

Conference on the Appointment of Judges to Constitutional Courts, Rome, Olivetti Foundation,
May 2003

Appointment of Judges in a Multicultural State

Menachem Mautner

One of the most striking features of the last decades of the twentieth century has been the widespread recognition throughout the world that the vast majority of the states of the world are multicultural, i.e., that there are very few, if at all, states that are culturally homogeneous.

There are several reasons for the rise of the awareness of the multicultural nature of states.

First, in the course of the twentieth century there was in many fields of knowledge a growing recognition of the futility of the attempt of the Enlightenment to attain knowledge over and beyond cultural constraints. Instead, there was a growing recognition of the crucial role played by culture in constituting the minds and practices of human beings, i.e., in constituting the meaning that exists in the lives of human beings.

Second, as part of the de-colonization process of the second half of the twentieth century, the claims of many nationalist movements were clothed in cultural terms, portraying the nation as a cultural group and emphasizing the importance of self-determination for cultural groups. This underlined the importance of other, non-national, cultural groups, such as religious groups and ethnic groups.

Third, in the course of the 1960s and 1970s Canada adopted multicultural policies to address the growing nationalist sentiment among the French population of Quebec. This generated a rich and continuous

discussion of what it means, for Canada and for other countries as well, to be a multicultural state.

Fourth, in the United States, the Civil Rights movement of the 1950s and 1960s shed light on the consequences of racial discrimination. This emphasized the crucial effects of cultural representations in the lives of human beings; raised questions about the division of the power to control cultural representations; and, in turn, bred claims for cultural recognition and for cultural equality on the part of groups such as women, gays and lesbians, and many ethnic and religious groups.

Fifth, Western European countries, such as England, Germany and France, as well as Australia and Canada, witnessed substantial waves of immigration in the post-World War II era. Most of the immigrants to these countries came from cultures that were markedly different than the dominant cultures of the absorbing countries. These immigrants tended to preserve their distinct former culture. This bred widespread public and policy discussion using the vocabulary of multiculturalism. In the cases of Australia and Canada, it made the state explicitly adopt multicultural policies.

As a result of these developments, the modernist self-image of the state that was prevalent in the past two centuries -- the image of the culturally homogeneous and homogenizing/assimilating nation-state, was substituted in many countries of the world by a new image, that of the state as a multicultural entity, composed of various national, religious and ethnic groups. [In passing, I would add that with the growing awareness of the corrosive effects of globalization processes on the effectiveness of states in the late twentieth century, the state has often been portrayed as facing pressures both from within -- multiculturalism, and from without -- globalization, or, put differently, from below and from above.]

The substitution of the nation-state image with that of the state as a culturally heterogeneous entity gave birth to widespread discussion in many academic disciplines, such as political theory, sociology, education theory and law, as to the implications of this new reality and perception of the state.

For the purposes of my discussion, I want to draw a distinction between a cultural group and an identity group.

I want to define a cultural group in fairly narrow terms. A cultural group is a group whose members share a comprehensive set of beliefs and practices. When a person belongs to a cultural group, that means therefore that the culture of the group constitutes the meaning that exists in the life of that person in both an extensive and a profound manner and that the culture of the group regulates many of the daily practices of that person. The case of a religious group is the most obvious case of a cultural group in this sense. [Thus, I refer here to the culture of a cultural groups in a similar manner to Rawls' use of the term "comprehensive doctrine" and to Taylor's reference to "cultures that have animated whole societies over some considerable stretch of time".] In contrast, an identity group is a group whose members share a certain conspicuous mark that determines in an important way the way members of the group are perceived and treated by people from outside of the group. This means that the mark that forms an identity group also determines the way members of the group perceive themselves, i.e., it determines the way they perceive their identity as human beings. This also means that the mark is important in determining the lot in life of the people who share it. For instance, males, females, gays, lesbians, rich people, poor people, young people, old people, blacks, whites -- all belong to distinct identity groups. It seems to me that every cultural group can be said to also be an identity group, but obviously the reverse is not the

case: an identity group does not necessarily comprise a cultural group in the comprehensive sense in which I have defined the term, even though it will be true to say that members of an identity group usually share a similar set of cultural traits and practices. Thus, man and women who live in the same society obviously live in the same culture, as do heterosexuals and homosexuals who live in the same society, yet it will be true to say that the cultural traits, and obviously the practices, of women differ from those of men, even if they share the same society, and the same is true with regard to the cultural traits and practices that take place in the lives of heterosexuals and homosexuals, whites and black, etc. [It seems to me that K. Anthony Appiah draws a distinction similar to mine, i.e., a distinction between cultural groups and identity groups.]

As lawyers, I think it will be useful if we distinguish between two different contexts in which problems of multiculturalism arise.

The first context involves the central institutions of the state, on the one hand, and the cultural practices of groups within the state, on the other. The major question that arises in this context is: to what extent should the state enable a cultural group to maintain practices that are deemed normatively problematic from the perspective of the political culture of the state's central institutions? For instance, the question may arise: to what extent a group should be allowed to proceed with practices such as female circumcision, arranged marriages, marrying of young girls, discrimination of girls in the school system, polygamy, sacrificing of animals, cruel slaughtering of animals according to religious procedures, and the propagation in a group's school-system of educational contents that are illiberal.

The second context in which problems of multiculturalism may arise involves the inter-relationship of the various cultural groups that compose

the population of the state. The groups may struggle over the control of the central institutions of the state and over the shaping of the political culture and the law of the state. For instance, in the multicultural country I come from -- Israel -- the Jewish secular group wants to reinforce the ties between the political culture and the law of the state, on the one hand, and Western liberalism and Anglo-American law, on the other hand. In contrast, the religious group wants to attenuate, or even completely sever, these ties and, instead, to extensively apply Jewish Halachic law within the framework of the law of the state. Additionally, the Jewish group in the population wants to preserve the character of Israel as a Jewish state while many Israeli Arabs aim at transforming Israel into a state that lacks any particular national identity or, in the alternative, into a bi-national state.

In a multicultural state, the question of the appointment of judges arises primarily within the second context, namely that of the struggle of various cultural groups over the shaping of the political culture and the law of the state. But the question has got much bearing on the first context, as well, for it is often argued that in a multicultural state the judiciary should be composed in a manner reflecting the cultural composition of the population of the state. Additionally, it is often argued that in a multicultural state judges should be guided by an attitude of sensitivity to and respect for the practices of the cultural groups that inhabit the state.

I want to make five arguments. First, the law created and operated by judges comprises a distinct cultural system, or put differently, a tradition. Secondly, if one wants to preserve the basic features of the legal culture, a major consideration in appointing a person to judgeship in a multicultural state should be the extent to which that person accepts the basic tenets of the culture of the law. Thirdly, the legal cultures of all Western democracies are premised on liberal tenets and there are strong arguments

for preserving this identity of these legal cultures. Fourthly, liberalism is the political theory best suited for a multicultural condition. My fifth and last argument is that in a liberal, multicultural state there are good reasons for appointing judges coming from all cultural groups that compose the population of the state, provided, however, that these appointees accept the liberal tenets of the legal culture of their state. Additionally, there are good reasons for appointing judges coming from the major identity groups that compose the population of the state.

My first argument then is that the law created and operated by judges comprises a distinct cultural system, or a tradition. In making this argument I want to draw on the writings of five scholars: Alex Bickel, James Boyd White, Karl Llewellyn, Pierre Bourdieu and Stanley Fish.

Courts, unlike legislatures, are non-elected and non-accountable institutions. The question how to justify the power of the Supreme Court to overrule laws of legislatures was widely discussed in American law throughout the twentieth century. Alex Bickel, one of America's greatest constitutional scholars in the 1960s and 1970s, confronted this question in his book "The Least Dangerous Branch", published in 1962.

Bickel argues that many actions of the government have implications of two types. First, the immediate, concrete outcome of the act. Second, the unintended effects of the act on the long-term values that are at the basis of the operation of the institutions of the state. Yet, the normative implications of the acts of the government do not present themselves in an explicit and self-evident way, argues Bickel. Rather, the values that are promoted by the acts of the government need to be exposed, explicated, preserved, revised and organized in a coherent system of doctrine and principles.

The question that arises is which of the state's institutions is best qualified to deal with the task of preserving and cultivating the long-term,

stable values that stand at the basis of the polity? Bickel's response is that legislatures -- institutions that serve as arenas for struggles between conflicting interests over immediate utilitarian outcomes -- are not fitting for the task. Rather, the state's institutions that are qualified to act in the normative plane are the courts. Judges have the education, the time, the patience, the distance from the pressures of competing interests, argues Bickel, and, therefore, they are the ones fitting for dealing with the normative dimensions of the acts of government and for educating their society about its long-term, stable normative vision.

What comes out of Bickel's discussion is a perception of the law created and operated by the courts as a distinct cultural system, a tradition, that embodies the long-term, stable values on which the institutions of the state and the state's political theory are premised.

A similar approach to that of Bickel as to the role of courts in a democracy comes out from the writings of James Boyd White, the founding-father of the law and literature movement in the United States and one of the most important scholars in the area of law and culture in our generation.

White perceives the law that is created and operated by the courts as a distinct cultural system. The major value in the existence of this system, argues White, is that the discourse that takes place in it defines and constitutes the normative identity of the political community. White deals with the law of the courts as a branch of rhetoric. He uses the term "rhetoric", however, not in its pejorative meaning, common in Western culture since ancient Greece, i.e., as an activity in which a speaker manipulates the minds of his or her listeners. Rather, White uses the term rhetoric in the sense of a discourse in which arguments that are plausible within the culture of a community are invoked in good faith, and after they

are considered and weighted the community reaches common persuasion as to the normative position it is worthwhile for it to adopt.

White perceives judicial proceedings as a discourse in which various normative options are raised, explicated and chosen. In other words, White sees court opinions as a set of normative determinations that in their accumulation determine the normative character of the community within which the law is created and operated. He thus sees judicial proceedings as an important ingredient in a continual collective process of building, i.e., a process in which the normative identity of a community is constituted by way of deliberating over the cultural options that are available to the community.

I want to move on now to Karl Llewellyn.

As is well known, the American legal Realists of the 1920s and 1930s exposed the misconceptions of legal formalism. This made the Realists directly confront the claim that law is a wholly subjectivist enterprise, i.e., that in a non-formalist legal culture judges are not limited by any external constraints and, therefore, they may resolve cases as they choose in accordance to their idiosyncratic views.

Karl Llewellyn, widely regarded as the intellectual leader of the Realists, took issue with this argument. The major thrust of Llewellyn's defense of non-formalism was that judges operate within the constraints of the culture of the law. Llewellyn argued that the legal culture is comprised not only of rules, but also of principles, ideology and a wide array of ideals, many of whom are non-explicit. All of these ingredients create, according to Llewellyn, a culture, or a tradition, within which lawyers and judges act. As judges are expected to draw on the extant legal materials, argued Llewellyn, these materials substantially, albeit not totally, constrain the

freedom of judges, and assures, therefore, a reasonable degree of objectivity and predictability in their conduct.

The approach of Pierre Bourdieu and Stanley Fish is more far-reaching than that of Bickel, White and Llewellyn. Whereas Bickel, White and Llewellyn see the law as a cultural system whose contents serve as raw-material for the development of normative arguments and justifications, Bourdieu and Fish see the law as a cultural system internalized in the minds of lawyers and judges, and activating them in a pre-reflective manner.

Pierre Bourdieu was a French sociologist who is widely regarded as the greatest sociologist of culture in the last decades of the twentieth century. The central concept in Bourdieu's sociology of culture is the habitus. The habitus is a system of dispositions that is enduringly embedded in the minds of human beings throughout their lives. The habitus structures the way people perceive the reality in which they live and the options available to them in that reality. The habitus does not motivate people to act in a conscious way, i.e., when people are activated by the habitus they do not choose their goals and strategies by way of conscious calculation and weighing, nor do they act by way of following rules. Rather, the habitus makes people act according to a "feel for the game", in the context of the circumstances in which they act.

Bourdieu argues that the legal field is governed by a unique habitus, or put differently, by a distinct cultural system, and that what distinguishes lawyers and judges from lay persons is their internalization of the legal habitus. Thus, Bourdieu also argues that lawyers and judges reach their conclusions not by way of following rules, but rather by way of being activated by the legal habitus.

Stanley Fish is an American literary and cultural scholar who has published many articles and books on the practice of lawyers and judges. Much like Bourdieu, Fish argues that lawyers and judges function in the law on a pre-reflective plane, following their internalization of the professional culture that is prevalent in the legal field.

One cannot distinguish between rules and the practices in which rules are embedded, argues Fish. Therefore, it is impossible to regulate a rich and complex practice with pre-existing rules. Rather, in order to understand the meaning of the rules that are relevant to a certain practice, one needs to know how to act within the practice that embodies the rules. Fish maintains that a good example for the connection between rules and a practice is that of a sports game, such as basketball. One cannot teach a basketball player ahead of time the “rules” that need to guide his or her conduct in the varying situations that may develop in the course of the game. Put differently, one cannot anticipate all possible situations that may materialize in the course of the game and then pre-fix to each and one of them its appropriate rule of conduct. All that one can count on is that the player will act in accordance with a “feel for the game” and will take appropriate moves in the varying situations of the game. Fish argues that the activities of lawyers and judges are very much like those of sports players. Much like sports players, lawyers and judges do not act by way of following rules. Rather, what guides their conduct is their internalization of the practice in which they participate.

Bickel, White and Llewellyn emphasize the development of arguments and justifications within the cultural system of the law. Bourdieu and Fish emphasize the way the materials of the legal culture constitute the minds and the conduct of lawyers and judges. Of course, there is a lot that can be said for and against the positions advanced by these five scholars.

What is important for the purposes of my immediate argument however is that all five of them share a perception of the law that is created and operated by the courts as a distinct cultural system or, put differently, as a tradition.

This was my first argument. My second argument is simple and straightforward: if the law created and operated by the courts comprises a distinct cultural system, then, if one wants to preserve the basic features of the legal culture of a state, a major consideration in appointing a person to judgeship should be the extent to which that person accepts the basic tenets of the culture of the law. If one appoints a judge that does not accept the basic tenets of the legal culture, then one's conduct clearly manifests an intention to effect a substantial change in the nature of the culture of the law.

I want to provide an example from the Israeli setting. The ultra-orthodox sector in Israel borrows from Western culture only its technological achievements. In that, it differs from the Amish community in the United States, for instance, that to a great extent continues to live a traditional, pre-modern way way of life. But the ultra-orthodox sector in Israel strongly denies any worth whatsoever of the normative creations of Western culture. Now Israel is a common law country, so that major portions of Israeli law, including Israel's constitutional law, draw on Anglo-American law. The culture of Israeli law is thus premised on the political theory of liberalism. In the past decade, it was often argued that in order to alleviate the alienation of the ultra-orthodox sector from Israel's legal system, ultra-orthodox judges should be appointed to the Supreme Court of the country. But assuming the resentment of Western values and Western law on the part of members of the ultra-orthodox sector, this suggestion amounts, in fact, to a suggestion to effect substantial changes in

the nature of the legal culture of Israel by introducing into it new, oppositional elements.

Disagreement is the human predicament. In order to understand the full (and, it seems, far-reaching) implications of my second argument, I want to draw a distinction between two types of disagreement that may take place between human beings: internal disagreement and external disagreement.

Internal disagreement takes place when people who share the same cultural system interpret an event differently. As lawyers, it is easy for us to understand why this happens: different people focus on different factual dimensions of the same event; identify different normative considerations as relevant for determining the meaning of the event; and give different weight to the various normative considerations that they deem relevant for giving meaning to the event. In contrast, external disagreement is what Richard Rorty calls “abnormal discourse”. External disagreement takes place when people bring to the task of giving meaning to an event the contents of different cultural systems. Here the problem is that in giving meaning to the event people draw in a different set of categories of meaning and their contents. Think of the case in which a Western liberal, a Muslim and a Buddhist are asked to interpret (i.e., to give meaning to) the same event. Or think of the difference between a domestic contractual transaction and an international contractual transaction. In interpreting a domestic contractual transaction, people are supposed to apply the same contract law, and yet they may still reach different conclusions as to the legal meaning of the case (internal disagreement). In the case of an international contractual transaction, let’s say a transaction between a French and an American, each party brings to the task of giving meaning to the event a different set of cultural categories and contents, and this, in

turn, may result in (external) disagreement. (Indeed, in order to avoid this mishap, an effort began in the late 1930s in Rome to draft a series of uniform “laws” for governing international contractual transactions, i.e., for avoiding external disagreement between contracting parties residing in different countries and for turning possible disagreements between such parties into cases of internal disagreement.)

The implications of my second argument are as follows: Parliaments should serve as arenas for both internal and external disagreements. Needless to say, in a democracy (except for rare exceptions) all normative positions that exist among the population of the state should be reflected in the parliament of the state. In contrast, courts should serve as arenas only for internal disagreements, i.e., courts should serve as arenas for disagreements between people who accept the basic tenets of the cultural system of the law that is created and operated by the courts. People who do not accept these tenets may be represented in the parliament of the state, of course, and may advance their normative positions there. And if they gain enough power there, they will pass laws that undermine the prevailing tenets of the culture of the law of the courts and that transform the nature of that law into something new. If they gain enough power in parliament they will also be able to appoint judges that are committed to turning the culture of the law of the courts into one premised on (their) new tenets. But until that happens, those who externally disagree with the culture of the law of the courts need to be confined to conduct their struggles in the arena of parliament. (The situations in which those who challenge the prevailing tenets of the law of the courts gain some power, but not enough power, in parliament raise many interesting questions but as they fall beyond the scope of my immediate argument, and for the brevity of time, I shall not discuss them here.)

My third argument is that the laws of all Western democracies are premised on liberal tenets and that there are strong arguments for preserving this identity of these laws. In recent decades a vast literature arose about the value of culture in the lives of human beings. It was persuasively argued that culture determines the identity of human beings, i.e., the meanings that exist in the lives of human beings. It was also argued that as people usually want to adhere to the cultures in which they live, people have a strong interest in preserving their national, religious or ethnic cultures. But this same argument applies not only to the cultures of minority cultural groups; the argument applies to the culture of the majority, as well. Thus, if most people in Western democracies live in a liberal culture and want to continue to adhere to this culture, then a strong moral interest exists for preserving this culture and for letting people continue to live in it, even if this culture is being challenged by some non-liberal groups.

My fourth argument is that liberalism is the political theory best suited for a multicultural condition. As is well known, there is no single, widely agreed-upon version of liberal political theory, but rather an array of theories that only partly overlap. One major current of liberal thought, associated with the names of Kant and Mill, is premised on the notion that the essence of valuable human existence is the ability to make autonomous choices. This current takes a substantive stand in the issue of the good life and is disputed by most, if not all, religious doctrines, as well as by some secular moral theories. Another current of liberal thought is political liberalism, developed in the later (i.e., post 1971) writings of John Rawls and by Charles Larmore. The departure point of political liberalism is the fact that people living in Western democracies adhere to conflicting comprehensive moral and religious doctrines. Political liberalism aims, therefore, at developing a narrow, political theory -- as distinguished from a

comprehensive theory -- reflecting a consensus that might possibly be reached by people living in Western democracies who adhere to different comprehensive moral and religious doctrines. Still a third current of liberal thought is premised on the assumption of moral pluralism, i.e., the idea that there exists a plurality of worthy values to be pursued in the lives of human beings; that these values cannot be ranked in any coherent order; and that values often contradict other worthy values. This current of liberalism is associated with the names of Isaiah Berlin and William Galston.

What is common to all these three versions of liberal thought is that they are aimed at establishing and maintaining political institutions that enable the greatest number of people to pursue their chosen values. (It might be argued that the last two versions are more hospitable to cultural diversity than the first version is, though). Now, the clearest case of a state whose population is committed to a broad spectrum of varying values is that of a multicultural state. Liberalism is, therefore, the political theory best suited for the running of the institutions of a multicultural state. In a multicultural state that is liberal, the greatest number of cultural groups and individuals will be able to pursue the values to which they are committed. What this implies is that in appointing judges in a liberal, multicultural state, it should be assured that the judges are committed to the preservation of the liberal values of the state's legal system.

My fifth and last argument is that in a liberal, multicultural state there are good reasons for appointing judges coming from the major cultural groups that compose the population of the state. There are prudential reasons for that, namely the need to reinforce the loyalty of all cultural groups living in the state to the state's institutions. There are also reasons that have to do with the enrichment of the legal culture of the state, namely letting it benefit from the inputs coming from varied cultural

sources. In a liberal, multicultural state all cultural groups that compose the population of the state should, therefore, be represented in the judiciary, but, as I noted before, a pre-condition for the appointment of a judge in such a state should be that that person accepts the liberal tenets of the state's legal system. The same logic supports the appointment to the courts of judges belonging to the major identity groups that exist in the state.