene Cisneros & John R. Gutiérrez eds., 2015).

13. Palestine Order-in-Council, in *LAW OF PALESTINE: IN FORCE ON THE 31ST DAY OF DECEMBER 1933* (Robert H. Drayton ed., 3rd ed. Waterlow, 1934) (1922), 2569, 2588.

14. Basic Law: Israel as the Nation State of the Jewish People 5778, SH No. 2743, (No. 3541/18), 2011, HH.

15. Basic Law: Israel as the Nation-State of the Jewish People, 5778, SH No. 2743, p. 898.

16. See Jonathan Lis & Noa Landau, *Israel Passes Controversial Jewish Nation-State Bill After Stormy Debate*, HAARETZ (Jul. 19, 2018), <https://www.haaretz.com/israel-news/israel-passes-controversial-nation-state-bill-1.6291048>.

17. Suzie Navot, *The New Controversial "Basic Law: Israel as the Nation State of the Jewish People"*, 61 JUSTICE 26, at 31 (Fall 2018).

18. Revital Hovel, *In Unprecedented Move, Judge Bases Verdict on Controversial Nation-State Law*, HAARETZ (Sept. 18, 2018), <https://www.haaretz.com/israel-news/.premium-in-unprecedented-move-judge-bases-verdict-on-controversial-nation-state-law-1.6489705>; Yonah Jeremy Bob, *ACRI Asks High Court to Strike Nation-State Law*, JERUSALEM POST (Dec. 23, 2018), <https://www.jpost.com/Israel-News/Yesh-Din-asks-High-Court-to-strike-Jewish-Nation-State-Law-575192>.

State of the Jewish People does not contain a limitation clause that restricts the rights it enumerates through a balancing mechanism.¹⁹ There is therefore a valid concern that the protection of the rights in this law is potentially unlimited.

Given the fact that the Israeli High Court of Justice usually hesitates to strike down Basic Laws because of their normative importance as part of Israel's constitution, the current realistic hope of the Basic Law: Israel-The Nation State's opponents is that the Court will find ways to limit its potential scope through creative judicial interpretation.²⁰

The Basic Law creates a strong connection between nation and language. The perception underpinning the Basic Law is that it is necessary to place Hebrew above Arabic in order to fulfill the Jewish nation's right to self-determination in Israel.²¹ In other words, the Basic Law supports the notion that if a state is defined as a national state, it should give priority to the language of the national majority. If a state places a minority language on an equal level to the majority language, then it is no longer a national state. It is, so the argument goes, therefore a bi-national state.

In my view, this perception is not only discriminatory toward the Arab minority, but it is also false. The fact that Israel is committed to a national model rather than a bi-national or a multicultural model, does not stand in contrast to acknowledging the equal status of Arabic and Hebrew, and supporting Arabic, along with Hebrew, in Israel's public sphere.

A bilingual state is not necessarily a bi-national state. Influenced by other national movements in Europe, the Zionist movement drew a connection between territory and language, by placing greater emphasis on the idea that Hebrew should be the primary language of Jews in Israel.²² However, language is not a territory or a static public symbol that belongs to the state or the nation and represents it.²³ Unlike Israel's flag and emblem that were designed and determined by the government of Israel,²⁴ the Hebrew language has been in existence long before Israel's establishment. Unlike Israel's flag and anthem which can be changed by decision of the Israeli government, the substance of the Hebrew language cannot be changed in the same way. Hebrew is a lively cultural asset that is practiced by the cultural community of Jews living in Israel. The context of the language and its evolution is determined mainly by its speakers. I certainly do not argue that the state does not have any role in the evolution and enforcement of language. It is obvious that language can be supported and shaped by state agents, such as the education system and the media. However, it cannot be changed unilaterally and exclusively by the state. It is a lively cultural asset belonging first and foremost to its speakers. Moreover, as

opposed to other cultural assets like religion, language is not exclusionary. When Jews speak Hebrew and Arabic, they are not "lesser Jews" or "lesser Zionists."

It is true that most Arabs in Israel tend to identify with Arabic, while most Jews tend to identify with Hebrew.²⁵ That, however, is exactly the point where equally supporting both languages in the Israeli public sphere can bolster civic solidarity between Arabs and Jews. Equal and comprehensive public recognition of Hebrew and Arabic has the potential to create an equally shared public space that is a precondition for a sense of belonging and substantive citizenship for Israeli Arabs and Jews. Both languages can live and breathe together, on an equal basis.

The fact that Israel is not a federal state can actually be an advantage for implementing a comprehensive language rights scheme that is personal and not territorial. In a state that does not have a federal structure, there is less concern that one language will monopolize one territory or one state, and less concern that such monopolization will result in a separation between the two linguistic groups. The fact that Israel is not a federal state divided by different territorial arrangements also allows creative solutions, such as bilingual educational institutions, that can preserve Arabic and Hebrew without causing disadvantage to the Arab or the Jewish population in terms of being able to integrate into Israeli society in general, and in the Israeli labor market in particular. ■

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19. *Supra* note 17, at 26-27.

20. Terrance J. Mintner, *Could Israel's High Court Strike Down the Nation-State Law?* JERUSALEM POST (Aug. 8, 2018), <https://www.jpost.com/Israel-News/Could-Israel's-High-Court-strike-down-the-Nation-State-Law-564367>.

21. Tamar Hostovsky Brandes, *Israel's Nation-State Law – What Now for Equality, Self-Determination, and Social Solidarity?* VERFASSUNGSBLOG (Sept. 11, 2018), <https://verfassungsblog.de/israels-nation-state-law-what-now-for-equality-self-determination-and-social-solidarity/>, <INTR>2DOK[S]: <https://doi.org/10.17176/20181111-122613-0>.

22. Bernard Spolsky & Elana Shohamy, *THE LANGUAGE OF ISRAEL: POLICY, IDEOLOGY AND PRACTICE* 76 (Multilingual Matters, 1999).

23. Benedict Anderson, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 133-134 (2nd ed., Verso 2006).

24. *See* The Flag and Emblem Law, 5709-1949, SH No. 8 p. 37.

25. *Supra* note 5, at 169-171.

IAJLJ Rome Conference – Select Presentations and Greetings

Jurisdiction and Multiculturalism in Israel

Justice Salim Joubran

Honorable guests. I thank you for this invitation to address you during this conference. I was asked to discuss the topic of jurisdiction and multiculturalism in Israel. Does the fact that Israel is a multicultural country, particularly with a large minority of Arabs, affect the judicial process? I will try to answer this difficult question, with particular reference to my life-experience and personal identity.

I start by telling you a little bit about myself. I am Israeli, Arab, Christian, Catholic and Maronite. I was born in 1947 in Haifa, in the northern part of Israel, just prior to the 1948 war. My late father was a clerk at the district court, under the British Mandate. When the war broke out, we moved to Lebanon, where we, as Maronites, a Christian denomination based in Lebanon, had relatives. We stayed there for seven years, when my father received an offer from his Jewish friends to come back and work as chief clerk of the Acre court. We came back and I grew up in Acre, a mixed Jewish and Arab town on the northern coast near the Lebanese border. It was an ancient, beautiful town with a 4000 years history, and impressive archaeology.

I studied law at the Hebrew University in Jerusalem, and after graduating, I opened my own private office as a lawyer. Twelve years later, I was appointed to the position of Magistrate Judge in Haifa, and after a dozen more years, I was promoted to the Haifa District Court, which is the court of appeals. Another dozen years later, I was promoted to the Supreme Court and became the first Arab Justice appointed to the Supreme Court of Israel. In 2013, I was elected to the position of chairman of the Israeli Central Elections Committee to the Knesset, the first Arab to hold this position. In 2017, I was elected to the position of Deputy President of the Supreme Court of Israel, also the first time an Arab held this position.

Being an Arab Justice on the Supreme Court of Israel is a unique situation. Except for one other judge, and the judge who replaced me, all other Justices, past and present, have been Jewish. Despite this, from the outset, I have, with all modesty, played an inseparable role on the panel of Justices of the Court. I did not feel like an outsider in any fashion during my long period as a Justice on the Supreme Court. One of my closest colleagues on the Court

was the Deputy Chief Justice of the Supreme Court, Elyakim Rubinstein, who, among his many good qualities, is a visibly Orthodox Jew. Being an Arab did not affect my duties and assignments in any way. We, the Justices of the Court, preside on all kinds of cases regardless of our origin, but, of course, it is still important to have Arab justices and judges in our courts, as part of a desire to reflect the entire composition of the population of Israel in its judiciary.

Did my unique origins affect my rulings as a judge? At the outset, I feel it necessary to clarify that judicial decision-making needs to be separated from the personal experiences of the judge. Personally, I am always careful to have a clear division between my personal stance in a matter and my approach to judicial decision-making. This is to ensure a just outcome from a legal point of view. Nonetheless, in the words of the renowned Israeli poet, Shaul Tchernichovsky: "Man is entirely his native outlook." Accordingly, it is clear that my personal experiences, including my cultural identity, influenced the way that I dealt with cases when I sat in judgment.

Israel is unique as a country in the Western world. On the one hand, the Declaration of Independence and the Basic Laws of the state define Israel as a Jewish state. Only recently, the Knesset passed a new Basic Law, defining Israel as the state of the Jewish people. I will not discuss this new Basic Law today although I have criticism about it. I will only say that it can be argued that the new Basic Law actually harms the multiculturalist identity of Israel, and the result of this Law is that whoever is not Jewish is a second-class citizen. Still, in its roots, no one can deny that Israel is a multicultural country. It is a heterogeneous country with one of the largest minority populations in the world. Israeli Arabs constitute one-fifth of Israel's population. This duality forms the basis for many of the inherently challenging aspects of managing such a state. The detriment of such tension often falls on the Israeli Arab minority.

Israeli Arabs suffer from institutionalized discrimination. For example, Israeli Arabs are not represented enough in most government positions; they face discrimination in housing and public service. I do not believe that anyone in Israel would dispute the fact that the Israeli Arab

minority has suffered, and is still suffering, from prolonged and profound injustices.

To be clear, not everything is bad. Within a democratic country, the state is obligated to treat everyone equally. In this regard, we have made some strides in reducing certain injustices within Israel. For example, the Knesset has passed laws that reflect the principle of affirmative action toward Israeli Arabs. It is now a legal obligation to redress past discrimination against Arabs through active measures that ensure equal opportunity in public government positions. Additionally, in the past few years, Arab academics have been appointed to key positions in the public sector, particularly in the Ministry of Justice. In the field of medicine, one can easily see the impressive integration of Arab doctors and heads of departments in many hospitals in the country. However, this is not enough, and the state should give much more support to the Arab minority.

In addition, the Supreme Court of Israel has ruled repeatedly that discrimination in housing and employment is unconstitutional, and has repeatedly forced the government to uphold the principle of equality. For example, in the *Kaadan* ruling, the Court established that it is illegal to discriminate against Arabs with regard to land allocation. In that particular case, the Court gave an order to the Katzir settlement to accept the Kaadan family as a member of the settlement.

Additionally, in the *Adalah v. Municipality of Tel Aviv* decision, the Supreme Court established that in mixed cities, the municipalities are obligated to have street signs in both Arabic and Hebrew. A final example is in the *High Monitoring Committee* decision, where the Court established that if the state grants benefits to Jewish settlements on the basis of their geographic location, the state is obligated to grant those same benefits to nearby Arab settlements.

Despite the achievements of the Supreme Court in reducing the divide, much work still needs to be done to achieve equality between Jews and Arabs in Israel. Only eight percent of all government employees are Arab. The government never allocates real estate for new Arab cities, while over 600 new Jewish settlements have been established since Israel was founded. Further, law enforcement in Arab towns is scarce, resulting in much higher crime rates than in Jewish towns.

I was born and raised in Haifa, and currently live there with my family. Haifa is a mixed city, where Jews and Arabs live together in peace and coexistence. Unlike most mixed cities, the neighborhoods in Haifa are mixed rather than segregated. It is common to find Jewish families, Arab-Muslim families and Arab-Christian families all living within the same apartment blocks. As a native of Haifa, I can speak from my personal experience and say

with no hesitation that the key to resolving many of Israel's tensions is communication, respect, tolerance and empathy.

As an example, I was the first Arab to be elected to the position of district governor of the Rotary International organization. I hosted at my home, and still do every year, a Christmas dinner for many Jewish and Muslim friends. My wife and I also hosted an annual Christmas event for all the Justices and the staff of the Supreme Court during my judgeship. Additionally, I have been invited to participate in several Jewish holiday traditions, such as sitting in a sukkah during Sukkot, and joining a seder meal on Pesach, as well as celebrating Muslim holidays. Rotary Israel also takes an active part in a unique tradition in Haifa, a tradition known as "the holiday month." This is celebrated in December, during the time of the Christian Christmas, the Muslim birthday of Muhammad the Prophet, and the Jewish holiday of Hanukah. The tradition includes many cultural events, such as special seminars on each of the religions, screenings of Arab and Jewish films, traditional music concerts, live theater performances, and many more events, all with the aim of promoting religious co-existence in Israel.

I believe that the fact that I am an Arab grants me a unique perspective with regard to cases connected to the Arab population in Israel. The Court deals very broadly with the Israeli Arab minority, including criminal, civil and constitutional cases. I will give examples about cases that involved multiculturalist aspects.

I will first discuss my approach to Reconciliation Agreements (*Sulh*), which are common in the Arab sector. A Reconciliation Agreement is like a cease-fire agreement between a perpetrator and a victim. There are clear rules and it is arranged by a broker mutually accepted by both parties. This is not simply a legal document that we may be familiar with. Rather, it is an agreement that is based on a rich tradition that is hundreds of years old. The purpose of the agreement is not simply to conclude the particular argument between the two parties, victim and perpetrator. Rather, on many occasions, it concludes a wider dispute between two large families or clans. The Reconciliation Agreement not only concludes the present argument, but, primarily, it prevents future criminal acts between the families. After the Reconciliation Agreement has reached the stage of truce, a real cease-fire can be achieved. The significance of a Reconciliation Agreement in criminal matters was first recognized in a 2005 decision. The majority judgment of a panel of the Supreme Court, including myself, ruled that a Reconciliation Agreement is a legitimate consideration in determining the punishment of the convicted party. Additionally, afterwards, the Court recognized that in suitable

circumstances, the award of a Reconciliation Agreement could determine whether a suspect is kept in custody during judicial proceedings. These important determinations, which are today common practice to anyone who deals with criminal law in Israel, were very innovative not so many years ago.

The legal recognition of Reconciliation Agreements, aside from the obvious advantage of preventing future arguments, was essentially sensitive to the existence of the Israeli Arab minority, its different traditions, and the existence of the State of Israel as a multicultural state. This does not mean that a guilty party is exonerated or not seen as guilty by the law because of the Reconciliation Agreement; nor does it mean that the law should be blind to the existence of such an agreement. The Supreme Court understood that there are many advantages to Reconciliation Agreements and the Court should encourage them by finding them relevant to proceedings. Additionally, giving weight to a Reconciliation Agreement emerges from a starting point that attributes importance to communal tranquility and general communal sentiment, particularly in the Israeli-Arab community.

Similarly, I feel that another reason that it is important to give weight to Reconciliation Agreements is the sentiment of the Israeli Arab minority with regard to general law enforcement in Israel. It is the perception of the Arab minority that it suffers from systematic and institutionalized discrimination. As I showed earlier, there is an empirical basis for this sentiment. Until recently, the law recognized Arabic as an official language, alongside Hebrew. Only recently, the new Basic Law has downgraded the Arabic language from an official language to a language with "special" status. The current law is that only Hebrew is the official language in Israel. As I hinted before, the new Basic Law distinguishes between Jews and others. The downgrading of the Arabic language emphasizes this. I really cannot see a good reason for this, except a cynical and political one. Additionally, it is sufficient to enter any Arab village to perceive the state of the homes and infrastructure and see that there is a problem of an inequitable allocation of public resources in Israel. With regard to criminal law, the Israeli-Arab population only comprises 20% of the Israeli population yet constitutes 40% of the prisoners in the jail system according to some studies. Additionally, some researchers show a consistent trend in the decline of Israeli-Arab public confidence in law enforcement institutions in Israel, particularly the police and the government.

On the other hand, a unique cultural custom should not automatically be considered legitimate, and therefore constitute a legal principle. A good example is the disgraceful custom of the so-called honor killing. An honor

killing is the murder of a member of a family due to the perpetrator's belief that the victim has brought shame or dishonor upon the family. The reasons for this can include refusal to enter an arranged marriage, being in a relationship disapproved of by the family, having sex outside marriage, being the victim of rape, dressing in a manner deemed inappropriate, engaging in non-heterosexual relations or renouncing the faith. A democratic and a humane country should not tolerate murder and violence, regardless of its reason. Accordingly, the Israel Supreme Court does not regard an honor killing as a circumstance for lenient consideration. I sat on several cases regarding honor killings, and emphasize that in my opinion there is no honor but shame in it, and such murders should be punished to the full extent of the law. In a particular case involving a father who persuaded his son to murder his sister because of the way she dressed, I quoted Nawal El Saadawi, an Egyptian feminist writer, who fights honor killing:

Virginity is a strict moral rule which applies to girls alone. Yet one would think that the first criterion of a moral rule, if it is indeed to be moral, should be that it applies to all without exceptions, and does not yield to any form of discrimination whether on the basis of sex, color or class. However, moral codes and standards in our society very rarely apply to all people equally. This is the most damning proof of how immoral such codes and standards really are.

Nevertheless, I believe that the most important area of law which multiculturalism is, and should be so considered, is constitutional law. A large portion of the important Israeli constitutional law cases deal with rights in the Arab sector. This should not come as a surprise. One of the primary purposes of recognizing human rights is to protect minority rights from majority oppression. The Arab minority is the largest minority group in Israel, and accordingly, it should not be surprising that a significant portion of the constitutional law in Israel deals with this subject. In my role as a Justice on the Supreme Court, I have sat on a large number of constitutional cases dealing with exactly these types of issues. One example was a petition to annul the Selection Committee Law. This Law enabled the selection committee of small communal settlements to reject people who did not fit into a particular mold as members of their settlements. I wrote the lead judgment of the dissent that argued for accepting the petition and the annulment of the Law (the petition was rejected by a vote of 5 to 4). The majority

opinion rejected the petition because the Justices held that it lacked “ripeness.” They recognized that discrimination is prohibited by law, however, they argued, it is not certain that Arab applicants will be rejected from each community before they apply to become a member. I thought otherwise. In my opinion, the Court’s decision not to annul the Law because it lacks ripeness will lead to a chilling effect toward the rights of different populations. This will have a disproportionately negative impact on the Arab sector. By and large, Arabs choose, at the onset, to refrain from applying to live in these communal settlements because they are aware that their applications will be rejected on the grounds that they do not fit the social mold of that particular community. I examined the constitutionality of the Law and ruled that the ability to exclude a particular candidate on the basis of his or her social unsuitability enabled, de facto, the discrimination of different populations, and for that reason, it should be annulled. Clearly, the fact that I am an Arab was not the reason I thought it appropriate to annul the Law. However, my familiarity with the discriminatory policy in certain circumstances toward the Israeli Arab minority leads me to analyze the mechanisms that allow for de facto discrimination, even if the Law, de jure, prohibits discrimination. It is important for me to clarify that I do not consider the fact that the Jewish Justices who sat with me on the panel to determine the validity of the Acceptance Committee Law were not “sensitive” to discrimination of this type. I have no doubt that the other Justices decided based on their own legal analyses.

Finally, and on a personal note, I want to present to you the advantages that I think I brought to the Court as an Israeli-Arab. I feel that the fact that I am not a Jew does not hinder my ability to decide matters connected to religion and Judaism in a just manner. I have spent my life living in mixed Israeli cities, and many of my friends are Jewish. Additionally, I studied Bible throughout my schooling. It is also worth stating that during my studies, I lived in an apartment in Jerusalem with two ultra-Orthodox students from the Hebron Yeshiva, and even taught them some Arabic.

Most of the judges in Israel are Jews; therefore I believe that my identity and personal history as an Israeli-Arab gave me a unique perspective to decide matters related to Judaism. I feel that judicial decisions like mine make strides with pluralism and the multiplicity of views. This is particularly important in the highest court in Israel. For example, I sat on many cases dealing with citizenship naturalization based on the Law of Return; kashrut; businesses being open on the Sabbath; conversion; rabbinic appointments; and others. These are very sensitive issues in Israel. Public emotions often run high regarding these

topics. Just as I feel that there is a certain advantage when Jewish Orthodox judges sit on these cases, because from their perspective they are dealing with a personal issue, so too, I feel that there is an advantage when non-Jewish judges, like myself, sit on these cases.

A good example of this is the case of *Ragen v. Ministry of Transport*. The *Ragen* case concerned bus lines – *Kavei Mehadrin* [kosher bus lines] – that had segregated seating between men and women in cities with large ultra-Orthodox populations. The argument was that these arrangements violated the principle of equality, the constitutional right to dignity and infringed on freedom of religion and conscience. The petitioner argued that the Ministry of Transportation absolved itself from its duty to supervise the operations of these segregated bus lines. There was no dispute that the reality of segregation on bus lines, being dictated and coercive, is unlawful. The Ministry of Transportation adopted a report compiled by a committee that denied any intentional discrimination, and therefore said there was no coercive segregation, and at the same time permitted consideration of the will of those voluntarily seeking to uphold segregation – the ultra-Orthodox community.

Three Justices decided on this matter: Justice Rubinstein, an Orthodox Jew, Justice Danziger, a secular Jew, and myself. The three of us were and remain good friends to this day. We decided that coercive segregation arrangements against a woman’s will, often with verbal violence and beyond, is a severe violation of equality and dignity that cannot be permitted, including on the criminal law level. We decided that the committee’s report, which the Ministry of Transportation adopted, is reasonable. It prohibits coercive segregation arrangements and grants the possibility, to those who desire it, to observe their religious and cultural views of the other. Moreover, we decided that the operators of public transportation would be required to post a sign on any bus line that was previously a “*Mehadrin*” line that would state that: “Any passenger may sit in any place he chooses, except for the seats marked for people with disabilities. Harassing a passenger in this matter may constitute a criminal offense.” The companies that operate the “*Mehadrin*” lines will advertise the cancellation of the segregation arrangements and the right of each passenger to sit wherever they please.

By-and-large, the fact that I am not Jewish does not mean that I am not proficient with Jewish religious topics. When I studied law at the Hebrew University, I studied *Mishpat Iori* – Jewish Religious Law, under Professor Menachem Elon. Professor Elon went on to serve as a Justice on the Supreme Court and as Deputy Chief Justice, same as myself. Despite the fact that I was one of the only Arab students in the class, I finished the course with one

of the highest grades in the class. Also, in my judgments, I relish quoting from Jewish law as well as from the Koran and the New Testament. I was the first (and I think still the only) Justice on the Supreme Court who quoted from the Koran and Arab literature in Arabic, the original language (together with a Hebrew translation). I believe that it is important that the Arabic language will appear in Israeli court decisions. Additionally, my familiarity with the religious texts of different religions helps me occasionally solve problems and arrive at a decision by using quotes from scriptures. Sometimes, using a parable or a quote from these holy texts helps me to arrive at a mutually agreeable solution between the litigants in the midst of a dispute in the court itself.

In conclusion, Israel is a complex country, and my home. No one can deny that Israel is a multicultural country and, accordingly, has a complex identity that affects the judicial process. I am proud of my tradition, of my origins and my values. Nevertheless, every judge is obligated to decide the matter before him in an objective, impartial manner. Notwithstanding this, every judge needs to be principled, fluent in the history of the state and the people who live in it. Only a judge proficient in the law, and who is familiar with and understands the people he presides over, is able to do justice.

Justice Salim Joubran (ret.) served on the Supreme Court of Israel, 2003-2017, and was appointed Deputy Chief Justice of the Supreme Court of Israel in June, 2017.

A Personal Comment

Amos Shapira

I was privileged to attend the Rome Conference, listen to the presentations delivered there, as well as peruse the articles in this issue of JUSTICE. It has been an interesting, thought-provoking experience. Still, I feel that I am missing a precise definition and a clear categorization of a variety of identities that we tend to attribute, often interchangeably, to majorities and minorities, namely, national, ethnic, civic, religious, political, cultural, linguistic and socio-economic classifications.

In the Israeli context, and in view of the recently enacted and bitterly controversial Basic Law: Israel – The Nation State of the Jewish People, how should one define the group identities and the ensuing freedoms and rights, of, say, Israeli citizens who identify themselves as Arabs, and/or Palestinians and/or Muslims or Christians? And how do we understand the constitutive common denominator of “the Jewish People,” which builds on the concept of Jewish Peoplehood? What are the criteria for including and excluding possible members of “the Jewish People”?

Moreover, should Israeli citizens who identify themselves as members of a national (not only civic, religious or cultural) minority be recognized as such by the majority Jewish nation-state, and what are the implications of such recognition? The insightful presentations whet our intellectual appetite for a further definitional exploration of the group identities discussed at the Rome conference.

Professor Amos Shapira is former Dean of the Faculty of Law, Tel Aviv University. He served on the organizing committee of the IAJLJ Rome Conference.

Rabbi Riccardo Di Segni

I greet with great pleasure the members of IAJLJ who chose Rome as the venue for your annual meeting.

Your association, with its highly qualified members, is evidence of the Jewish passion for the right. This passion – I say this as a medical doctor – is quite a “congenital disease” of Judaism. The traditional Jewish right is the *halakha*, but the Jewish commitment is extended to many other juridical systems. Thanks to this commitment, in the last centuries, when and where the anti-Jewish barriers were broken down, Jewish sensitivity exerted its influence, first of all humanitarian, on the juridical systems. This is especially evident in the great statements of principle at the base of national and international constitutions and solemn declarations. As Rabbi Jonathan Sacks wrote, “the language of human rights is universal, but it speaks with a Jewish accent.”

The tragic history of the persecutions of the Jews in the last century has contributed to disseminating all over the world the sensitivity for human rights. Among its effects, it forced exile upon many illustrious Jewish jurists, who contributed to founding new schools of rights everywhere, from South America to the future State of Israel.

Today, there are many important tasks for Jewish jurists: from the attention to grant human dignity in the systems and countries where it might be threatened by authoritarian temptations, to the vigilance against the risks of violation of basic religious rights. Today there is a trend to fight religious rights in a “politically correct” way, as a conflict of opposing rights: Examples include the issue of male circumcision, which is opposed in the name of the rights of children, and ritual slaughter, which some oppose in the name of animal suffering. Your attention and contribution to these fields will be decisive.

I wish you much success in your discussions and deliberations.

Rabbi Riccardo Di Segni is Chief Rabbi of Rome.

Noemi Di Segni

It is a great honor to welcome you to Rome, on behalf of all of the 21 Jewish communities in Italy, to this prominent gathering. On the 80th anniversary of *Kristallnacht* and the laws enacted to protect the purity of the Italian race, the 70th anniversary of the State of Israel, and in consideration of the pace of changes in our geopolitical landscape, it is our duty to dedicate thought and analysis to the story of our people and the history of our nations. What lessons have we learned? What were – and still are – the responsibilities of legal experts in abusing the principle of the rule of law to deny supreme rights and favor democratically taken but inhuman decisions, using law as a tool to implement hatred, rather than to promote development and enhance unwritten ethics? Jewish lawyers, judges and jurist have contributed to the development of lawmaking in Italy at the dawn of the Emancipation and even before, with the contribution of religious thinking and studies to medieval and Christian philosophy and afterward, "Renaissance storming." Italian Jewry has always been an integral part of Italian culture and civil life. What happened between 1938 and 1943, with the consequences of deportation and extermination, has been received as a betrayal of the country toward its Jewish population, a deep injury to Italy itself. After the war, the contribution to the drafting of the Italian constitution has been an essential one. The principles and safeguards stated especially in article 3 are fundamental and need to be mentioned day and night – like the Shemà. This needs to be known and needs to be taught. I cite Menachem Elon: *"abbiamo in amano una regola: Il Sistema giudiziario non può nutrirsi solo di un corpo di leggi – il corpo del sistema deve avere un'anima e a volte un'anima speciale."*

Today we are facing an increased wave of antisemitism, racism and hate crimes, leveraged by digital technologies, in line with the growing number of other minorities. Our challenge is to complete, and hopefully accelerate, the process that has begun after the war, the switch from protection of race to protection of rights, from legalized divisiveness and exclusion to cultural inclusiveness, as natural coexistence. There are challenges related to freedom of religious practices (*milà, shchità*); understanding other cultures at the level of proceedings; of giving magistrates better "legal tools" and better specific criminal provisions to address the real impact of extended and burning hate; of enhancing the constitutional frame of Europe to reflect not only financial integration but also solidarity and social opportunities. Education starts at age zero, and it is the effort of all public institutions, lawmakers, families and educators to create conditions for sharing and developing our country, for proving that a combination between natural rights and true life can really exist. I envisage also an important role for your association in supporting us all with your expertise. I am sure that the history of Italian Jews, with their ability to preserve tradition and be an integral part of their homeland, will be a voice of civil society and an agency for constitutional affirmation that can guide us also through these challenges to future solutions. I wish you all fruitful work and enjoy this gathering.

Noemi Di Segni is President of the Union of Italian Jewish Communities.

IAJLJ MEETING WITH POPE FRANCIS

The Executive Committee of the International Association of Jewish Lawyers and Jurists (IAJLJ), together with several Members of its International Board of Trustees, met with Pope Francis at the Vatican on Friday, November 9, 2018. Advocate Meir Linzen, President of the IAJLJ, himself the son of Holocaust survivors, delivered a heartfelt appeal to Pope Francis, to utilize his position in the Catholic Church in order to combat antisemitism world-wide.

The Pope expressed sympathy with the IAJLJ mission and stressed the importance of fighting hatred and advancing peace between all peoples. The Pope expounded his concern and fear of an imminent Third World War, not global but in parts, with the parts expanding. When thanked by members of IAJLJ's delegation for his support of the Jewish people and the State of Israel, he humbly responded, "Please pray for me."

The IAJLJ delegation delivered several gifts to Pope Francis, including a portrait painting of his likeness, created by Bartosz "Bart" Sucharski. The IAJLJ also presented the Pope with a copy of the issue of *JUSTICE* (No. 60) devoted to "50 Years of a United Jerusalem: Legal, Geo-Strategic and International Aspects," based on the IAJLJ 16th Congress (held in Jerusalem Nov.-Dec. 2017).

IAJLJ Participants at this historic event were:

Adv. Meir Linzen (Israel) President

Adv. Irit Kohn (Israel) President Emeritus, Member of the Board

Adv. Calev Myers (Israel) Deputy President

Adv. Daniel Reisner (Israel) Vice President, Secretary General

Adv. Avraham (Avi) D. Doron (Israel) Vice President, Treasurer

Col. (Ret.) Adv. Pnina Sharvit Baruch (Israel) Vice President, Coordinator for International Organizations

Justice Marcos Arnoldo Grabivker (Argentina) Vice President

Adv. Maurizio Ruben (Italy) Vice President

Prof. Stephen R. Greenwald (USA) Vice President

Adv. Jonathan David (Israel) Member of the Board

Adv. Ronit Gidron-Zemach (Israel) CEO, Member of the Board

Dr. Mala Tabory (Israel) Editor of *JUSTICE*, Member of the Board

Adv. Avraham Yishai (Israel)

Justice Maria Claudia Caputi (Argentina)





Presentation of Justice issue on Jerusalem

Address to His Holiness Pope Francis

By Advocate Meir Linzen

President of the International Association of Jewish Lawyers and Jurists

Your Holiness Pope Francis
Your Excellencies

In the name of The International Association of Jewish Lawyers and Jurists, we thank you for receiving us, for this first meeting between the Holy See and our organization. At the outset, I would like to thank our Vice President, Mr. Marcos Grabivker for helping to make this meeting possible.

The motto of our organization, and our mission statement, is taken from the Book of Isaiah, צִיּוֹן בְּמִשְׁפָּט תִּפְדָּה, וְיִשְׂרָאֵל בְּצֶדֶקָה "Zion shall be redeemed with justice."

Our organization takes an active role, primarily through legal means, in the war against antisemitism, and the de-legitimization of the State of Israel as the home of the Jewish people. But our organization also acts against all who seek to attack others on racial, religious, or xenophobic grounds.

The Catholic Church has done much to denounce antisemitism during the past few decades, and to bring Jews and Christians closer together. There is no doubt that this process is reaching its height under the leadership of your Holiness. The accepting approach of Your Holiness to the Jewish people comes from the depths of your heart, and we are grateful for that.

Both my parents were Holocaust survivors from Poland. My late mother survived the Warsaw Ghetto, and the Auschwitz and Bergen-Belsen concentration camps. Perhaps naively, we had thought that after the Holocaust, the nations of the world would outlaw and condemn xenophobia and antisemitism.

However, 75 years after the end of the Second World War, Jews around the world are still subject to hatred, and are still at peril. Just two weeks ago, the Jewish community in the United States witnessed a terrible massacre at the Tree of Life Synagogue in Pittsburgh. This heinous attack was the product of extreme antisemitism. Innocent worshipers were massacred simply because they were Jews.

The State of Israel is attacked not only by terrorism, but also by attempts to eradicate its legitimacy. Our organization looks forward to the opportunity to explore with the Holy See practical possibilities to combat antisemitism and all forms of racial and religious intolerance.

The followers of the three great Monotheistic faiths, Jews, Christians, and Muslims, are all inspired by our common forefather Abraham. It is Abraham who challenged God Himself to act justly.

השופט כל הארץ לא יעשה משפט

Will the Judge of all the earth not Himself act justly?

May we find common ground to fight injustice, hatred, and intolerance.

I end with the words of the Old Testament, "צַדִּיק צְדָקָה יִתְרַדֵּף,"
Which I translate "Pursue the right path... the right path."

Thank you,
Advocate Meir Linzen



הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

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