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**Building Inclusive and Just Societies:
The Role of Deliberative Theory**

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BUILDING INCLUSIVE AND JUST SOCIETIES: THE ROLE OF DELIBERATIVE THEORY

PUJA KAPAI*

ABSTRACT:

This paper starts from the premise that the nation-state model which enables nationals to participate in their own governance is an outdated model of political organisation in an age where plurinational states have become the norm. Drawing on the works of several political theorists who have sought to reconcile the status and role of cultural and national minorities in these states using liberal accommodation, tolerance, integration or multicultural accommodation and self-governance, this paper questions the central bases of the theories advanced. The paper argues that citizenship needs to be reconstrued to include everyone as having an equal and reciprocal duty in their own governance, including minorities. The current failure of the nation state model which has served to entrench differences and exclusion is attributable to the limited perception of immigrant and ethnic minorities as mere subjects of the polity. This view of immigrant and ethnic minority people as passive subjects as opposed to active and interactive members of the polity, distorts their role in the political apparatus of the state, ignoring their concerns, interests and capacities for political agency. In arguing that the inclusion of these groups into the state's political structure and in the development of law and policy would serve numerous purposes, the paper draws on various theories of justice. The fundamental premise for such inclusion is that belonging and loyalty are cultivated through processes that require regular engagement with other groups, including minorities, in deliberative decision-making processes. Through the creation of a space for inter- and intra-group dialogue, the development of a national political identity whilst enabling the maintenance of subjective community identities becomes possible. The inclusion of minority groups in this process can help cultivate feelings of membership, commonality of purpose and ultimately, trust. In time, this trust can be capitalized upon to achieve justice through inclusion. Deliberation theory, it is argued, has an important and indispensable role in building just and inclusive societies, particularly multicultural polities.

I. INTRODUCTION

The last two centuries have witnessed enormous changes in the constitution of the nation state. Colonization, two world wars and mass industrialization have triggered the movement of people globally resulting in the proliferation of multicultural populations and communities.¹ Many immigrants have sought homes in liberal democratic countries such as Australia, the United Kingdom and the United States of America, which have come to be known as 'immigration countries.' This has forged into existence plurinational states, the successor political model of the nation-state. Despite large numbers of immigrants now entering these states, some with a view to becoming citizens through naturalization

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¹ Stephen Castles, "Migration, Citizenship, and Education" in James A. Banks, ed., *Diversity and Citizenship Education: Global Perspectives* (San Francisco: Jossey-Bass, 2003) 17 at 18 [Castles].

processes, there is no accompanying political process to help shape their political agency as they transition from immigrants into citizens. This transformation of the state calls for specific changes in the states' political structure and apparatus to reflect accurately the new influences on politics, which, if unaccounted for, run the risk of entrenching existing inequalities and further straining the already delicate ties between ethnic groups given structural and political inequalities that have rendered vulnerable groups completely marginalised.

Immigrant communities bring with them their culture, tradition, and religious belief systems. Although they find others with whom to pursue their visions of the good and meaningful life, they remain the minority, often excluded from or marginalised in mainstream discussions taking place in law-making processes and political circles. The liberal democratic constitution affords them certain basic rights including, inter alia, the freedom of religion, the right to practice their culture in community with others, and the freedom of speech. These rights ensure that they are able to live life according to the beliefs without fear of persecution or discrimination.

However, the existence of such groups in a nation with a dominant group is not without its challenges despite the protections offered. The coexistence of cultural and religious minorities in liberal democratic systems presents various complexities. Minority groups within such states often struggle when they are subject to the general legal system. Some of these groups maintain cultural and religious practices which, although meaningful to their identity, are objectionable and sometimes contrary to the laws of their host nation. They are caught in the twilight between the two worlds they inhabit in terms of cultural, legal, political and religious norms. As they struggle to fit in, they are exposed to different dimensions of their new environment, faced with the choice between acculturation and assimilation at every step. Some minorities are temporary settlers whilst others, such as asylum seekers, seek a permanent home. The treatment of minorities has often rested on the fine distinctions drawn between nationals by birth as opposed to naturalization.

The controversial question that arises is whether incoming immigrants have a right to be part of the state's political structure so as to provide them with the space to voice their concerns and to have a say in their own governance. This question challenges and critically engages political theory and current discourse on differentiated and multicultural citizenship.² Does a commitment to constitutional rights entail a requirement that such a framework be provided for the groups' full inclusion in politics? A further impact of their exclusion is the inability to express specific concerns regarding their social or political circumstances due to the lack of appropriate channels. Thus, the question of how their minority status results in special needs that require accommodation or consideration at work, in schools or in medical contexts, remains unaddressed. Without appropriate channels through which these issues can be engaged in an inclusive forum where the groups affected participate directly, there is a risk of injustice and discrimination. Accommodationist and integrationist approaches entrench the age-old east-west power dynamic where the immigrant or ethnic minorities from the 'south' depend on the accommodating state government or its people for 'approval' or 'tolerance' of their cultural and religious practices or 'inclusion' into the community. Integrationist policies replicate historical oppressions such as slavery and colonialism through legal dictates that

² Seyla Benhabib, *Democracy and Difference: Contesting the Boundaries of the Political* (New Jersey: Princeton University Press, 1996) [*Democracy and Difference*].

seek to 'depoliticise the subject' by forcing the abandonment of certain attributes. Many of these attributes are strongly entrenched in the sense of identity that the subject most closely relates to. However, in the pursuit of unity, stability and the common good, does integrationism or accommodationism invariably single out certain groups for the project of a 'diluted individual identity'?

The difficult question is what degree of accommodation ought to be extended by the government to minority groups? More importantly, what is the basis for such accommodation? Is such accommodation required by constitutional and human rights principles to the extent that the failure to accommodate would be tantamount to discrimination or a negation of the identity and autonomy of the groups concerned? What, if any, political space should minorities be given to contribute to the development of law and policy in the immigration country? Can inclusion mitigate some of the unjustness associated with the unequal burdens that result from the application of generalized norms or the experience of colonial oppression in the past? This question of inclusion in the state's political apparatus raises important questions about the concept of citizenship and its application in the post-modern state. What is the basis for this political inclusion of immigrant communities and what purposes can it serve in building just and inclusive societies? What role does equality law play in this context?

These questions have played themselves out in different liberal democratic countries³, whose governments have routinely debated the best model of governance to be adopted in order to ensure that immigrant or ethnic communities are not deprived of the rights due to them under international law or state constitutional law.

³ *Employment Division (Oregon) v. Smith*, 494 U.S. 972 (1990); *Leyla Sahin v. Turkey* [2005] E.C.H.R. 819; *R (SB) v. Governors of Denbigh High School* [2006] UKHL 15; *Otto-Preminger Institut v. Austria* (1995) 19 E.H.R.R. 34; *Jersild v. Denmark* (1994) 19 E.H.R.R. 1; *Faurisson v France*, CCPR/C/58/D/550/1993, 8 November 1996, Human Rights Committee; *Wingrove v. UK* (1997) 24 E.H.R.R. 1; and *Pell v. Council of Trustees of the National Gallery of Victoria* [1998] 2 V.R. 391. All of these cases concerned the extent to which the state was to protect the rights of a religious group in order to fully comply with international obligations pertaining to state protection against discrimination on grounds of religion and full protection of the right to freedom of religion. These cases have moved from the national context to complaints brought against states in the European Court of Human Rights or the Human Rights Committee of the United Nations with a view to providing determinative guidance on these questions. As the cases reveal, however, there is still much disagreement concerning the approach towards resolving these questions and the treatment of religion and culture in public or employment contexts.

More recent tensions have surrounded the question of veiling in public (France, Belgium, United Kingdom), the building of minarets (Switzerland), veiling of witnesses in the courtroom (Canada) and the application of religious law in personal matters such as divorce and custody (Canada, United Kingdom, United States of America). These issues have brought to the forefront the key tensions that multicultural societies have faced for decades but only more recently have these issues been ventilated in public forums as a result of the formalized handling of these issues through litigation or referenda. Some communities, however, have been pioneers of developing integrative frameworks of governance that seek to include aspiring citizens by experimenting with civic engagement with immigrants by giving groups such as aspiring green card holders (those who have submitted an application for the green card scheme) a limited set of rights to participate in discussion and decision-making in limited contexts in light of their long-term desire for political inclusion into the United States. These rights become permanent and full-fledged upon the success of their application for citizenship. Some states in the USA have put such a scheme into place. The aim is to provide a smoother transition to citizenship for the increasing number of immigrants who are seeking to develop a new community.

Modern political discourse has traditionally drawn on ideas such as tolerance, accommodation, assimilation, group autonomy and group rights to determine the space to be given to such minorities to exhibit their distinct identities. Unfortunately, however, the discourse to date has been heavily politicised and has failed to address the real concerns that underpin the challenge to the nation-state model and traditional notions of citizenship and agency.

This paper argues first, that the failure of the modern nation state to calibrate differences effectively is attributable to the limited perception of immigrant and ethnic minorities as mere subjects of the law or the polity. This view of immigrant and ethnic minority people as passive subjects as opposed to active and interactive members of the polity, distorts their role in the political apparatus of the state, ignoring their concerns, interests and capacities for political agency. Taking into account of theories of justice, the inclusion of these groups into the state's political structure and in the development of law and policy would serve numerous purposes. These include the creation of a space for inter- and intra-group dialogue, the development of a national political identity whilst enabling the maintenance of subjective community identities. Both of these processes enhance social understanding and therefore, stability. Consequently, they help cultivate national attachments and belonging that is common in citizens. The current political frameworks of exclusion or limited inclusion conditioned on theories of tolerance, accommodation, citizenship and integration are fatal to the creation of a just and inclusive society. They present immigrant and ethnic groups as inherently incapable of or apathetic to politics and rational deliberation, rendering them irrelevant or relegating them to the bottom of the list of prioritization of issues requiring urgent attention affecting the polity. These practices of routine exclusion and ignorance strip such groups of their dignity by depriving them of their civil and political rights, dispossessing them of a political voice. For those who are 'tolerated', the process is one which reminds the vulnerable, powerless groups where power really lies. These experiences contribute to feelings of exclusion, disengagement, and disempowerment, leading to social and political instability.

On the one hand, outdated approaches to citizenship and nationality dictate the exclusion of immigrants and ethnic minorities subject to their occasional incorporation into the state's political framework when they fulfill stringent conditions. However, even where there is such inclusion at the formal level, these groups are unable to participate in practice because they lack the communicative tools they need to participate in government and the development of law and policy. Alternatively, the groups are unwilling to participate in such processes as a result of feelings of dislocation, discrimination or the fear of reprisal or exclusion. This is particularly true of newly arriving immigrant groups.

On the other front, scholars of modern constitutional and political theory have been working on developing new understandings of citizenship grounded in ideas that relate more closely to the modern experience of the formation of countries and the processes which influence migration and immigration. In light of this turn, it is important to correct perceptions of indifference, passivity and lack of capacity often attributed to the "Other." The entrenchment of practices and frameworks of exclusion is the subject of a contentious critique in political theory and theories of justice.

With a view to reducing social and political inequalities, it is imperative to expand the actual and perceived role of the "Other" and theorize the possibilities of the contribution that multiple actors bring to the political domain in pursuit of the good and the just society.

Through mechanisms that cater to participation by diverse groups, the complexities of multicultural citizenship can be better managed and addressed. The role of minorities needs to be extended beyond mere 'subjects' and reconstituted as groups with a civic responsibility to contribute to the betterment of society as a whole, but most importantly, to keep channels of communication and dialogue open so as to help develop inclusive processes and deliver just outcomes.

One of the means through which this can be achieved is through the creation of a deliberative space within the political structure for minority groups to interact with lawmakers and the general populace. At present, numerous barriers lay in the path of minorities' participation in politics. First and foremost, it is apparent that in multicultural societies, democracy appears to be operating at its weakest. Democratic practices reinforce the majority group's stronghold in politics, enabling them to steer the course of policy, oftentimes, to the detriment of minority interests. Counter-majoritarian mechanisms remain weak as constitutional courts designed to safeguard minority interests reflect a strong commitment to the national public interest, political stability and with a view to avoid getting embroiled in judgments that bear serious political consequences. More importantly, however, they shy away from overstepping their constitutionally-prescribed roles as interpreters of the law as opposed to engaging in policy-making from the bench.⁴

Numerous theorists have criticized modern democratic systems for their lack of depth and engagement of the masses in the pre-decision-making moments. Democratic moments in many countries today represent a mere aggregation of the group's collective interests, as opposed to a deliberated account of their political will. This has called into question the effectiveness of democratic mechanisms employed in determining the political will. Liberal values and practices which have long been championed as engendering in the public the desire to participate in decision-making through discussion of contentious issues of legal, social and political consequence. The argument has been that the liberal framework provides the space to engage in discussions pertaining to politics, law and policy-making. Through engagement in the public sphere, the market place of ideas enables the best ideas to come to the fore. However, as modern critics of the market-dominated paradigm have lamented, the system is subject to manipulation and domination by the most powerful voices. Likewise, political discussions have also been known to be dominated by mainstream voices due to the power stronghold.

Additionally, current democratic practice reveals that the mechanisms traditionally used for debate and engagement have lapsed into the monotony of 'routine' vote-casting which decision is taken by individuals after a short period of self-reflection (if at all), rather than after vigorous debate and engagement with civil society institutions.

Politics is marred by the decisions made by groups of self-interested individuals who vote collectively to follow their own agendas. It appears that nationalistic sentiments that may

⁴ This leaves the position of the minority particularly precarious in multicultural societies. Although there are decisions that reflect that judges do consider minority positions, in the majority of cases still, the reasoning reflects a failure to fully consider all dimensions of the impact of a decision or a position on the minority group concerned. This is usually the result of inherent limitations of the adversarial process which leaves it to the parties to define the pleadings and thereby, the issues at trial. This constrains judges in how they approach the issues in during their determinations. Furthermore, dealing with complex issues of this nature through courts inevitably means that the developments in law will be piecemeal since resources are finite and judges have to make economic use of these resources.

at one time have been the motivation behind thinking and acting in pursuit of the common good has increasingly been replaced by self-interested decision-making, fueled by consumerism, isolation from community-contexts and a general culture of making pragmatic decisions based on economic or materialistic considerations rather than ethical or moral reasoning informed by the duties that come with the privilege of enfranchisement. The process of voting and campaigning has been taken over by propaganda and materialism which attract or split voters on issue-specific bases rather than a complete platform for the overall improvement of the community. As such, it has been argued that modern societies suffer from a democratic deficit.⁵

These circumstances call for immediate reform. It is suggested that by prefacing the democratic moment with a series of dialogic and deliberative processes, this ‘democratic deficit’ can be addressed. Through a participatory democratic setting, nonpartisan aspects of political choice can be fully discussed and applied to the democratic moment. It can help distill the political and rhetorical arguments from reason-based and pragmatic arguments, enhancing the quality of democratic participation. The inclusion of minority groups in this process can help cultivate feelings of membership, commonality of purpose and ultimately, trust. In time, this trust can be capitalized upon so as to achieve justice through inclusion. Deliberation, therefore, is an important and indispensable component in building just and inclusive societies, particularly multicultural polities.

In order to ensure that the dialogue is meaningful, substantive aspects of the minorities’ experiences of intersecting marginalizations historically and politically would need to be considered and addressed. Furthermore, in order to build capacity for inclusive participation, substantive inequalities that may hinder such participation need to be addressed in a meaningful manner. This requires redesigning political apparatus to cultivate capacities for political participation across a diverse populace. Finally, the paper considers how such a reconstituted political dynamic incorporating civic responsibility and deliberative access for minority communities complements or adds to existing theories of justice.

II. THE POLITICAL ORGANIZATION OF MULTICULTURAL SOCIETIES

The existing impasse on the question of how to calibrate fundamental differences that manifest themselves in modern multicultural societies can be traced back to the models of governance employed by the governing regimes. Classic immigration countries have attempted to manage their diverse populations through various policies designed to ensure minimal disturbance to the foundational values and systems of the receiving community. Immigration countries have historically adopted models of assimilation and differential exclusion. Assimilation seeks to break down differences between immigrants and citizens by encouraging national language education and familiarisation with cultural and social practices of the nation. Differential exclusion restricts the immigrants’ ability to be incorporated into the society as settlers through its strict policies against long-term settlement by these groups. The primary aim of allowing immigrants into the society was

⁵ James S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (New York: Oxford University Press, 2009). See also James S. Fishkin, “Response to Critics of *When the People Speak: The Deliberative Deficit and What To Do About It*” (2010) 19:1 *The Good Society* 68 and other essays in that volume.

to benefit from their labour during the industrialization period.⁶ It was only in the late 70s and early 80s that these policies progressed towards more accommodative models in light of human rights developments which held governments accountable for serious human rights violations. In recognition of the rights of ethnic communities, immigration countries have gradually transformed their policies to accommodate them, however, not without antagonizing public sentiment at home. This has resulted in practices such as isolation, racialisation and discrimination against the “other”. Despite this, ethnic communities developed strong intra-group structures to serve their needs.⁷

Among democratic nations, models of political arrangements have ranged between those encompassing varying degrees of accommodation of ethnic identities and cultural practices to assimilationist models that seek to eliminate difference through encouraging (sometimes mandating indirectly through citizenship policies) compliance with and commitment to mainstream values. Very rarely do states allow internal self-governance. The spectrum spans from the pure liberal model to the liberal multicultural model.⁸ These represent varied policies towards ethnic groups, including accommodation by virtue of self-governance or group rights to the more limited rights to cultural and religious beliefs or practices which do not offend liberal principles; or assimilation, which refers to political designs that prohibit the public manifestation of religious affiliations and generally disallow special accommodation on grounds of culture or religion.

Accommodative models are more widely known as models with multicultural policies and have taken on a variety of forms. Generally, policies of multiculturalism recognize minority groups as having distinct attributes which find their expression in their own language, culture, and social etiquette. Multiculturalism recognizes the rights of ethnic communities to maintain their cultural, linguistic and social systems and to be protected equally against the intrusion of any of their constitutional rights. In exchange, multiculturalism, in most of its forms, is conditioned on the requirement that minority group practices be in conformity with basic principles of equality and non-discrimination and respect the law.

In offering a brief critique of liberal democratic theory and multiculturalism, this paper argues that these models fail to adequately address the challenge of diversity. This failure primarily stems from an exclusively state-centric vision of government, which is viewed as an institution resulting from a set of independent administrative processes which lead to decisions that legitimize state action. It is argued that a more citizen-centered vision of governance would serve to enhance the democratic legitimacy of decisions, particularly those regarding conflicting norms, thereby providing a more effective model for government and inclusion in multicultural communities.

⁶ See Castles, *supra* note 1 at 24.

⁷ Stephen Castles & Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World*, 2d ed. (London: Macmillan Press, 1998).

⁸ For example, the United Kingdom takes a liberal democratic approach, premising its decisions to accommodate or reject certain practices on the foundational principles protected by a liberal constitution underpinned by principles of human rights and other constitutional rights. Canada, on the other hand, adopts the multicultural political model, allowing communities a wider space in which to practice certain aspects of their culture or religion. Ultimately, however, Canada too, is insistent on the requirement that practices comply with the demands of constitutional and human rights as provided for in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11.

Multiculturalism has been criticized in recent years for unraveling some of the achievements of accommodationist policies. This has primarily resulted from a critical lack of appreciation as to how identities are formed and maintained. Moreover, a rigid focus on 'liberal multiculturalism' has disregarded the merits of empowerment through responsibility, reciprocity and mutuality as opposed to the rights-oriented model which focuses on the dichotomy between the subject and the government as the protector of these rights. Multiculturalism based on liberal ideology has failed due to the failure to include minorities through models of citizenship which enable the coexistence of cultural difference and belonging to the nation within a single individual. This calls for greater synchronicity between the recognition of cultural difference, civic equality and civic engagement rights and practice in plurinational states.

Liberalism as a Model for Multicultural Citizenship

Liberalism as a theory of citizenship prioritizes autonomy and liberty, allowing the individual to pursue their private interests without interference from the state. It is predicated on the idea that all individuals should be free to pursue their visions of a good life. The liberal democratic constitutional framework serves to ensure that all people are afforded equal protection from the government in order to prevent the infringement of their liberties and to facilitate their pursuit of this good life. In order to ensure that this protection is equally effective for all citizens, liberalism demands all public institutions to comply with the principles of equality and non-discrimination.

The reason why liberalism apparently succeeds as a suitable theory of accommodation is that by safeguarding equal rights for all in the public sphere, liberalism relegates culture to the private realm, where people are free to practice their beliefs as they desire. By keeping these differences grounded in culture and religion firmly out of the public eye using this dichotomy between the public and private, liberalism privatizes culture although it can appear in public subject to the principles of equality and non-discrimination. The privatization of difference gives the impression that the polity as a whole need not deal with cultural difference. However, as various recent examples have revealed, the divide between public and private spheres is not clear cut and governments have been challenged by difference in the private context given that some such acts have strong implications for the public sphere. The increasing recognition of the fluidity between public and private spheres demands an alternative approach to the conceptualization of cultural and religious difference and as systems that necessarily have a 'public' dimension for some groups.

Liberalism is particularly skeptical of affording any political or legal status to groups.⁹ Thus, whilst liberalism protects individual rights, indirectly, it facilitates the suppression of group rights through its framework. Liberal theory affords protection to individuals on the assumption that all their interests can be adequately protected based on the recognition of their needs as individuals. However, the theory overlooks the role of individuals within the collective, ignoring the critical relational influence of group membership on the constitution of one's identity. Liberalism assumes that through the protection of individuals, their membership within a particular group is adequately secured. The theory fails to appreciate the need for specific protection of group rights as an aspect of enabling the joint pursuit of common life goals or the intricate relationship between the individual

⁹ Jeff Spinner, *The Boundaries of Citizenship: Race, Ethnicity, and Nationality in the Liberal State* (Baltimore: John Hopkins University Press, 1996) at 4.

and the group they identify with. This individual-centered conception of identity fails to capture the role of group membership in the constitution of one's identity. It further fails to address the dynamic between individual and group identity and its relationship with achieving or pursuing a life of meaning. Thus, as an accommodative theory, liberalism fails with respect to those groups for whom group identity and performative action in the 'public' sphere constitute a meaningful existence.

Minority groups therefore, necessarily struggle without political power, through which they can represent themselves and secure their needs to the political process. Although individually, they have rights, majoritarian politics prevents them from having the desired impact in terms of numbers without adequate counter-majoritarian or affirmative action measures in place.

Multicultural Policies: Laws or Exceptions to Law?

Sometimes, as alternatives, but mainly as complementary institutions working in synchronicity with liberal models are multicultural policies such as liberal accommodation, tempered deference or group rights, which have been varyingly applied in different countries. Accommodative practices have suffered from the charge of ethnocentrism given that 'liberal values' are applied to adjudge the acceptability of the practice for the purposes of multicultural accommodation. On the other hand, some multiculturalism policies which afford group rights to minorities have resulted in the fragmentation of groups by concretising boundaries between different ethnic groups. Majority ethnic groups become wary of the differential treatment afforded to newcomer. This has caused resentment towards immigrant groups. Alternating systems of norm application to minority ethnic groups may also result in the 'deregulation' of certain activities that traditionally fall within the state's governance prerogative, for example, equality and non-discrimination. Such a separate system for the dispensation of justice and the protection of rights depletes the possibility of and the incentive for the development of a 'national' attachment to the host community, thereby further isolating minority groups from the national majority. This serves as a disincentive for any future engagement between the two groups as they are seen as having polarized interests. The struggle for political recognition becomes one for wresting power from majority groups to divide among the different minority ethnic groups in society. There being no common agenda between the different groups, they generally tend not to work together. These circumstances can result in a lack of social cohesion.

Feminist scholars¹⁰ have identified a further problem with group rights afforded under multicultural arrangements, arguing that these measures lead to further oppression of women and children whose rights may be deprived under such regimes where group rights take priority over individual rights. This may result in the perpetuation of discrimination and patriarchal policies inherent within certain communities, thereby weakening the position of these vulnerable groups further.

¹⁰ Avigail Eisenberg, "Identity and Liberal Politics: The Problem of Minorities within Minorities," in Avigail Eisenberg & Jeff Spinner-Halev, eds., *Minorities within Minorities: Equality, Rights and Diversity*, (Cambridge University Press, 2005) 249; Susan Moller Okin., "Is Multiculturalism Bad for Women?" in Joshua Cohen, Matthew Howard & Martha C. Nussbaum, eds., *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999) 9; and , Phillips, Anne (2003) When culture means gender: issues of cultural defence in the English courts. *Modern law review*, 66 (4). pp. 510-531.

As the discussion reveals, there are problems with both approaches. The problem is not necessarily the framework but the fact that accommodative frameworks are generally unaccompanied by complementary features which serve to reduce difference or enhance intercultural exchanges. If anything, in their present forms, they serve to antagonize multicultural groups and entrench differences due to the growing negativity that surrounds anything resembling ‘special rights’ or ‘special treatment’. This is due to the persistent ‘othering’ that is reinforced through policy-making processes and policies themselves, which entrench the historical power dynamic between the former colonial powers and the colonized. There is a complete lack of identification between the two groups that are party to the tensions that derive from one group having the power to give ‘recognition’ or ‘tolerate’ whilst the other is subject to the will and whim of this dominant group.

However, if these specific tensions were addressed so as to reduce othering and other deleterious policies, any of the aforementioned accommodative frameworks, if coupled with certain measures that seek to cultivate greater participation of minority groups within the broader society, would be better able to achieve the goal of a stable, just and inclusive society. Existing frameworks of liberalism and multiculturalism, where practiced in their pure forms tend to break down existing attachments, seeking to assimilate or create uniform citizens through the imposition of a set of values whereas multicultural measures may result in group exclusion or isolation. At either extreme, these systems run the risk of fragmentation within the community.

Both liberal and multicultural policies generally fail to recognize the intrinsic boundedness of culture to minorities’ identity and ‘cultural citizenship’ as an essential component to their self-determination.¹¹ Assimilation stifles cultural identification, particularly the community-expression dimension of it, whereas accommodation distorts it or suppresses it in its authentic form. Both are damaging and marginalize the communities concerned, rendering minorities outsiders to their own communities but also, in the mainstream society.

Brysk and Shafir refer to this as the “citizenship gap.”¹² The status of some individuals in societies where citizenship is primarily defined by birth, descent or blood and sometimes by residence, achievement or other identity, is such that they lack the usual bundle of rights that they would ordinarily have if globalization and its effects were adequately accounted for and understood. Whilst some people find themselves in a state of dual citizenship, there are those whose citizenship status is ambiguous or second-class, for example, ethnic groups or tribal and rural inhabitants. These people, and others, such as refugees, migrant workers or their children, and undocumented workers fall through the ‘citizenship gap.’¹³

The dynamic of globalization is intense and moving at a fast pace. This wave of cosmopolitanisation has critical implications for the notion of ‘state-citizenship’,

¹¹ Gloria Ladson-Billings, “Culture Versus Citizenship: The Challenge of Racialized Citizenship in the United States” in James A. Banks, ed., *Diversity and Citizenship Education: Global Perspectives* (San Francisco: Jossey-Bass, 2003) 99 [Ladson-Billings].

¹² Alison Brysk & Gershon Shafir, “Introduction” in Alison Brysk and Gershon Shafir, eds., *People out of Place: Globalization, Human Rights and the Citizenship Gap* (New York: Routledge, 2004) at 6 [Brysk & Shafir].

¹³ *Ibid.* at 5. For a discussion of the some of the impacts that globalization has on the rights of these groups, including those of citizens, see discussion on pp. 6-7.

previously determined by a simple test of certain attributes. However, the new types of residents in a bordered, borderless world that globalization has given birth to, demand a reconceptualised citizenship model, one that includes them and protects their interests adequately. Brysk and Shafir aptly describe the challenge as one requiring a “balance between ‘citizenship deficit’ due to the contraction of political democracy, and ‘citizenship surplus’, created by new venues of political influence.”¹⁴

Although globalization brings with it new opportunities and forms of intercultural exchange, from a governance perspective, the opportunities merely provide certain ‘access’ rights but without the “membership or responsibility” that comes with citizenship.¹⁵ Whilst a new structure of unterritorialised supranational rights is coming into play, it does not comprehensively define, inform nor attend to this new concept of citizenship in terms of membership, accountability or justice. As Soysal notes, we are in a space between ‘postnational citizenship’, an era in which the sovereign-statehood model of citizen rights is transitioning to a realm where (some) rights are conferred internationally. The state-centric model has not as yet been abandoned.¹⁶ However, Soysal’s thesis that universal human rights are the projected replacement for citizenship rights has been rightly criticized by others, such as Joppke, who notes that the nation will still be indispensable to the integration of immigrants.¹⁷ The relationship between the local and the international citizen needs to be critically explored to determine the duties and rights of the national, the overseas national, the immigrant or the citizen immigrant, and to assess the junctures at which these identities intersect and complement or override each other. Given the inadequacy of existing measures to nurture a healthy sense of national and cultural attachment, the construction of identity and cultural identifications and attachments need to be reexamined to be better understood.

III. REPHRASING THE QUESTION: WHAT TO PROTECT? ‘CULTURE’, ‘MINORITY RIGHTS’ OR ‘IDENTITY’?

The critical question which much of the existing discourse on minority rights and cultural rights or identity rights has failed to address is the question of what to protect? In recent scholarship in anthropology, political philosophy and psychology, it has become increasingly clear that cultural and identity formation processes are not uniform across cultures or groups. Moreover, the formation of cultural attributes and the constitution of one’s identity are complex processes that cannot be traced to any single influence of ‘culture’ or national ‘inheritance’. Rather, these attributes and attachments develop sporadically based on one’s exposure to different ‘Symbolic Orders’.¹⁸ In today’s global world, where the local has become the microcosm of the global, singular symbolic orders are complemented by multiple symbolic orders, all of which work simultaneously to

¹⁴ *Ibid.* at 7.

¹⁵ *Ibid.*

¹⁶ Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994).

¹⁷ Christian Joppke, *Immigration and the Nation State: The United States, Germany, and Great Britain* (New York: Oxford University Press, 1999) at 645.

¹⁸ Michael Kearney & Setsuko Adachi, “Mapping Hybrid Identities: A Matrixing Model for Transculturality” in Michael Kearney, ed., *From Conflict to Recognition: Moving Multiculturalism Forward* (Oxfordshire: Inter-Disciplinary Press, forthcoming, September 2010) [Kearney & Adachi]. Draft on file with author.

influence the development of one's identity. These attachments cannot be broken down neatly into any single category pertaining to culture or ethnicity or nationality.

This scholarship needs to be studied in greater detail by political theorists and constitutional law scholars in order to question why culture needs protection and to unpack what components inform the development of culture. Furthermore, the larger question concerning identity and its formation and entanglement with concepts of culture needs further exploration. These questions have distorted politics and dialogue about representation of groups and need to be critically addressed. Only through such a reexamination of culture, identity and their role in the quality of human life can we better address the question of the appropriate means through which culture should be recognized and protected.

Kymlicka and others have offered compelling theories. However, many of these have been criticized on various grounds, such as the flawed assumptions about the homogeneity of culture that often form the foundational premise for some such theories or alternatively, the much-talked about plight of the minorities within minorities.

Identity-Matrixing as a Model for Understanding Identity-Construction

It is crucial to understand the formation of identities and the influence of identity on the development of loyalties and allegiance. A better understanding of these processes would enable political institutions and structures to be more closely aligned to affiliations formed as a result of these attachments. A polity organized to accurately reflect the realities of citizens' identities can serve to enhance citizen participation, inter-group dialogue and ultimately, feelings of 'national' belonging. Moreover, as groups interact, their identities are influenced by these interactions and the boundaries between 'us' and 'them' begin to blur as groups come to a consensus on different issues. Ultimately, a movement in this direction can help depoliticize some of the culturalisation of issues that appears to have overtaken discussion in the political sphere.

Recent literature has extensively documented the various influences on the construction of the "self".¹⁹ Jacques Lacan has introduced the "conception of the mirror stage" as a novel explanation on the construction of the self, which he claims challenges the understanding of the self as a derivative of one's cognitive perceptions.²⁰ Through this theory, Lacan has sought to establish that the human being's self-image undergoes a transformative period. The "mirror stage" consists of a phase of identification which "situates the agency of the ego, before its social determination, in a fictional direction."²¹ Although this process is internal, the individual's environment and its social language are applied to this mirror self-image to transform it into the realm of culture and other social indicators to constitute a social-self, which contributes to that person's individuality. These social indicators are called the "Symbolic Order."²² Kearney and Adachi have gone on to interpret the

¹⁹ Jacques Lacan, "The Mirror Stage as Formative of the Function of the I as Revealed in Psychoanalytic Experience" in Julie Rivkin and Michael Ryan, eds., *Literary Theory: An Anthology* (Oxford: Blackwell Publishing Ltd, 1998) at 178.

²⁰ *Ibid.*

²¹ *Ibid.* at 179.

²² Jacques Lacan, *The Four Fundamental Concepts of Psychoanalysis*, trans. by Alan Sheridan (Vintage: London, 1998) at 279.

Symbolic Order as a “set of cultural constructions that is matrixed into individuals; this Symbolic Order provides the content and structure from which identity is formulated; it imparts of the ideologies, realities, and beliefs that constitute thought and the discursive formations that govern it.”²³

However, as Kearney and Adachi note, Lacan’s work, although invaluable in its contribution to better understanding the construction of human identity, it bears a notable gap given its lack of account of the transcultural societies in which identity formation occurs today. The transcultural conditions today reveal the existence and interplay of multiple Symbolic Orders.²⁴ Each individual therefore, inhabits multiple Symbolic Orders unless they live in isolated cultural groupings whereby the lack of interaction with other Symbolic Orders makes this an unlikely possibility. Kearney and Adachi propose a complex model of “identity matrixing” which captures the process in which the construction of an individual’s identity takes place across transcultural settings and within which people constitute their identities through exposure to the external influence of multiple Symbolic Orders.²⁵ This matrixing across the numerous strata offered within each Symbolic Order provides the basis for the formation of a unique and individual identity.²⁶

In similar vein, Kearney and Adachi use the vertical and horizontal identity-matrixing models to account for the intra- and inter-cultural matrixing. Thus, vertical matrixing describes cultural constructions transmitted within a closed societal set within a particular Symbolic Order whereas, horizontal matrixing accounts for the process whereby cultural constructions are transmitted across parallel societal sets representing different symbolic orders.²⁷ Viewed in this manner, human identity is the result of a complex process of transcultural interactions, aptly depicted by such matrixing processes which function across economic, social, religious, ethnic and other groupings, both horizontally and vertically.

Tapping into the Dynamism of Identity-Matrixing: A New Paradigm for Recognition?

The misguided emphases of existing policies on the homogeneity of culture and the uniformity of its expression have alienated minorities in mainstream society. Liberalism has invariably extended a model which seeks to create national attachments at the expense of community values and experiences, particularly through its ignorance of the use of cultural behaviours and language in the political context. This has resulted in the alienation of ethnic groups who experience exclusion and a lack of belonging to the nation-state. With these feelings, ethnic communities are less likely to participate in national affairs. Multiculturalism, on the other hand, has sought to recognize ethnic groups and their culture. This, however, has also had the effect of alienating ethnic and immigrant groups due to the emphasis on difference. Existing liberal and multicultural policies reveal a critical failure to comprehend the formation of cultural and national identities and attachments and therefore, do not reflect them appropriately in policy, law or government.

²³ Kearney & Adachi, *supra* note 18.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

The result is an institutionalized racism that has perpetuated inequalities, thereby preventing the structural integration of minorities into mainstream society. This contributes to the politicization of all issues²⁸ and ultimately derails national-level consideration of the society's broader policies and frameworks.

To strive for a commitment to inclusion within both, mainstream and minority communities, the state must acknowledge difference and the dynamic processes and influences on the formation of identity and attachment. It must implement structurally inclusive mechanisms to give expression to different cultural values within the national culture. These mechanisms would more accurately reflect the interactive dialectic between national and local cultures and how closely these are interconnected and therefore, impact each other. As identity-matrixing reveals, people transform as they interact with other cultural structures, giving them the option to embrace norms from other systems, resulting in a unique self-identity which is not exclusively grounded in any single culture or identity. As Nussbaum notes, individuals have able to develop multiple identities which attach them to their culture, their nation as well as to "the worldwide community of human beings."²⁹

In light of this dynamic infiltration of cultural value systems crossing each other, the political process firstly, needs to account for the difference between political modalities that currently recognize voting by citizen-group or voter-identity. Second, policies need to be reevaluated and revised to critically address the citizenship 'gap' that results from liberal and multicultural policies in their current expressions. Third, in fully recognizing the dynamism of the process through which identity and attachments are formed, multicultural societies need to establish mechanisms that positively influence this process of identity-construction so as to yield national as well as cultural attachments that minimize the marginalization of minorities. This can only be achieved through a structured, long-term reform of educational curricula to include democratic citizenship education which can assist in the cultivation of strong citizenship values such as recognition, equality and acceptance. This is possible through curriculum changes which involve a systematic inclusion of the study of diverse cultures. Such a curriculum can assist in the development of global citizens who are able to function in multicultural communities in the national and the global context. Such a program should enable students to acquire "a delicate balance of cultural, national and global identifications and attachments."³⁰ A systemized process which serves to inculcate values that mobilize citizens into civically responsible citizens would greatly enhance the overall quality of democratic decision-making and issue-resolution in multicultural societies. The quality assurance comes from the fact that individual and group interests from various backgrounds will be better understood in light of an education that has served to enhance such understanding between different communities. However, this alone, would not guarantee the exercise of one's civic duties to participate in democratic decision-making.

A further dimension to responsible and participatory citizenship pertains to the influences on the decision-making process itself. A critical element in developing trust within diverse communities is the transparency of the decision-making process and the underlying

²⁸ Ladson-Billings, *supra* note 11.

²⁹ Martha Nussbaum, "Patriotism and Cosmopolitanism" in Joshua Cohen, ed., *For Love of Country?* (Boston: Beacon Press, 2002) 2 at 4.

³⁰ James A. Banks, "Introduction: Democratic Citizenship Education in Multicultural Societies" in James A. Banks, ed., *Diversity and Citizenship Education: Global Perspectives* (San Francisco: Jossey-Bass, 2003) 3 at 7.

positions adopted by different parties in arriving at those decisions. Whether those positions are informed by reason, morality, pragmatism or prejudice, self-interest and power will strongly affect the development of trust within multicultural societies. Therefore, Gutmann approaches the question of cultivating civic responsibility from the perspective that the primary ingredient must necessarily be the cultivation of a moral commitment to justice, rather than to any community.³¹

According to Gutmann, “Doing what is right cannot be reduced to loyalty to, or identification with, any existing group of human beings.”³² The capacity to determine the morally right decision will necessarily result in upholding the fundamental guarantees of equality and non-discrimination. Whilst this position is undoubtedly ideal, it can only be achieved progressively, rather than all at once. Initially, relying on reason, pragmatism and trust, processes designed to tap into public opinion will solicit public opinion through fair systems that provide for equality of access and opportunity. Justice follows as part of the ‘justice as fairness’ approach but is complemented by the trust that has been built through a reason-based discussion that breeds affiliation and commitment through the appeal of reason and trust rather than ‘loyalty’ grounded in nationalism or race or other attributes external to the processes of political participation. Gutmann, however, ignores the inevitable influence of identity on feelings and the effect of sentimentality on capacities for reasoning (at a subconscious level) as well as loyalty to reason over emotion.

As scholarship on accommodation and integration of difference has revealed over time, however, theorizing the various permutations of citizenship in multicultural societies is part of a complex process which necessarily involves choices about meta-theory and principles relating to ideas of the ‘just’ and the ‘good’. These, in turn, are tied to comprehensive doctrines of life and human existence and heavily influenced by history, culture and religion. The right permutation for a perfect model for accommodation of difference for a multicultural society is a question fraught with difficult choices in light of the multiple influences that establish this ‘bottom line’ or the ‘grundnorm’ from which all other norms flow. Any attempts to reconcile these differences are likely to result in polarization, disagreement and non-cooperation because the question of meta-theory that is at stake is far too important to compromise on, given that it defines the very meaning of human existence for various camps. Even a slight push towards the alteration of the most basic commitment to a particular value is eyed with suspicion as an attempt to thrust a particular ‘version’ of justice on a group and therefore, rejected, sometimes as retaliation against neocolonialist agendas and ethnocentricity, and at other times, simply on account of disagreement with other principles from which this new norm originates.

This has triggered the extensive critique of theorists such as Kymlicka, Taylor, Spinner. Their theories have been criticized for their lack of ‘neutrality’ and have been branded as largely liberal, despite the apparent commitment to the value of ethnicity, culture and communitarianism. The main criticism is that the proposals are canvassed as non-ideological or neutral models of citizenship, although these theories require a subscription to at least the most basic liberal ideals. In this sense, they are inherently value-laden. Given the current state of impasse, there is a need to consider alternative means to reconstruct the political dimensions of multicultural citizenship.

³¹ Amy Gutmann, “Democratic Citizenship” in Joshua Cohen, ed., *For Love of Country?* (Boston: Beacon Press, 2002) 66 at 69.

³² *Ibid.*

The key, therefore, must be to recognize the role of culture in the development of identities and to facilitate cultural learning by protecting interactive and developmental learning in the community or ‘in-group’ context. This is very different from protection of an abstract or intangible ‘body of ideas’ loosely defined as ‘culture’, the attributes of which can rarely be defined accurately or identified as a complete body of specific values. It is more accurate to describe the object of such protections as ‘processes that engage cultural development and enable human flourishing.’

IV. CURRENT VOTING PATTERNS: BETWEEN JUSTICE AND LOYALTY

The difficulty with modern-day democratic practice is the uncertainty that surrounds the reasoning process, if any, which leads to support for a particular decision or candidate. Outcomes are perceived as just when they can be directly correlated with reasoned judgment, thereby making them widely acceptable. Decisions which rest on reason are viewed as legitimate given the positive relationship implied between reason and justice. Conversely, outcomes lose their independent validity when they are perceived as stemming purely from sentiments of loyalty. In these cases, decisions are viewed as tainted by the bias that accompanies the support of members who allow group membership, identity or other common cause to influence their decision. It is difficult to trace decisions back to a particular line of reasoning as opposed to the sentiment of loyalty or prejudice which might accompany such decision-making.

Habermas requires that norms be validated independently of sentiment, i.e. that they should rely on reason. Rawls, on the other hand, requires a constructivist approach towards the universal through a law of peoples which reaches out to all groups and communities. For Rawls, what is reasonable is different from what is rational (means-end rationality). Rawls often also invokes ‘practical reason’ as represented by an independent human faculty, free from subjective influences to help achieve the Habermasian task of discerning a ‘transcultural moral validity.’ This universality of morals commands legitimacy. But is this what Rawls means? Rorty thinks he is actually referring to actual principles and conceptions as in fact arrived at in the course of creating a community.³³ Therefore, practical reason is a process – rather than substance of agreement about universal norms. However, it remains to be questioned whether indeed, Rawls and Habermas share similar objectives. Rorty claims they are similar, particularly in light of their endorsement of Thomas Scanlon’s answer to the “fundamental question why anyone should care about morality at all,” namely that “we have a basic desire to be able to justify our actions to others on grounds that they could not reasonably reject – reasonably, that is, given the desire to find principles that others similarly motivated could not reasonably reject.”³⁴ The ultimate goal is to appeal to ideas that others similarly appeal to so as to be able to justify the action suggested. Rorty has examined this relationship between justice and loyalty as explanations for particular judgments, questioning whether the notion of loyalty should be expanded to include a larger group of people so as to render it equivalent to an acceptable

³³ Richard Rorty, “Justice as a Larger Loyalty” in Ron Bontekoe & Marietta Stepaniants, eds., *Justice and Democracy: Cross-Cultural Perspectives* (Hawaii: University of Hawaii Press, 1997) 9 at 16 [Rorty].

³⁴ See *ibid.* at 17; see also John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) at 49 where he summarises Scanlon’s views.

concept of justice.³⁵ Through regularity in the exercise of finding or discovering overlapping interests and beliefs, there are prospects for enlarging the circle of loyalty.

Thus, the aim is to provide reasons for embracing a larger group into your circle of loyalty for the same reasons that underscore your current sphere of loyalty. In Walzer's terms, this would mean creating alternative 'moral identities.'³⁶ Rorty's suggestion is that by drawing on these ideas, one can make a case for interest-based appeal rather than belief-based appeal.³⁷ This helps eliminate controversies about cultural or religious practices or minority rights. This view accords with Michael Walzer's notion that morality is inherently thick, intermingled with cultural beliefs and systems. 'Thin' principles can only be derived in special circumstances where the occasion calls for it in particular cases.³⁸

Although this approach is commendable, it does not cater to or account for those groups whose exercise of rationality or reason is derived from cultural or religious constructs and beliefs. There is however, promise to his proposal on how the creation of alternative moral identities can be facilitated. Rorty attempts to present rationality and the acquisition of loyalty as part of the same activity.³⁹ He hints at how the circle of loyalty can be expanded by producing unforced agreements between different groups. This will assist in the dissolution of 'otherness' through processes which reveal the 'other' as reasonable or trustworthy people. He argues for the need to view reason not as a source of authority (as Kant or Plato would), but rather, as a process of facilitating agreement by persuasion. As time goes on, a continuum is produced along which, there are varying degrees of consonance between beliefs and interests. As these instances of overlap increase, there is increasing compromise, deference and trust. Gradually, these sentiments find expression through the development of loyalty towards a group.⁴⁰

Rorty surmises that moral identity therefore, boils down to the groups with which one identifies.⁴¹ A common identity compels loyalty which undergirds moral behaviour that would befit a group member. This concept of identity is a 'shifting' concept which takes on a form depending on the associations we feel bound by or answerable to. Similarly, our moral compass is tugged in different directions depending on these affiliations. Walzer explains this with reference to our level of knowledge about the people we deal with.⁴² We

³⁵ *Ibid.* at 11.

³⁶ Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame: University of Notre Dame Press, 1994) at 101 [Walzer].

³⁷ Rorty, *supra* note 33 at 17.

³⁸ Walzer, *supra* note 36 at 4.

³⁹ Rorty, *supra* note 33 at 18.

⁴⁰ On the other hand, Annette Baier suggests an alternative, but equally compelling explanation for our moral behavior. Baier tracks the morality in our behaviour to sentiments of respect and reciprocity when dealing with our family or groups with whom we share a membership, whereas moral behaviour towards strangers or insignificant others is commanded by 'obligation'. The former rests on trust, whereas the latter derives from a conflict between loyalties to an in-group qua out-group. Annette Baier, *Moral Prejudices*, as cited in Richard Rorty's *Justice as a Larger Loyalty*, *supra* note 33 at 11-12. Rorty also cites Wilfrid Sellars and Robert Brandom who depict moral progress "as the expansion of the circle of beings who count as 'us'". See Rorty, *supra* note 33 at 20, footnote 3. Although Kant accounts for the disparity in moral behaviors as the result of a conflict between reason and sentiment.

⁴¹ Rorty, *supra* note 33 at 12.

⁴² Kuper, however, disputes this, stating that Walzer underplays the extent to which global civil society has enabled the convergence of a set of 'thick' norms surrounding various global issues. These norms have been embraced despite cultural differences across national boundaries, whilst the degree of consensus should not be overplayed, it is significant as a marker of the areas of convergence in global civil society.

have a thicker account of those we are familiar with and therefore, are on certain ground when we need to apply a moral analysis to decide how they are to be treated. It is all part of the shared system of knowledge which makes our actions understandable (therefore moral?) to them. Once we distance ourselves from in-group members and need to decide how out-group members are to be treated, we rely on systems of ‘law’ to dictate the appropriateness of our actions because we only have a ‘thin’ conception of them.⁴³ On this account, there is no ‘core’ or ‘basic’ self that espouses universal values by virtue of our human identity or principles derived purely from ‘reason’ and therefore prior to our ‘subjective’ loyalties.⁴⁴ If this is an accurate depiction of the human identity, then we must accept the plurality of identities and incorporate their fluidity into our decision-making processes.

The reality of today’s cosmopolitan multicultural communities demands structures that respond to the dynamic processes of engagement, the formation of loyalties that accompanies the forging of multiple layers of identity. It is imperative that political regimes provide systems or institutional support to deal with such fluidity of identity. We must further recognize the reality that far from being able to arrive at principles of morality that are universally acceptable (or abstracting a thin concept of morality from thicker versions)⁴⁵, it may be that we are better off trying to ‘expand’ our circle of loyalties as suggested by Richard Rorty.⁴⁶

As Sunstein notes, depending on the particular conceptions of justice and democracy one adopts, a polity may be required to make a choice as to its overriding priority between justice and democracy. On this view, if justice is to be prioritized, then democracy would need to be accordingly limited. On the other hand, if democracy is to be prioritized, then this may mean compromising certain principles of justice. However, there are also ways in which the two can be mutually reinforcing.⁴⁷

One understanding of democracy is that it entails a deliberative exercise whereby preference-formation is facilitated through deliberation and reasoned discussion. In this institutional arrangement, the outcomes which result are considered ‘just’ as a result of the reason-based process through which preferences formed, critiqued and reformed. Through a representative system of politics where decision-makers are held accountable to the deliberative voice and its reason, this deliberative version of democracy responds to the criticisms of democracy as adopted in its pure form as a system of one-man-one-vote without accounting for the role and value of reason or the space and tools required for preference formation and its facilitation and complements these two versions to render a more effective democracy in the true sense of the word.⁴⁸

Andrew Kuper, “Representation as Responsiveness” in *Democracy Beyond Borders* (New York: Oxford University Press, 2004) 75 at 124-125.

⁴³ Rorty, *supra* note 33 at 12.

⁴⁴ Clearly, this account is non-Kantian in the sense that it seeks to premise morality on grounds other than the capacity for human reasoning, which Kant believed governed moral imperatives.

⁴⁵ Rorty, *supra* note 33 at 13. Rorty agrees with Rawls and Walzer insofar as they too discount the possibility of arriving at such ‘thin’ morality as Kant expects.

⁴⁶ Rorty, *supra* note 33.

⁴⁷ Cass R. Sunstein, “Deliberation, Democracy, Disagreement” in Ron Bontekoe & Marietta Stepaniants, eds., *Justice and Democracy: Cross-Cultural Perspectives* (Hawaii: University of Hawaii Press, 1997) 93 [Sunstein].

⁴⁸ *Ibid.* at 94-95.

The question often asked is whether there is a conflict between the appeal to interest as opposed to appeal to reason in arriving at agreements. Reason can be influenced by both, reason and interest. One view of justice relies on reason. The other derives legitimacy through the utilization of just processes which assume the outcome produced to bear the hallmarks of justice (Rawls' justice as fairness approach). Thus, one may begin with an 'interest-based' appeal to expand the circle of loyalty. Once numbers have accumulated, the system can then progress towards procedural fairness and ultimately, to reason-based justice, seeking a more perfect and just society.

Given the challenges that accompany deliberation in multicultural settings, it is pertinent to recognize the impossibility of agreement on meta-issues at the outset and to begin the trust-building, loyalty-enlarging process with simpler questions that need addressing. One possible approach is to adopt Sunstein's view. Forced attempts at complete agreement over high-level theory about basic questions would only increase tensions and affirm the skepticism of parties belonging to different groups that no consensus is indeed possible between them across the board. He posits that seeking agreement over the complete theorization of questions which are so heavily contested (both, in intra- and inter-group settings) is unnecessary and undesirable.⁴⁹ This is primarily because identity politics have often dominated the process of any genuine agreement being reached between different interest groups. A classic strategy deployed by numerous political 'camps' to further divide groups and usurp the function of any targeted deliberation geared towards reaching a compromise or agreement has been to link other contentious questions that lie on the peripheral boundaries of the issue being considered.⁵⁰ This conflation of political issues distorts the political process, heightens inter-group tensions and confirms group polarization theories⁵¹, rendering it less likely that groups would see their interests converging. This jeopardizes any prospects of a meaningful dialogue or the enlargement of the 'circle of loyalty'. The atmosphere for effective deliberation is purged due to continued distrust.

⁴⁹ *Ibid.* at 93-117.

⁵⁰ This has occurred in numerous contexts even where national or ethnic identities are not at stake, but particular minority status issues are. For example, the question of whether same-sex couples ought to be protected under prevention of domestic violence legislation has often been dogged by the heavily politicized debate about whether homosexuality should be decriminalized or punished on account of it being contrary to certain religious teachings. Anti-gay groups have deliberately linked these two questions (one which is a practical question of who should be afforded protection under the law as the victim of undesirable social behavior and the other, which touches on various aspects of a society's interests, including the moral, religious, political, public and private) as a strategy to bring under their fold those who condemn homosexuality for religious or moral reasons, even when this latter issue has nothing to do with the basic need to render practical protection through legal processes to anyone who is victimized by violence.

⁵¹ Cass R Sunstein, 'The Law of Group Polarisation,' in Cass R Sunstein, *Why Societies Need Dissent*, (Harvard University Press, 2005), 111. For a perspective on how large groups can engage in the democratic process, see, Bruce Ackerman & James Fishkin, *Deliberation Day*, (Yale University Press, New Haven and London, 2004).

V. REWORKING CITIZENSHIP: DELIBERATION AS A FOUNDATION FOR ACCOMMODATION

Citizenship

A citizen is someone who has been conferred a status in law by the machinery of the state whereby he or she is conferred civil and political rights. With citizenship, come certain responsibilities towards the state, primarily described as a sworn allegiance to the state. As a member of the political unit of the state, a citizen is required to act in accordance with the law and is entitled to the law's protection. Furthermore, a citizen may be expected to participate as a political agent in society and contribute towards the development of the law and engaging in electoral processes. Citizenship, in some instances, also confers a distinct identity of being a member of a political community. Not all of these criteria define citizenship in all instances. In some states, the citizen is a more passive agent with certain rights, whereas in others, he or she may be more active in political participation.⁵²

Numerous scholars have recently challenged the nation-state model as a framework for extending citizenship and have called for a revised framework that accommodates citizenship in its more flexible or fluid form.⁵³ The nation-state model of citizenship rights predicates citizenship on the possession of particular attributes linking individuals to a 'political community' with particular characteristics. These traits used to be associated with a pledge to protect the territorial integrity of one's state through military service. Since states used to be more homogenous in the medieval era, by virtue of their physical ability to fulfill this criterion, citizenship rights were usually accorded to men. Gradually, citizenship was expanded to include freedom from bonded labour.⁵⁴ The industrialisation era led to the inclusion of all groups and classes of people in the labour market and as such, citizenship rights were extended to include women and minority groups. They have since developed into their modern form encompassing political and social rights and more recently, even cultural rights.⁵⁵ However, despite its expansion as a category, citizenship was still confined to a particular political group that bore certain traits, making it an entity

⁵² See generally, Joseph H. Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000) [Carens]; Jean L. Cohen, "Changing Paradigms of Citizenship and the Exclusiveness of the Demos" (1999) 14:3 *International Sociology* 245 [Cohen]; Denis Diderot & Jean le Rond D'Alembert, eds., *Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers*, t. 3 (Paris: chez Briasson et al., 1753) "citoyen", at 488, online: The ARTFL Encyclopédie Projet (Spring 2010 Edition) <<http://encyclopedie.uchicago.edu/>>; David Miller, *On Nationality* (New York: Clarendon Press, 1995); David Miller, *Citizenship and National Identity* (Cambridge: Polity Press, 2000); Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge (Mass.): Harvard University Press, 1991); and Bryan Turner, "Outline of a Theory of Citizenship" in Chantel Mouffe, ed., *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (London: Verso, 1992) 33.

⁵³ See Brysk & Shafir, *supra* note 12; Seyla Benhabib, *Another Cosmopolitanism* (New York: Oxford University Press, 2008); *Democracy and Difference*, *supra* note 2; Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004); Seyla Benhabib & Judith Resnik, eds., *Migrations and Mobility: Citizenship, Borders, and Gender* (New York: New York University Press, 2009); Pheng Cheah & Bruce Robbins, eds., *Cosmopolitics: Thinking and Feeling beyond the Nation* (Minneapolis: University of Minnesota Press, 1998); Peter Kivisto & Thomas Faist, eds., *Citizenship: Discourse, Theory and Transnational Prospects* (Oxford: Blackwell Publishing, 2007); and Rodolfo D. Torres, Louis F. Miron & Jonathan Xavier Inda, eds., *Race, Identity, and Citizenship: A Reader* (Massachusetts: Blackwell Publishers, 1999).

⁵⁴ Brysk & Shafir, *supra* note 12 at 4.

⁵⁵ *Ibid.*

which excludes non-members from certain privileges. In many parts of the world, including multicultural states, this continues to be the case. Clearly, the emergence of poly-ethnic states has beckoned a more just framework for the acquisition of citizenship.

To complement this process of the development of citizenship rights, in the early twentieth century, basic concepts of human rights began to emerge. Human rights were predicated on the understanding that all human beings are born with certain rights that derived from natural law. Initially, these developed as civil rights. Gradually, however, they expanded to include a variety of political and increasingly complex socioeconomic rights. As with citizenship rights, human rights were restricted to elite members of particular communities.⁵⁶ In time, human rights have been expanding their reach through international treaties and institutions. Despite their expanse, however, human rights still suffer from a lack of robust international institutional responses and much of their enforcement is still dependent on state-based machinery. Thus, while human rights potentially fill the ‘citizenship gap’, the fact that they depend on state machinery for their enforcement, as do citizenship rights, the state-based model at continues to discriminate against ethnic groups on grounds that demarcate boundaries between dominant groups and ‘out-groups’ or the ‘Other’. Traditional state-defined markers of difference, which govern how we treat individuals and those we perceive as different from us, determine the enforcement of human rights left to state-machinery. As such, human rights fail to capitalize on their derivation from the law of nature as a fundamental premise for the extension of equal treatment and rights.

As a result, we have two overlapping rights frameworks, neither of which is fully committed to the equalization of social, economic or political rights. Citizenship rights are aimed towards developing social solidarity in the face of continuing inequalities resulting from socioeconomic disparities, rather than eliminating inequality; whereas human rights provide protection against the state’s arbitrary exercise of power, rather than equal access to power.⁵⁷ Marshall’s critique of citizenship confirms this. He notes that citizenship coexists with class structure and its struggles. Although it ameliorates classist struggles somewhat, it legitimates inequality.⁵⁸ Marshall has referred to citizenship as ‘the architect of legitimate social inequality’.⁵⁹ As Shafir notes then, citizenship retains an air of privilege despite its expansion from a right of the local domain into one institutionalized at the state-level. Although it has democratized the political process by allowing traditionally excluded ‘lower classes’ into the political process, it remains exclusive to those who share an allegiance to the elusive concept of the ‘common good’, as idealized by the characteristics perceived to be significant by the dominant group. As such, despite its expansion and universalisation, citizenship remains out of bounds for the new populations that have come to replace the old lower classes.⁶⁰

⁵⁶ Brian Orend, *Human Rights: Concept and Context* (Ontario: Broadview Press, 2002).

⁵⁷ Gershon Shafir, “Citizenship and Human Rights in the Era of Globalisation” in Alison Brysk and Gershon Shafir, eds., *People out of Place: Globalization, Human Rights and the Citizenship Gap* (New York: Routledge, 2004) 11 at 14-15.

⁵⁸ *Ibid.* at 15, citing Marshall, *infra* note 59 at 70.

⁵⁹ Thomas Humphrey Marshall, *Citizenship and Social Class* (New York: Cambridge University Press, 1950) at 70 [Marshall].

⁶⁰ See generally, Iris Marion Young, “Polity and Group Difference: A Critique of the Ideal of Universal Citizenship” (1989) 99:2 *Ethics* 250.

Deconstructing Citizenship

As Cohen documents, these definitions are far too simplistic to capture the complexities of modern-day citizenship typical of multicultural and democratic nation-state societies.⁶¹ The definitions resonate intensely with pre-modern ideals related to a single nation-state, where identification with the national culture and shared values among citizens constituted citizenship in law. Working definitions today have failed to incorporate this last dimension pertaining to the development of a political identity. Marshall in fact offers a valuable overview of the expansion of citizen rights into three distinct groups: civil, political and social rights. His theory of the social rights of citizenship conceptualizes social rights as the possibility of attaining “the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in society.”⁶² Marshall emphasises the need for a common standard of dignified existence and canvasses social rights as the signifier of citizens belonging to a common political community as opposed to contemporary conflation of social rights with ideas of welfare protection.

Even where a person is naturalized as a citizen of a particular state, if they belong to an ethnic group which is different from the dominant ethnic group, they will not necessarily be perceived as citizens by the dominant groups. This has a direct impact on the ‘structural inclusion’ of such persons within the community due to perceived differences based on race, culture language or religion. These characteristics influence how individuals of minority ethnic groups, although citizens are treated, and undergird why they might be treated differently.⁶³ This is largely the result of the perpetuation of stereotypes which are constructed by social scripts written about groups, usually minorities.⁶⁴ At times, this translates into second-order citizenship which is differentiated based on ethnicity or other markers of difference.

As Brodtkin describes, the identity of a citizen is constructed from a combination of factors, including ‘ethnoracial assignment’ and ‘ethnoracial identity.’ The former consists of “popularly held classifications and their deployment by those with national power to make them after economically, politically, and socially to the individuals classified.” Ethnoracial identity, on the other hand, comprises individuals’ self-identification “within the context of ethnoracial assignment.”⁶⁵ Given the influence of ethnoracial assignments on citizenship identification, it is incumbent that a deliberative space be made available to shape the discussions about social scripting so as to more accurately depict identities. The experience of political engagement with diverse groups through deliberative mechanisms

⁶¹ Cohen, *supra* note 52 at 245-268.

⁶² Marshall, *supra* note 59 at 70.

⁶³ Stephen Murphy-Shigematsu, “Expanding the Borders of the Nation: Ethnic Diversity and Citizenship Education in Japan” in James A. Banks, ed., *Diversity and Citizenship Education: Global Perspectives* (San Francisco: Jossey-Bass, 2003) 303.

⁶⁴ Holning Lau, “Identity Scripts and Democratic Deliberation” (2010) 94 *Minn. L. Rev.* 897. Since identity-scripting is an important part of the political process in that it may ultimately influence the value attributed to a particular groups position and their capacity to influence policy in a democratic setting, there is a need to involve minorities in the process of their own scripting so as to enable them to challenge existing stereotypes and to empower them to shape scripting by providing input that more accurately defines these groups. Their inclusion in the process would also counter-balance the power-dynamic between oppressor-oppressed and majority-minority, that often results in scripting being a one-way process.

⁶⁵ Karen Brodtkin, *How the Jews Became White Folks & What That Says About Race in America* (New Brunswick, NJ: Rutgers University Press, 1998) at 3.

and addressing social scripting and ethnoracial assignment through citizenship education can serve to correct existing stereotypes and provide an opportunity to re-script them accurately and positively.

More specifically, however, discourse on citizenship needs to be reoriented towards attending to the psychological dimension of citizenship,⁶⁶ through which social integration and the collective identity of the political community is strengthened. If citizenship can be reconceptualised as more than a legal status, one which contributes to the development of this psychological dimension to cultivate stronger ties of belonging so as to give greater meaning to the legal rights and duties entailed in the concept of citizenship, politically diverse communities can move towards a strong and cohesive model of citizenship which is inclusive.

Moreover, the bases on which citizenship is conferred need to be reexamined to shift perceptions of citizenship based on blood, birth, nationality or ancestry to the more 'social' rather than inherent (mostly physical) attributes that characterize citizenship. This will facilitate the development of a more just community which extends membership based on a more compelling system of inclusion, informed by the principles of substantive justice. This move has already begun in the partial embrace of new characteristics that attract citizenship entitlements such as a specialized skills set or monetary affluence. These, however, serve globalization's economic objectives of commodifying and mobilizing labour. However, the emergence of globalization is not confined to the economic order. It has influenced the development of a global political culture, resulting in the creation of a global civil society through the emergence of cross-border networks and communication.⁶⁷

Despite the emergence of a global political order, the system has not crystallized into a framework of political institutions and instruments seeking to unify global governance as sophisticated as the World Trade Organization, its economic counterpart. The rapidly extending force of the global economic order have concretized disparities between citizens who bear legal entitlements in their national homes and also have the added advantage of labour mobility which might have afforded them are dual citizenship status; and those at the other extreme, who have neither citizenship nor mobility. Thus, behind those who are affluent and effective global citizens by virtue of their nationality, social status, or birth, are the groups that bear second-class citizenship or labor class status which does not entitle them to any or minimal citizenship rights.⁶⁸ Lipschutz refers to this as the contradiction between the "spaces of political membership" constituted by national citizenship and "spaces of market participation", characterized by economic citizenship.⁶⁹

Existing models of citizenship fail to capture several realities of the post-nationalist era we live in. There is a need for a new political framework that reflects the new types of identities and accurately captures the process of identity construction. The system should

⁶⁶ Carens, *supra* note 52 at 166.

⁶⁷ Ronnie D. Lipschutz, *Global Civil Society and Global Environmental Governments: The Politics of Nature from Place to Planet* (New York: SUNY Press, 1996).

⁶⁸ This has been referred to as 'low-intensity citizenship'. See Richard Stahler-Sholk, "El Salvador's Negotiated Transition: From Low-Intensity Conflict to Low-Intensity Democracy" (1994) 36:4 *Journal of Interamerican Studies and World Affairs* 1.

⁶⁹ Ronnie D. Lipschutz, "Constituting Political Community: Globalisation, Citizenship and Human Rights" in Alison Brysk and Gershon Shafir, eds., *People out of Place: Globalization, Human Rights and the Citizenship Gap* (New York: Routledge, 2004) 29 at 31 ["Constituting Political Community"].

incorporate designs to enable dialogue and cross-cultural understanding to influence these processes positively to cultivate citizenship with a commitment to the national, an appreciation of the multicultural and an understanding of the transnational and global networks that feed into national level citizen. Such a system should facilitate processes that enable the co-creation of knowledge about minority groups with minority groups. Citizenship categories should accurately reflect these realities to render democratic decisions that are inclusive and therefore, representative and legitimate. Political legitimacy cannot be achieved through a system devoid of the basic principles of justice and inclusion.

The national sphere is no longer the only sphere of agency for the exercise of choices in a national context but rather, a transnational context, given the multiple commitments that citizens have by virtue of their complex identities. The transnationalism that pervades global communities today has important ramifications for identity and belonging. The pace at which globalization is breaking down old barriers whilst constructing new ones causing the displacement of multiple communities that do not conform to the norm or slip through due to a structural misfit.⁷⁰ The uni-dimensional citizen who belongs to just one nation is becoming a rarity in an age where millions of people belong to a variety of places at all once. Existing models of citizenship, although increasingly robust, fall short when they reach national boundaries because of their nexus with state machinery and political institutional structures. A new model of citizenship is required to address the changed dynamics between the nation-state, its citizens, immigrant-turned citizens and migrants. Political organization today must recognize the multiple sources of allegiance that bind modern citizens in a political climate influenced by the simultaneous operation of the forces of nationalism and globalization.

Moving Multicultural Citizenship Forward

In recent years, citizenship discourse has been dominated by discussions about membership based on nationality or ‘cultural citizenship’ advocated by minority activists as the legal recognition of the “right to be different.”⁷¹ This is in response to the desirability of minorities to feel fully incorporated into the nation state’s democratic process without compromising their values. In this sense, cultural citizenship offers the promise of enfranchisement to marginalized communities so as to empower them to influence and ultimately, legitimize, decisions made about their legal, political, social and economic needs. This requires unpacking existing systems to highlight the dominant norms, the cultural expressions of which are based on the dominant group and therefore, at variance with and discriminatory toward culturally different groups. Furthermore, existing political processes need to account for the substantive needs of different cultural groups to aspire towards political participation so that their values and goals for a just society can be

⁷⁰ See Aihwa Ong, “Latitudes of Citizenship: Membership, Meaning and Multiculturalism” in Alison Brysk and Gershon Shafir, eds., *People out of Place: Globalization, Human Rights and the Citizenship Gap* (New York: Routledge, 2004) 53 [“Latitudes of Citizenship”].

⁷¹ Renato Rosaldo, “Cultural Citizenship, Inequality, and Multiculturalism” in Joseph S. Nye & John D. Donahue, eds., *Governance in a Globalising World* (Washington D.C.: Brookings Institution Press, 1997) 27.

included and realized. As Kymlicka emphasises, this is important for justice between groups in liberal societies.⁷²

Whereas various scholars, a ranging from the political sciences to philosophy, have argued for the inclusion of ethnic, cultural or racial minority groups on the basis of “difference” (for example, Kymlicka’s popularized ‘differentiated citizenship’), it is argued that the fluidity of identity and the heterogeneity of cultural identities render the difference-based tools of political participation obsolete.⁷³ It is critical to develop citizens’ awareness of their civic duties, develop their skills to make decisions on virtuous bases, considering the interests of all people, rather than self-interested approaches to decision-making.⁷⁴ It is this vision of citizenship that ought to be the guiding basis for determining civic responsibility in today’s diverse societies, inhabited by people with multicultural and transnational identities.

VI. THE PROMISE OF DELIBERATIVE THEORY

The concept of citizenship as membership needs to be revisited to account for the realities of the borderless world, in which political units do not necessarily congregate territorially. A revised conceptualization of citizenship⁷⁵ as political agency is better suited to developing an institutional framework that supports the fluidity of contemporary transcultural identities. It is argued that deliberative mechanisms can assist in achieving both of these objectives.

A multicultural citizenship model informed by an understanding of how identities are formed and maintained and the influences that shape them can better effectuate political participation and create new spaces for belonging. It can also promote a culture for civic action through the formal recognition of the input of multiple groups through a just and inclusive process of substantive participation. The challenge is to find a value system which resonates with these complex individuals in light of their multiple memberships so that it mobilizes feelings of belonging and responsibility towards a particular nation-state and invests them in its success. This requires the denationalization of citizenship and grounding belonging in political process and participation rather than physical or cultural signifiers of identity.⁷⁶

⁷² Will Kymlicka, ‘Human Rights and Ethnocultural Justice,’ in Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*, (Oxford University Press, 2001), 69.

⁷³ Ong similarly argues that inclusion based on difference rests on the misguided assumption that cultures are fixed and rigid, immune to the different forces that work to shape them in their new environment. This ignores the impact of globalization and neoliberal forces on the constitution of immigrant citizenship. See “Latitudes of Citizenship”, *supra* note 70 at 54-55 and generally, Aihwa Ong, *Buddha in Hiding: Refugees, Citizenship, and the New America* (Berkeley: University of California Press, 2003).

⁷⁴ Petronilha Beatriz & Goncalves e Silva, “Democratic Citizenship Education in Multicultural Societies” in James A. Banks, ed., *Diversity and Citizenship Education: Global Perspectives* (San Francisco: Jossey-Bass, 2003) 185 at 197.

⁷⁵ Ronnie Lipschutz argues, however, that it is not citizenship that requires reconceptualisation, but rather, political communities and their constitutive membership. See “Constituting Political Community”, *supra* note 69 at 30.

⁷⁶ T. Alexander Aleinikoff & Douglas Klusmeyer, eds., *Citizenship Today: Global Perspectives and Practices* (Washington D.C.: Carnegie Endowment for International Peace, 2001); T. Alexander Aleinikoff & Douglas Klusmeyer, eds., *From Migrants to Citizens: Membership in a Changing World* (Washington D.C.: Carnegie Endowment for International Peace, 2000); T. Alexander Aleinikoff &

The state-centric vision of government has been viewed as an institution resulting from a set of independent administrative processes which lead to decisions that legitimize state action. However, a more citizen-centred vision of governance can serve to enhance the democratic legitimacy of decisions, particularly those regarding conflicting norms, thereby providing a more effective model for governance in multicultural communities. The role of minorities needs to be extended beyond ‘subjects’ and reconstituted as political actors with civic responsibility. Given the fundamental role of memory in the construction of identities, a political process premised upon inclusive governance will create new memories and cultivate belonging in the larger community. Participation in a political space that accounts for multicultural realities will facilitate greater understanding of the issues and ultimately influence the enactment of suitable law and policy. By expanding the actual and perceived role of minorities in governance and the pursuit of a just society, the complexities of multicultural citizenship can be better managed and addressed.

In order to effectively deal with differences presented by multicultural communities, there is a need for a system that provides a mechanism through which to address the sources of differences, and their bases can be better understood. A deliberative process that is substantively inclusive may provide such much needed political space within which different groups can undertake a rational discussion with at the end goal of taking a decision that is determinative of the viability of a particular practice or to rationalize the reason for that difference to persist. At present, conflicts between cultural and moral values as they manifest themselves in multicultural communities are dealt with by judges (and sometimes, juries) sitting in courtrooms⁷⁷ or by legislators sitting in parliament. These venues, whilst providing a space for debate cannot provide the kind of fora for deliberation as conceived useful by deliberative theorists. The adversarial nature of trials in the common law system and the partisanship that dominates in legislative chambers both rule out the possibilities for productive deliberation.

This requires deliberative space within which minority groups can interact with the general population. The justification for this is provided by the inherent weaknesses of democratic societies today. Politics is marred self-interested individuals who vote collectively to advance their own agendas, rendering democratic moments today a mere aggregation of the group’s collective interests, as opposed to a deliberated account of their political will. Without deliberation or a process to guide preference-formation, citizens often cast votes on misguided bases without understanding electoral platforms or issues underlying the policies being voted on. Deliberative democracy provides an organizational context for meaningful dialogue between stakeholders, producing outcomes that have benefited from public reasoning and discussion among equals. It is a model which provides an opportunity to convince others of their position and those involved can openly engage in discussion confident that their voices will be heard. This interactive deliberative space can also help negate exclusion, and ultimately, root out conflict. It can foster critical reflection across cultures to root out stagnant practices and beliefs which are no longer held. The deliberative democratic model can help build solidarity through these opportunities that cultivate feelings of belonging and engage civic participation across cultures to produce an

Douglas Klusmeyer, eds., *Citizenship Policies for an Age of Migration* (Washington D.C.: Carnegie Endowment for International Peace & Migration Policy Institute, 2002).

⁷⁷ Puja Kapai, “God’s Laws in Caesar’s Courts: Delivering Justice through Deliberative Decision-Making Mechanisms” (Paper presented at “Subjects Before the Law: Membership, Recognition and the Religious Dimensions of Women’s Citizenship,” University College Cork, Cork, Ireland, 9 September 2010).

inclusive polity. Such processes will facilitate the development of trust and understanding across cultures and help forge new collective and individual identities through exposure to multiple value systems.

Whilst the democratisation of the political setting may be a progressive step, it is meaningless if equality of access to democratic dialogue is granted in 'form' but not substance. For a system to be representative in fact, it must be undergirded by a systematic search for different voices which ought to be represented. This is essential if deliberation is to yield a meaningful outcome based on an accurate depiction of the different positions as opposed to 'surrogate' representation based on false assumptions about shared belief systems. This can be achieved through nominations or elections within different sub-groups. This will help ensure substantive participation. Deliberative processes cannot be successful if the very basic source of some peoples' worldviews is excluded from the repository from which they make sense of their lives. A basic condition for trust requires complete openness to all reasons proffered in the process of deliberation if genuine understanding is to be cultivated between divided communities. Thus, the claim by deliberative democrats that only reasons that are acceptable to the 'general population' may be advanced as acceptable reasons for particular positions does not satisfy this requirement.

Whilst various studies have revealed that deliberation, even in informal or limited-question contexts, have an immense empowering (and emancipatory) effect on those who partake in the process, social inequalities have long been known to affect political inclusion due to a lack of civic education. These capacities need to be built across different groups in order to defeat the social inequalities that render certain groups least likely to be included in political participation despite inclusive measures.

Finally, the most critical need of all is to build long-term capacities of marginalised and minoritised groups to engage in deliberative processes, to own the outcomes which come to bind them. To openly deliberate and discuss, those involved must have some basic knowledge about the nature of political arrangements, commitments and arguments that are acceptable to others, without which the arguments that appear 'foreign' risk exclusion. Without such prior knowledge and understanding, it is difficult to conceive how the engagement would be meaningful. Dissenters within groups are a typical target of such exclusion. Therefore, it is all the more important that deliberative processes mobilise change by requiring substantive capacity-building forums that focus on eliminating obstacles to political participation and deliberation. Participants would need to have access to information relating to the political arrangements in the country in a manner that is accessible to them, for example, in their language.

Through the development of these capacities and the provision of these opportunities, minorities will not only develop feelings of belonging to the common identity but be committed to exercising their civic duties through regular political engagement. Inclusion through deliberation has tremendous potential as a corrective, redistributive and most importantly, transformative force for change. Through active engagement in political processes, minorities are empowered and can reverse the tide of existing stereotyping and exclusion by forging new loyalties and identity scripts. This process can serve to achieve the goals of enlarged circles of loyalty and the cultivation of compassion for the 'other'. Ultimately, these mechanisms can help achieve a more just and inclusive political framework that facilitates outcomes that are substantively just.

VII. CONCLUSION

Substantive deliberation through these means could well serve as the beginning of a slow but long-term process of inclusion and belonging. The sooner this sense of civic responsibility is tapped into, the more adept the minority and excluded groups become at exercising these rights and engaging their civic responsibilities seriously. This process of collective deliberation in which interactions between groups are mediated to produce collective agreements may be the first step in the long journey towards building the social conditions needed to accompany constitutional and legal change. We need social forces and processes to accompany constitutional achievements rather than have blind faith in the constitution or judges. Therefore, we require an integrative, interdisciplinary and inclusive approach at all levels. Such ‘home-grown’ processes of inclusion, belonging and dialogue are critical in generating commitment towards a multicultural polity and to encourage the exercise of civic responsibilities. These approaches can also positively influence identity-construction, feelings of belonging and attachment. Whether this vision of a virtuous, participatory and deliberative framework would work to democratise diversity and breed a harmonious multicultural existence in the long-term remains to be seen. However, it certainly poses important questions for existing frameworks of categorisation of people and groups, forcing a rethink of the notions of citizenship, culture, identity, belonging and justice.