

# The Law of Majorities

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Liav Orgad Di 16 Feb 2016

Are Poland and Hungary justified, under international law or EU law, in restricting migration to defend their “Christian heritage”? How about the so-called “European way of life” or their “constitutional identity”? More generally, can a liberal democracy restrict immigration and/or access to citizenship in order to protect the „majority culture” and still remain liberal? Cultural defense policies are mushrooming in Europe, as refugees and migrants from Africa, Central Asia and the Middle East many of them Muslims keep coming to our shores in unprecedented numbers. Can the “cultural defense” of majorities be reconciled with liberal values and, if so, how?

The current international legal structure for managing global migration was established in a different era, when cross-border movements were of a different scale, pace, and composition. The 2015 refugee/migrant crisis has caught Europe unprepared, politically and legally. The crisis has brought to the fore the relationship between immigration policy and constitutional identity. Leading officials in the Czech Republic, Cyprus, Hungary, Poland, and Slovakia declared an admission preference to Christian refugees in order to defend what they perceive as the „national identity” and the „European way of life.” This jargon has been more than mere political rhetoric. According to the preamble of the EU plan for the distribution of refugees, in deciding which state „should be the Member State of relocation, specific account should be given to the specific qualifications and characteristics of the applicants concerned, such as their language skills and other individual indications based on demonstrated family, cultural or social ties.” The meaning of “cultural ties,” however, has not been defined, and right-wing governments in Europe are currently claiming to have a right to defend their Christian heritage by restricting entry of Muslims, as is the recent case of Poland and Hungary.

The recent populist trend in European politics toward immigrants has enhanced the already-existing discussion on justifiable and unjustifiable attempts by states to protect their cultural essentials in the immigration context. How can liberal democracies welcome immigrants without fundamentally changing their cultural heritage, forsaking their liberal traditions, or slipping into extreme nationalism? This issue is one of the greatest challenges facing liberalism today.

## Cultural Defense of Nations

Global migration affects concepts of sovereignty, self-determination, and the nation-state. One of its expressions is the rise of what I term „cultural defense policies”—immigration and naturalization policies that are aimed at protecting different forms and expressions of the national identity. In Europe, integration has become mandatory, sanctioned, and test-based. It applies to all types of immigrants, including family members, and it is more invasive than the classic requirements of familiarity with a country’s history and civics. In some states, the frontiers are moving beyond the territorial borders with the creation of a new concept—“integration from abroad.” Cultural defense policies are implemented through five main measures: (a) citizenship tests; (b) integration contracts; (c) loyalty oaths; (d) attachment requirements; and (e) language requirements (other measures include fences, preferences to ethnic diaspora, etc.). Although the law uses politically correct language, such as „community,” „society,” and „state,” and in spite of the fact that politicians try to show that the law defends „common,” „prevailing,” and „shared” values, the defended culture essentially represents the ways of life, traditions, and values of the non-immigrant groups, the native-born population (autochthon, autochtonen, Français de souche).

## The Paradox of Majority Rights

Talking about a liberal theory of majority rights seems paradoxical. Liberal theorists have always been troubled with

the constant threat posed to individual liberties by democratic majority rule. Democracy is a „government of the people, by the people, for the people,“ but „the people“ is essentially a majority population expressing itself through a majority vote. In a democracy, as Alexis de Tocqueville wrote in his essay *The Tyranny of the Majority*, the majority may „do whatsoever it pleases“ and tyrannize the minority. In liberal political philosophy, majorities are associated with „evils against which society requires to be on its guard,“ to quote John Stuart Mill. The phrase „The will of the people,“ Mill argued, is deceptive, because it „practically means, the will of the most numerous or the most active part of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, may desire to oppress a part of their number; and precautions are as much needed against this, as against any other abuse of power.“ This widely-shared view—that the power of the majority should be restrained—has become one of the most important pillars of international human rights law.

Given the fact that a democracy is based on majoritarian politics, democratic theory assumes that the majority culture „can take care of itself.“ It can dominate the public sphere by controlling entry into the community and by utilizing the forces of democratic decision-making. Thus, it does not need special legal privileges, nor is the concept of the „majority“ even legally recognized.

## **A Rift in the Democratic Theory**

In the post-World War II international system, Western countries did not struggle with the question of „who we are?"; they had a solid sense of what was British, French, or German. But times have changed. The recent influx of refugees and asylum seekers, foreign workers, and family migrants, together with the rise of multiculturalism and minority rights—as well as the erosion of national identities as a result of technological developments, globalization, and transnationalism—have led to a new reality where the assumption that the majority can take care of itself is no longer self-evident. Majorities in the West, particularly in Europe, have become smaller in size—numbers matter, especially in a democracy—and their culture has become more needy.

Furthermore: talks about the adoption of the majority culture to the minority culture have become popular. A recent article in *The New Republic* has called France to abandoned the concept of *laïcité* to accommodate the realities of multiculturalism; an article in *The Economist* has called the UK to revisit the status of the Church of England to adopt itself to a new era; and in Cologne, after 120 women reported being sexually assaulted, the mayor has called women to keep arm's length from strangers to prevent sexual harassment—to give just three examples from this week.

## **Three Conceptions of Majorities**

The first step in talking about majorities would be to legally recognize the existence of the majority entity. Identifying a majority is an exercise in classification; there is no one size-fits-all formula. In particular, it is difficult to decide how and where to draw the line between majorities and minorities; after all, majorities politically are made, not born. In many cases, today's majority is composed of a coalition of yesterday's minorities. Still, the fact that a concept is elusive does not mean that the reality to be denoted by it does not exist. With few exceptions, Western societies are heterogeneous. They contain a majority alongside one or more minorities. Everyone who advocates cultural minority rights must recognize their side-effect; cultural minority rights, by definition, yield a distinctive cultural majority. This is the inevitable outcome of multiculturalism.

In theory, various conceptions of majorities exist. One conception is an ethno-cultural majority; a majority is a group that is larger than other groups in the population, and is defined by one or more common ethno-cultural characteristics: descent, heritage, culture, language, religion, or way of life. Most nation-states have a dominant ethno-cultural group around which the state was founded—Castilians, English, Lithuanians, Poles, Russians, Serbs, etc.—alongside one or more minority groups: Basques, Catalans, Frisians, Scots, Tatars, Welsh. Each society has its own subtle features and there is no list of fixed criteria for identifying an ethno-culture majority.

A second conception is a sociological majority; a „majority“ is a group whose members have the strongest political,

economic, or cultural power in a society. A sociological majority is measured not by the number of people, but by resources, dominance, and power. Hence, there may be cases where a numerical minority is the controlling group. These cases ought not to exist in a democracy because a free election is unlikely to produce such an outcome, yet they exist in autocratic regimes. Sociological majorities may also be composed of groups that, although a numerical minority, are perceived as part of the majority group due to their socioeconomic status.

A third conception is an idea-based majority; a majority is a group whose members share, to a high degree, certain ideas and principles that are the dominant ones in a given society. Put differently, members of the majority are those who do not differ substantively from the existing state's dominant ideas and principles. Each society stands for something fundamental, whether we call it constitutional essentials, a society's basic structure, or the general political philosophy. It can be a form of government (democracy, republic, monarchy), character (religious heritage, secularism, language), rights and freedoms (equality, liberty, dignity), or a combination of ideas that, taken together, are unique to a certain country. Some of these ideas are universal; others are more particular. The focus here is not on tastes in food, literature, sport, poetry, and the like; it is rather a statement of the most fundamental beliefs of a political community, its *raison d'être*.

Each of these three conceptions of majorities has a different emphasis. However, all of them view the majority as a collective with three main characteristics: a collective self-identification of a distinctive group; closeness of the members in terms of ethno-cultural character, socioeconomic character, or ideas; and the position of these characteristics in a given society as the dominant one.

## **Four Cases of Needy Majorities**

When (and why) would the concept of the majority be useful in practice? Immigration policy is such a field where the majority may become „needy.“ Four paradigmatic cases can be identified.

The first case is diminishing majorities; it relates to a case in which majorities have reached a point where a fundamental cultural feature of society faces a significant challenge due, among other things, to immigration. This challenge is a function of numbers and the capacity to absorb additional immigrants without a reasonable likelihood that their admission would radically affect the „core“ of the majority culture (a liberal institution, basic constitutional structure, distinctive vision of the common good, etc.). Under this case, if the state continues to admit immigrants, the majority's ability to freely define its „self“ in a state-based framework will become much weaker.

The second case is regional-minority majorities; it relates to a case in which a fundamental feature of the majority finds itself to be of a regional minority. In the Baltic countries or in the Ukraine, for example, the non-Russian majority lives in countries bordering the powerful Russian Federation. The idea that these countries should admit massive Russian immigration is perceived as dangerous by the majorities. Factors that may be considered here are: the level of the cultural gap and its manifestation; the numerical ratio between the majority and the neighboring countries; the strength of the majority culture; geographical proximity; the scale of immigration from neighboring countries; and the level of integration of newcomers into the majority culture.

The third case is minoritized majorities; it relates to a situation in which a national majority displays a state of mind of a national minority. Will Kymlicka, who has coined this term, defines minoritized majorities as „majorities that continue to think and act as if they are weak and victimized minorities and, therefore, continue to live in existential fear for their survival.“ These majorities were once national minorities, dominated by a foreign national majority, which is often the present national minority. Kymlicka gives the example of the Slovak majority and Hungarian minority in Slovakia, but other examples exist: the German minority in Poland, the Hungarian minority in Romania, the Russian minority in Ukraine, the Serbian minority in Croatia, and the Turkish minority in Bulgaria. In such cases, further immigration of people sharing the minority background is perceived by the majority as a threat to its territorial integrity and sovereignty.

The fourth case is victimized majorities; it relates to a situation in which the majority has a rich history of being

victimized and persecuted. In the paradigmatic case, the history of victimization is comprehensively rooted in a preset group's collective identity and has become part of its memories, traumas, and ethos (Israel can be an example). And when the threats are persistent and empirically-grounded, more than just bad collective historical memories are at stake.

Some of these cases may justify cultural majority rights in the immigration context. In other circumstances, these cases create, at most, an excuse—a plea to consider existing regional, historical, and psychological circumstances of a group when evaluating its immigration policies. It is a plea for a different legal interpretation of what is just, or for an exception to a general norm.

## Majority Rights

Cultural minority rights have paved the way for cultural majority rights. Some of the principles invoked to defend minority cultures may apply, with proper accommodation, to „needy“ majority cultures. Liberal theory and human rights law do not contain an explicit body of laws on cultural majority rights, yet this is merely because, so far, the majority culture has been presumed able to take care of itself by virtue of being a majority. However, majorities, like minorities, have an interest in adhering to their culture and preserving its essentials. This interest is based on similar justifications of cultural minority rights—the rights to personal identity and personal autonomy.

What does majority „rights“ mean? First and foremost, it entails that the cultural interests of the majority should be protected by law—that is, recognizing that some aspects of the cultural interests of majorities, in some cases and subject to some limitations, are a sufficient reason for granting privileges to the majority and imposing duties on others in order to secure those interests. Majority „rights,“ in this context, means a plea to consider its needs and circumstances when determining its immigration absorption capacity, either as a justification for a certain policy or as an excuse for a deviation from a general legal norm—a form of mitigating circumstances.

What should be the scope of that protection? My approach provides a narrow defense for the majority culture. First, the focus is culture in the normative, rather than anthropological sense. It centers on normative principles, values, and institutions, instead of actual practices, folkways, lifestyles, and cultural mores. Second, within the normative realm, the focal point is the constitution, rather than sociological concepts of German living conditions, life in the United Kingdom, French communauté, or Dutch society. Put differently, it is the constitutional, rather than national or societal identity. Moreover, the focus is only on core constitutional principles, the basic structure, and, exclusively, on those principles that are essential for citizenship in a given state. Third, there is no plea for moral identification, only for legal acceptance. The notion of acceptance is more demanding than cognitive knowledge—it requires some commitment—but less demanding than identification. Fourth, the majority culture must be just, in light of the state's circumstances; not every element of it is to be defended. And fifth, the majority is not a temporary political majority, represented by a political body, but a more permanent majority, reflected by the values of the constitution. It is a constitutional, rather than an electoral, majority.

What factors should be considered when determining the scope of majority rights? One factor is the severity of the threat posed to the majority culture, the probability of it occurring, and its consequences. Other factors are the moral value of the culture of the majority (how much of it is worth protecting?) and its centrality in defining the majority's identity. While the focus of these factors is the majority interest, other factors relate to justice: does the demographic change brought about by immigration bring a more, or less, just society? There are cases where the cultural effects of the demographic change brought about by immigration are perceived to be for the worst, while in others they are perceived to create a more just society. The hard case is when the cultural effects of the change brought about by immigration give rise to just institutions, but different ones; in this case, the majority seeks to restrict migration not in order to prevent harm to liberal-democratic principles and institutions, but to sustain its dominant status and privileged position in determining the particular outcome of those just institutions and their basic structure.

## International Constitutional Moment

Never in human history has so much attention been paid to human movement. By 2015, the number of international immigrants soared to 232 million—11 percent of the total population in the developed regions. Global migration yields demographic shifts of historical significance. Still, political theory and international law are ill-equipped to address the challenge. The 2015 European crisis creates an „International Constitutional Moment“ for a candid discussion of both the challenge and the legal structure to address it. Some of the issues are national (e.g., defining a constitutional identity), other issues are regional (e.g., balancing between EU jurisdiction and the sovereignty of Member States to protect their constitutional identity),<sup>[1]</sup> and others are international (e.g., the relations between „majorities,“ „peoples,“ and „nations,“ or the nexus between self-determination of peoples and the cultural interests of majorities). My goal here is to advocate the recognition of a new concept, „majority groups“ (mainly, an idea-based majority), to bring to the fore a few cases where majorities may see themselves, or indeed are, culturally needy in the immigration context, and to provide a primary framework for analyzing them. Disregarding the topic of cultural majority rights is not only theoretically wrong, but also politically unwise. With forms of „majority nationalism“ rising and a growing popularity of extreme right-wing parties in the West, time has come to liberally address the new challenge. While liberal states should watch over “the tyranny of the majority,” they should not entirely dismiss the legal recognition of a majority group, as well as the moral value of its culture.

[1] Article 4(2) of the TEU (Maastricht, 1992) provides that „The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional . . . including ensuring the territorial integrity of the State.“ This „constitutional identity clause“ is currently part of the Treaty of Lisbon (Article 4(2)).

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