The Concept of Citizenship: Multicultural Challenges and Latin American Constitutional Democracy

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In Latin American multicultural societies, citizenship is defined by a normative status that allocates community status rights. Citizenship in multicultural societies is therefore determined by legal dynamics that delimitate who receives citizenship status and who is excluded from it. According to this framework, those who have citizenship rights are considered equal under the law. However, it can be argued that constitutional statements that determine notions of equality do so at a rhetorical level. Considering this point, one can question whether laws that provide rights to citizens with cultural differences are in fact effective if certain groups cannot fully exercise them. The substantive point that is being argued here is that although certain rights are formally granted to every citizen, pragmatically speaking, it is often the case that certain members of society are not able to exercise these rights. The point that will therefore be argued in this article is that while legal and political rights are formally granted to minority groups, administrative and social conditions make such rights unattainable to the very groups that these rights were designed to help.

Introduction

Multiculturalism is a social and political reality in Latin America. However, its legal recognition in some constitutions in the region is quite recent and its practical implementation presents certain

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challenges. Nevertheless, several state constitutions consider multiculturalism and guarantee minority groups legal protection and normative respect. For example, article 2 of the Mexican constitution states that 'The Mexican Nation is an indivisible one. The Nation has a multicultural integration based on its indigenous peoples which are those inhabiting the country since even before the conquest took place and who have lived according to their own social, economic, cultural and political institutions ...'.[1]

Indeed, and as can be inferred from numerous state constitutions, in Latin American multicultural societies, citizenship is not defined by the notion of belonging to a common identity or national spirit. On the contrary, it is defined by a normative status that allocates

[1] *Political Constitution of the Mexican United States* (translation by Carlos Pérez Vázquez, Instituto de Investigaciones Jurídicas, México, UNAM 2005) <www.juridicas.unam.mx/infjur/leg/constmex/pdf/consting.pdf> accessed 17 April 2014. Further examples can be found in other Latin American constitutions. The Preamble of Venezuela's constitution states that 'The people of Venezuela, exercising their powers of creation and invoking the protection of God, the historic example of our Liberator Simon Bolivar and the heroism and sacrifice of our aboriginal ancestors and the forerunners and founders of a free and sovereign nation; to the supreme end of reshaping the Republic to establish a democratic, participatory and self-reliant, multiethnic and multicultural society: *Constitution of the Bolivarian Republic of Venezuela* (translation from the Embassy in Korea) <www.venezuelaemb.or.kr/english/ConstitutionoftheBolivarianingles.pdf> accessed 17 April 2014. Article 1 of Ecuador's constitution reads: 'Ecuador is a constitutional State of rights and justice, a social, democratic, sovereign, independent, unitary, intercultural, multinational and secular State.': *Constitution of the Republic of Ecuador* <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> accessed 17 April 2014. Article 1 of Bolivia's constitution states: 'Bolivia is constituted as a Unitary Social State of Pluri-National Communitarian Law that is free, independent, sovereign, democratic, inter-cultural, decentralized and with autonomies. Bolivia is founded on plurality and on political, economic, juridical, cultural and linguistic pluralism in the integration process of the country.': *Bolivia's Political Constitution of the State* (translated by the Embassy of Bolivia in Washington DC) <www.forensic-architecture.org/wp-content/uploads/2012/11/Bolivia_Constitution_2009-Official-Translation.pdf> accessed 17 April 2014. Other countries such as Argentina have not explicitly stated the word 'multiculturalism' but recognize the ethnic and cultural pre-existence of indigenous peoples and guarantee respect for the identity and the right to bilingual and intercultural education, among other rights: *Constitution of the Argentine Nation* <www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf> accessed 17 April 2014.

community status rights. Citizenship in multicultural societies is therefore determined by legal dynamics that delimitate who receives citizenship status and who is excluded from it. According to this framework, those who have citizenship rights are considered equal under the law.

Although many state constitutions guarantee minority groups specific protections that provide them special rights such as, inter alia, the right to choose their own public authorities via democratic procedures, access to their own justice system, keep their own institutions, language, costumes, etc., it can be argued that constitutional statements that determine notions of equality do so at a rhetorical level. One can therefore inquire if this determination transcends the positive and narrative fields and allows for legal recognition of minority rights, or if, on the contrary, the inequality remains. Considering this point, one can question if laws that provide rights to citizens with cultural differences are in fact effective if certain groups cannot fully exercise them. To substantiate the point that is being made here, it can be argued that although certain rights are formally granted to every citizen, pragmatically speaking, it is often the case that certain members of society are not able to exercise these rights. The important point is that while legal and political rights are formally granted to minority groups, administrative and social conditions exist that make such rights unattainable to the very groups that these rights were designed to help.

The aim of this paper, then, is to consider citizenship rights that are formally given to all citizens, but which are in practice unattainable to specific groups due to cultural differences. That is, in sum, that in contemporary Latin American multicultural societies, there is a tension between legal notions of equality and the pragmatic realities that define these constitutionally protected rights. The argument that this article will make is that, from a pragmatic perspective, as citizenship implies a degree of equality, rights that are conferred to citizens in equal terms will not be realized unless cultural differences that compose the whole of citizenship are taken into account. Thus, inequality will persist if cultural differences are not considered in the formal narrative. Furthermore, and if states are to address the cultural differences that define contemporary multicultural societies, a pragmatic solution would involve formal consideration of the

relevant differences that create certain categories of people. For example, different cultural groups may have different conceptions of justice and jurisprudence. In this context, a relevant question is: should indigenous groups be granted special legal treatment; that is, given privileges that are not available to other groups in order to enforce constitutional guarantees of equality?

In order to answer the question posed above, this article will discuss traditional literature that defines the relationship between citizenship and the state, review how this literature can be applied to multicultural countries in Latin America, and discuss the legal and political implications of constitutionally protected rights and the effect that they have on groups who do not share the same cultural and linguistic traditions as the dominant inhabitants of today's contemporary nation states. The main focus of this article will consider the tensions that exist between homogeneous communities and the indigenous inhabitants of contemporary Latin American nation states.

Theory: Hans Kelsen and Citizenship in Multicultural Societies

The purpose of this article is to consider the concept of citizenship and investigate its legal, political, social and pragmatic implications in multicultural societies.[2] As discussed in the introduction, traditional notions of citizenship present certain challenges in countries that are not only multicultural, but, are considered to be constitutional democracies. In order to consider how these challenges affect Latin American, multicultural societies, it is necessary to discuss the theoretical components that define and determine contemporary understandings of citizenship. This section will therefore discuss the theoretical aspects that define citizenship in Latin American constitutional democracies.

[2] More specifically, this article will be considering the concept of citizenship and how it can be applied to an analysis of the relationship between the nation state and the indigenous communities who have inhabited contemporary Latin America since before colonization.

Theoretical Overview

As a starting point, it is essential that we consider two theoretical perspectives: Hans Kelsen's *Pure Theory of Law,* [3] and Will Kymlicka's *Multicultural Citizenship: A Liberal Theory of Minority Rights*. [4] Indeed, when discussing citizenship in Latin America, Kelsen's theory is the dominant framework. It has been said that the *Pure Theory of Law* is of such importance that every Latin American constitutional lawyer relies upon Kelsen's works.[5] The importance of his works rests in Kelsen's determination that a state is defined by a legal system that governs and creates laws and obligations in homogenous societies. According to this determination, a state becomes a legal system that is both valid and legitimate within a given jurisdiction.[6]

Kelsen's theory can be described as a theoretical framework that is meant to apply to every normative system and one that carries universal vocation. His theory was based on a formal conception of the nation state. Although every state is unique and has its own legal tradition, every state is governed by a procedural conception of law that has its foundations rooted in the constitution. As the constitution implies equality and the rule of law, Kelsen's theory asserts that within a given territory, individual cultural values and conceptions of what is, or is not, fair are not relevant. Kelsen's theory therefore asserts that every citizen is equal before and under the law.

As is relevant to a legal conception of citizenship, Kelsen explained that as states mature, they develop norms and the ability to apply sanctions when norms are not observed. Nevertheless, because a state is a normative system, its survival is based on citizens obeying

[3] Hans Kelsen, *Pure Theory of Law* (University of California Press 1967) 172-175.

[4] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 2003).

[5] Alejandro Médici, *La Constitución Horizontal: Teoría Constitucional y Giro Decolonial [The Horizontal Constitution: Constitutional Theory and the Decolonial Turn]* (Universidad Autónoma de San Luis Potosí 2012) 32-42.

[6] When a state is considered valid and legitimate there is an applied implication that individuals who live in this geographical territory will be aware of the state's laws and obligations and therefore, obey the law.

the rules and respecting the limits which the state prescribes.[7] More specifically, an objective examination of the state would reveal that the existence of the state is dependent upon the validity of the normative system.[8] Kelsen's conception of the state and of the normative validity of the system therefore implies that a state's existence is dependant upon the state's ability to coerce citizens into not only *obeying* the law, but also *believing* in the law.

Looking at citizenship from another perspective, Will Kymlicka developed a theory that discusses citizenship in multicultural societies. That is, while Kelsen's theory is based on a disposition where citizenship is built upon a homogenous society, Kymlicka's starting point is citizenship in a geographical area that is defined by a diversity of cultural, linguistic and historical differences.[9] Indeed, Kymlicka assumes that there are two kinds of multicultural societies. The first is the society made up of immigrants. The second and the one that is relevant to this article is the multicultural state that is defined by the sum of first and second generation citizens. First generation citizens may be those—for example, indigenous communities—who inhabited the land prior to conquest and colonization. The second generation would be the colonial disciples who now can be labelled as the hegemony. Therefore, citizenship can be said to be defined by a 'pluri-national' state,[10] that is, a state that is composed of a plurality of nationalities. Citizenship can then be said to have an integrative function that allows for a common legal and political identity that respects a diversity of cultural and linguistic values.[11] Under these assumptions, the plurality of the community establishes the state's legitimacy. While people identify

[7] José Mariá Rodríguez Paniagua, *Historia del Pensamiento Jurídico* [*History of Legal Thought*] (Vol II, 8th edn, Universidad Complutense de Madrid 1997).

[8] Juan Enrique Serra Heise 'Referente a la Pureza de la Teoría Kelseniana' ['On the Purity of Kelsen's Theory'] in Claudio Oliva (ed), *Estudios sobre Hans Kelsen* (Valparaiso EDEVAL 1996).

[9] Kymlicka (n 4).

[10] I think this notion from Kymlicka might result in some confusion as, when one reads some Latin American constitutions, the different cultures are specifically not recognized as independent nations by most Latin American constitutions. Bolivia's constitution is an exception; it defines itself as a 'pluri-national' state.

[11] Kymlicka (n 4) 9.

with a diversity of cultural and linguistic traditions, a degree of normative respect and tolerance allows these groups to establish the validity of a common legal system. Indeed, and as was established by Kelsen, a harmonizing constitution is still required.

A Critical Perspective

As discussed above, Kelsen's theory is the dominant discourse defining citizenship in Latin American constitutional democracies. While Kymlicka offers a viable alternative, his theory is not a legal theory: it is a sociological and political framework that studies social cohesion. The problem that then arises is, if we were to consider citizenship based purely on Kelsen's theory, in Latin American multicultural societies Kelsen's conceptions would ultimately—indeed, have already—lead to failure (this argument will be developed though the course of this article).

The fundamental problem with Kelsen's theory is that it fails to take into consideration the effects that cultural and linguistic factors have on the formal conception of citizenship. Considering that valid norms that influence the behaviour of those who inhabit the nation state are derived from the constitution, conflict emerges when there are numerous cultural and linguistic perspectives. It can therefore be stated that, although Kelsen's theory is appropriate for culturally homogenous societies, his theory does not fit in countries that derive multiple ways of living under a given nation state.[12]

Considering the fact that Kelsen's theory does not seem to be suitable for defining citizenship in multicultural societies, it appears that his theory does not achieve universal vocation. The main problem that can be identified is that for those who live under different cultural values and have their own political and social institutions—such as is the case in many Latin American countries—those who do not fit with what is to be considered the hegemony are,

[12]Alejandro Médici, 'Teoría Constitucional y Giro Decolonial: Narrativas y Simbolismos de las Constituciones. Reflexiones a Propósito de la Experiencia de Bolivia y Ecuador' ['Constitutional Theory and the Decolonial Turn: Narrations and Symbols of Constitutions. Thoughts About the Experience of Bolivia and Ecuador'] (2010) 1 Otros Logos 94.

by default, excluded from a formal recognition of citizenship rights. More specifically, 'those who do not fit in our system's explanations are not part of the system at all'.[13]

The negative implication of Kelsen's theory—in terms of citizenship—is that it lacks a necessary consideration of humanity. That is, Kelsen does not consider citizenship from the perspective of how an individual identifies with the community around them.[14] Indeed, citizenship implies individual rights and obligations, but, it must also imply a legal recognition of individual identity—cultural and linguistic values. It can therefore be argued that for Kelen's theory to achieve universal vocation, it must consider an individual to be more than a legal construction of someone who has rights and obligations. In multicultural societies, where individuals have a variety of cultural and linguistic values, Kelsen's theory of law cannot be said to represent what is important to all members in a given country. The main point here is that human beings should have an ontological pre-eminence over laws. Otherwise citizenship, as a legal category, will always be grounded on certain fictional images. The negative impact on such fictions will be that, inevitably, certain individuals will be excluded from formal conceptions of citizenship.

Practical Implications

This article will explore the practical implications of forming a conception of citizenship based on Kelsen's theory. Although many, if not all, Latin American constitutions recognize multiculturalism and the rights of minority groups, from a pragmatic perspective the very theory of citizenship makes it so many groups, particularly indigenous communities, will be unable to access these rights. What

[13] Helga Maria Lell, 'El Derecho Indígena de Acceso a la Justicia Estatal: Un Denotado que Desafía la Lógica del Sistema Jurídico' ['The Indigenous Right to Access State Justice: A Legal Sense That Defies the Normative System's Logic'] in Daniela Zaikoski Biscay and Manuela G González (eds), *Actas del XII Congreso Nacional y II Latinoamericano de Sociología Jurídica: Problemas Sociales de Latinoamérica: Desafíos al campo Jurídico* (Universidad Nacional de La Pampa 2011) 5.

[14] Kelsen (n 3) 172-175.

is needed is a conception of citizenship such as that developed by Kymlicka to be given legal vocation. This can be done by creating a legal framework that takes into consideration cultural and linguistic values.

Critically speaking, it can therefore be observed that although traditional conceptions of the nation state conform to the criteria outlined by Kelsen, this definition does not take into account the fact that rules are made for the people and that the people who live in a certain state are those who have to obey the law. Indeed, an individual's submission to the law is what, according to Kelsen, allows for a nation state. Thus, diversity gives rise to a series of constitutional issues such as language rights, political rights, autonomy, and political representation. Finding solutions to these issues and harmonizing values and customs of diverse cultures within the legal system in a coherent and feasible way is perhaps one of the greatest challenges facing contemporary multicultural democracies.[15] Considering these claims, the remainder of the article will consider citizenship as it applies to Latin American multicultural societies.

Legal Discourse and Democratic Challenges: the Concept of Citizenship

Legal discourse is a narrative that has a symbolic dimension. Citizenship is created out of this symbolic dimension and is made real through mechanisms of inclusion and exclusion. Democracy implies that the government is made by the people for the people—the 'demos'. In Ancient Greece, the 'polites' were people who, during the democratic period, took an active part in the common issues: issues that were of concern to the community. In Ancient Rome, the equivalent concept of 'polites' was 'cives'. In modern times, the 'polites' is what we understand as 'citizen'. Indeed, a citizen is understood to be a member of a political community that can take part in the common decisions by using the democratic mechanisms, and has rights and obligations that he/she collaborated to create/recognize.

[15] Kymlicka (n 4) 1-9.

To clarify these concepts: it is possible to claim that citizenship, conceived as a unitary status, equalizes the status of all citizens by creating a framework that legally enshrines citizens with equal rights—civil, political, and social duties, responsibilities and freedoms. [16] From a political perspective, the unity of a heterogeneous group composed by normative subjects is grounded on the basis that all citizens respect, abide by, and recognize the rule of law.[17]

Considering the concept of citizenship as a legal mechanism that creates equality for those for whom it applies to—by determining citizenship rights and obligations—cultural diversity threatens to breakup this narrative and forces multicultural societies to reconsider citizenship rights and obligations. Therefore, while citizenship implies uniformity and the inclusion of the 'same', democracy must also consider diversity. In this context, democracy must allow for mutual coexistence without cultural impositions.

According to 'state's legal system's logic', citizenship is presented as a set of homogenous units that represent social values that are shared by all citizens.[18] The inclusive challenge is, in many cases, solved by rhetorical statements that avoid falling into a performative contradiction, [19] because in democratic societies [20] the arbitrary

[16] Susana Villavicencio, 'Ciudadanos para una Nación' ['Citizens for a Nation'] in Susana Villavicencio (ed), *Los Contornos de la Ciudadanía: Nacionales y Extranjeros en la Argentina del Centenario* (Eudeba 2003) 13.

[17] Susana Villavicencio, 'Domingo F. Sarmiento: Republicanismo y Filosofemas de la Nación' ['Domingo F. Sarmiento: Republicanism and the Philosophy of the Nation'] in Susana Villavicencio and María Inés Pacecca (eds), *Perfilar la nación cívica en la Argentina: Figuraciones y Marcas en los Relatos Inaugurales* (Instituto Gino Germani, Universidad de Buenos Aires 2008) 67.

[18] Carlos Maria Cárcova, *La Opacidad del Derecho* [*The Opacity of Law*] (Trotta 2006) 61-91.

[19] Constitutional law dictates indigenous and non-indigenous peoples will be treated as equals. However, as this requires the recognition that there are two different groups, the necessary administrative requirements needed to access these rights and to claim them are the same. If the differences between these groups make it impossible to claim such rights then the notion of equality fails and the norm that creates the formal equality also create an inherent inequality: this is the performative contradiction: Robert Alexy, 'On Necessary Relations between Law and Morality' (1989) 2 Ratio Juris 167.

exclusion of citizens based on cultural, racial, ethnic, or religious grounds, among others, would be illegal or, in other words, 'a dialectic suicide'.[21] A country's constitution often declares the recognition of equal rights for all citizens even when they also recognize special and diverse legal mechanisms to make these rights effective in some groups (i.e. the access to justice is usually recognized in two ways: (i) access to the state's judicial system and; (ii) access to indigenous communities judicial systems, or the right to choose democratic authorities by the procedures that each native community decides). The notion of 'citizen' implies being an inhabitant of a country and living under the laws and rules of the nation state. The concept of 'national' implies certain feelings of belonging to an ethnic, cultural and historical group that might be the same or different from the status quo (those who live in a same territory). To clarify these different concepts, Quijada uses the terms 'civic nation' and 'ethnic nation'.[22] For example, in Argentina, every person that was born in the country is considered Argentinian and, therefore, citizens. However, not every citizen identifies with the notion of being part of the national spirit, for example, the indigenous peoples of ranqueles, mapuches, guaraníes, tehuelches, among others. The native communities, those that inhabited the lands before the European conquest and colonization and the foundation of the country, have different values, beliefs, rules,

[20] See Walter Mignolo, 'Hermenéutica de la Democracia: El Pensamiento de los Límites y la Diferencia Colonial' ['Hermeneutics of Democracy: The Thought of Limits and the Colonial Difference'] (2008) 9 Tábula Rasa 39.

[21] The dialectic suicide implies something that cannot be put in practice without contradicting itself. In this case, for example, one can say that everybody that lives on a territory is a citizen. Citizens have equal rights and equal obligations. Also, people who are different should be included in the society and respected just as they are, and so, if it is necessary, legal exceptions should be made. However, this creates a situation in which some citizens, the 'same', have to obey the law in the same way as 'others' have special exceptions from it.

[22] Mónica Quijada, 'Los Límites del "Pueblo Soberano": Territorio, Nación y el Tratamiento de la Diversidad. Argentina, Siglo XIX' ['The Limits of the "Sovereign People": Territory, Nation and Diversity Treatment in Nineteenth Century Argentina'] (2005) 13 Revista Historia y Política 143.

cultural products, institutions, etc. They do not identify with the 'national' concept even though they are citizens.[23]

While the concept of 'citizen' differs from the 'national' one,[24] there exists a complex conflict arising from the imposing of a government system, and the associated claim of power, as formulated by some traditional cultures. Every culture defines a set of values and ideals that guide legal institutions. Thus, these values have universal vocation and there is a strong possibility that these values will be imposed on those who are not aware of or do not identify with the same cultural values.

Under this framework, the idea of the 'same' and the 'other' is generated. The modern colonial tradition has installed a model of the ideal citizen. However, those who resist or those who are different are thought to threaten notions of citizenship and are therefore labelled as the 'others'.[25]

Latin American multiculturalism is built upon multiple cultural identities that come from communities with their own traditions and institutions. Often, these communities outdate the states that define their citizenship and are part of the 'occidental' communities.[26] Under this framework, multiculturalism in Latin America does not imply only or mainly challenges from the migrating phenomenon.[27]

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[23] ibid.

[24] According to the concepts provided by Mónica Quijada, ibid.

[25] As has been said before, the idea of the 'same' and the 'others' belongs to Foucault. How these notions are used in this context will be addressed later in this article.

[26] Usually, the notion of 'occidental' (or 'Western') is used in order to identify the people who come from the societies organized under the European parameters (in order to point out the difference between the indigenous communities that inhabited the lands before the conquest). The Constitution of Bolivia illustrates this by stating: 'Given the pre-colonial existence of nations and rural native indigenous peoples and their ancestral control of their territories, their free determination, which consists of the right to autonomy, self-government, their culture, recognition of their institutions, and the consolidation of their territorial entities, is guaranteed within the framework of the unity of the state, in accordance with this constitution and the law.'

[27] There are different ways in which minorities become incorporated into political communities (from the conquest and colonization of previously self-governing societies to the voluntary immigration of individuals and families). These

In order to make an analysis from a post-colonial perspective, it is important to consider citizenship from the perspective of Latin American pre-colonial communities. The multiculturalism that comes out from pre-colonial communities is relevant in the sense that it is important to think about the legitimacy of the indigenous people's institutions—that were part of a native culture and the result of their own consensus—facing the legitimacy of the non-indigenous legal system and political institutions that were imposed after the conquest of America and the colonization of the remaining societies.[28]

The challenges being discussed can be defined as those that appear in legal systems where the countries' constitutions attempt to harmonize the coexistence of communities that pre-date the colonial states and whose people have different cultures, values, and ways of living. In these systems, every person under the law is defined as a citizen. However, if every citizen has equal rights and duties, what happens when the cultural and social differences make it impossible to enjoy or claim these rights? The main question is where to create limits between relevant differences or where equality demands that no distinction is made. This does not mean that providing special rights to certain groups is wrong. On the contrary, the point here is that it is appropriate and that these rights should be attainable not only formally but also in practice. Nevertheless, it is also interesting

differences in the mode of incorporation affect the nature of minority groups, and the sort of relationship they desire with the larger society: Kymlicka (n 4) 9-18. International migration implies going out from one country in order to come into another one. So, at the time one goes out from the country, the country where one intends to go to, and its society, already exists. For Latin American multiculturalism, based on indigenous communities, this is very different. The indigenous communities pre-dated the societies of this era, but as they were on the conquered territories, their destiny was forced: sometimes they would take part in the modern state as cheap workers or, other times, they would just be eliminated from it. The conquest from European people also implied that the indigenous people would lose all their properties, social and political institutions, and freedom. Nowadays their situation is not as bad as it was six centuries ago, but they are still treated as minorities and they cannot always claim for their rights.

[28] Indeed, the formal recognition of multiculturalism and imposition of rights for indigenous minorities is not a foreign concept. Considering the historical violence of colonization, recognizing cultural differences is a fundamental component of a just society.

to highlight that if every citizen is equal under the law, this equality is grounded on the construction of different categories. For example, when a non-indigenous person commits a crime he/she is judged by the state's justice system. On the other hand, when an indigenous person commits a crime he/she is judged by community procedures. In the event that the communities' conception of justice does not provide an equitable outcome, what are the implications for the victim? Consider a second example. There is reason to argue that indigenous people should be equal under the law—as non-indigenous people are. Under this model, indigenous people enjoy the same rights as everybody else, and, therefore, have the same duties (pay taxes, read the official newspaper, obey the law, etc.). The problem with this model is that it is often the case that an indigenous person will not speak the official language and cannot understand what their rights or duties are. As he/she is a citizen, just as everybody else, they cannot claim to be outside the law (in the same way that they have rights, they have the duty of obeying the law). However, he/she is recognized as an indigenous person (which probably means they speak another language and live in an indigenous community). How then is it possible to harmonize both categories: citizenship (an equal component) and the distinction between indigenous and non-indigenous (a non-equal component)? What does justice demand: to treat everybody as equals or to accept that some people should be treated differently and therefore, unequally?

To illustrate this point, let's consider a hypothetical example. Suppose England is invaded by a group of aliens. They conquer the territory and create new institutions and a new government. They tell the English people that they will consider them as equals and as citizens of their new state. They allow English people to stay in certain lands and keep their own culture, rules and institutions (the monarch, prime minister, parliament, courts, etc.) so long as they obey every single order the great alien—the new state's authority—gives. The aliens feel that they have been just because they have allowed the English to coexist while maintaining their own political institutions and to become members of the new society. In fact, they treat the English as equals, therefore, implying that they have been just conquerors. However, one day, the great alien gives an order that requires every citizen to pay a tax. The penalty for not paying

the tax is death. The order was given in the alien language. No English man or woman could understand it due to the fact that nobody spoke the alien language. The English people are murdered because, as citizens, they were required to pay and the consequence of non-payment is death. The important question is: were the English treated as equals?

It is important to notice that in the case above, we were talking about an invasion, so it might seem that it may not be a similar case to the coexistence between native people and the non-native inhabitants. On the contrary, the case is very similar to Latin American territories that were occupied by native communities prior to the conquest. When the conquest occurred, the Europeans occupied the territory. Native people were suppressed and many of those who survived were forced to work in awful conditions (Quijano noted that this was one of the pillars of capitalism in the region[29]). Nowadays, the oppression of indigenous communities is not the same as it once was: current conditions are much better and many rights are conceded to the indigenous communities. While this is a positive development, one should not be naïve and think that a perfect situation has been arrived at. There are still great deals of conflict that result from a lack of understanding.[30] Thus, tensions exist and these tensions make certain equality rights unavailable to specific groups.

Considering cultural differences that exist in multicultural societies, we can observe specific challenges that face these constitutional democracies. Conflict thus appears at the political and organizational level and a concept of citizenship is required to consider concepts such as tolerance and equality that establish equal conditions for diverse cultures (even though, frequently, this covers the persisting inequality and determines a way of relating between

[29] Aníbal Quijano, 'Colonialidad del Poder y Clasificación Social' ['Colonialism of Power and Social classification'] in Santiago Castro-Gómez and Rámon Grosfoguel (eds), *El Giro Decolonial: Reflexiones para una Diversidad Epistémica Más Allá del Capitalismo Global* (Siglo del Hombre Editores 2007) 342.

[30] There are other problems, for example: should the lands be returned to the indigenous people or should they be content with the lands that the state provides them with?

members in society). [31] Additionally, qualifying a regime as democratic has moral connotations because there is a general consensus that this is a desirable characteristic for political organizations. Democracy therefore presupposes a state/legal system that attributes citizenship status to certain people and is supported on a universal and inclusive basis.[32]

Normative Limits: Inclusion and Exclusion Mechanisms

In his analysis Foucault asked: what conditions and under what circumstances are historical *a priori* statements—as described by classical philosophy—reflective of the similarities between things that support words, classifications and categories? [33] More specifically, how can we describe distinct identities that place themselves ahead of and over those who are considered 'different'? In the context of this paper, we can define the 'other' as the cultural group that is excluded from the official narrative because they are considered 'dangerous'. The 'same', on the other hand, are those who conform to the official identity.

In this context, a legal system can be defined as a means of distributing or assigning rights in an explicit or implicit way.[34] According to this narrative, it can be said that the legal system builds categories between those who have a certain status and those who do not. Thus, the normative system is what allows us to separate the 'same' from the 'other'.

The foundation of this line of thinking can be found in Tamanaha's argument that, among western states, everyone is better off when

[31] Susana Villavicencio, 'Neoliberalismo y Política: Las Paradojas de la "Nueva Ciudadanía"' ['Neoliberalism and Politics: Paradoxes of the "New Citizenship"'] (2000) 16 Revista Internacional de Filosofía Política 5.

[32] Guillermo O'Donnell, *Disonancias: Críticas Democráticas a la Democracia* [*Dissonances: Democratic Critiques of Democracy*] (Prometeo 2007) 23-31.

[33] Michel Foucault, *The Order of Things* (Routledge 2005) 17-25.

[34] Miguel Ángel Ciuro Caldani, 'Bases de la Integración Jurídica Trialista para la Ponderación de los Principios' ['Basis of the Legal Trialistic Integration for Pondering Principles'] (2009) 32 Revista del Centro de Investigaciones en Filosofía Jurídica y Filosofía Social 9.

they live within the 'rule of law'.[35] According to this theory, the rule of law protects citizens from what they might fear; it protects their rights and allows them to develop in a free and diverse society. As a formal legality, the rule of law entails laws with the characteristics of generality, equality, and certainty. This means that law is the same for everybody, not only for one specific person; that it is applied to everyone in the same way and that people can know before acting what the consequences of their actions may be.[36] Generality of law is therefore important in order to ensure equality and to eradicate possible arbitrary acts from the government; it can also be useful in allowing for the coexistence of diversity. However, these are only formal qualities and in order to develop a proper understanding of how law works in multicultural societies it is important to consider, from a pragmatic perspective, how the rule of law functions when we factor in the material conditions that make possible the coexistence of different values and linguistic traditions. In the examples given above, equality, generality, and certainty were clear characteristics of the legal system. English people could live under the same laws as the aliens and their communities were respected but, from a pragmatic perspective, they could not live as equals under the law as they could not understand the alien language.

Continuing with this argument, if subjectivity is based on the rights and obligations attributed by law, then it is also grounded on those that could have been attributed but were not because of the will of the normative authority. In addition, if norms are linguistic performative statements,[37] they build the object to which they are referring to by including it in the legal world. In this sense, the

[35] Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambidge University Press 2004) 66-97.

[36] Franco Catalani, 'Conceptos Básicos de Teoría del Estado' ['Basic Concepts of the State's Theory'] in Franco Catalani, Alejandro Médici, Helga Maria Lell, and Rodrigo Torroba, *Derecho Político Actual: Temas y Problemas Vol 2* (EdUNLPam 2012) 11.

[37] Performative statements are, according to John Austin, those by which it is possible to do something, to create something. They do not describe and are not true or false. For example: 'I now pronounce you husband and wife'. John Austin, *How to Do Things with Words* (2nd edn, Harvard University Press 1975) 69-94.

nature of material things are a linguistic matter as it implies that there is a search for a definition.[38]

We can therefore argue that beliefs influence human conduct as they give it directions according to social imagination.[39] That is why it is not just a coincidence that, when dealing with the idea of differences linking with the 'other', the legal discourse uses symbolic forms to distinguish those who are not considered the 'same'. Beliefs, then, inspire the order that is given to the world—to the classifications—and labels anything that exists in reality. They give concepts and make intelligible the chaotic heterogeneity.[40]

According to what has been argued, one can affirm the possibility of knowing the categories of citizens by studying legal norms and how they refer to normative subjects. The citizen, as a subject of a predicate, is a textual and discursive construction. Textual, because it is created by the attributions that every norm makes. Discursive, because it is a linguistic product pronounced and interpreted depending on the circumstances and the roles played by each person. What is not said in the text is also important and defines the meaning of a message since the text is not just a mere sum of sentences.[41] What is elided presupposes an ideology that determines what can or cannot be announced.

Cultural Incompleteness

The constitution's role in this pluralistic model extends horizontally. It harmonizes and attributes a sense of unity to those who are different without forgetting heterogeneity and without pretending to uniform it. Faced with the kind of cases that often come before

[38] Alfred Jules Ayer, *Language, Truth and Logics* (Penguin Adult 2001) 64.

[39] Nora Wolfzun, 'Mercosur: Diálogos entre Nación y Región' ['Mercosur: Dialogues between Nation and Region'] (7th National Congress of Political Science at the Argentina Society of Political Analysis (SAAP), November 15-18 2005) <www.saap.org.ar/esp/docs-congresos/congresos-saap/VII/programa/paneles/a/a5/wolfzun.pdf> accessed 17 April 2014.

[40] Médici, *The Horizontal Constitution* (n 5) 27-47.

[41] Altjandro Raiter and others, *Discurso y Ciencia Social* [*Discourse and Social Science*] (Eudeba 1999) 10-20.

judges, the interpretative model often requires a transcultural dialogue or, in other words, a transversal communication between different cultures. From this perspective, the *topoi*, [42] as argumentative premises, are often left aside and a legal reinterpretation that does not result in cultural subjugation is produced. The diatopic hermeneutics that Boaventura de Souza Santos proposes,[43] suggests a predisposition that every culture has its own universal values about human dignity but, as they are incomplete, they allow other universalisms.[44] The incompleteness of every culture (cultures are actually not conscious of their incompleteness) is revealed when facing a problematic case in which the different priorities come together and create a diversity of claims.[45] The notion of 'diatopic' characterizes the idea of dialogue between different 'τό π οι' ('tópoi').[46]

[42] According to de Souza Santos, the *topoi* are common rhetorical places extended in a culture and that are evident. That is why they are not under debate. They are premises from which create arguments but when they are transferred to a different culture they are problematic and vulnerable.

[43] The 'diatopic hermeneutics' are a kind of hermeneutics that are characterized by the goals of 1) making every culture conscious about their incompleteness (this means that although they might consider their values as universal, they cannot be applied to other cultural groups), and; 2) emphasizing the dialogue between cultures in order to make it possible to understand each other (so, if a person wants to interpret a legal statement according to his/her values, they have to think not only as their cultural group would, but also as different cultural people involved in the situation would do). For example, in this case, the Occidental people would consider it just if the claim of the Oaxaca's indigenous community would be rejected as the deadline had already passed and everybody had to read the official newspaper. However, according to the diatopic hermeneutics, in order to interpret the legal statement about the deadlines the Occidental point of view would not be enough. The interpreters have to put themselves in the shoes of the indigenous people, and then, and only then, they can decide which interpretation for the case is most right. The 'diatopic' characteristic means that there is a dialogue between the accepted premises of at least two cultures.

[44] Boaventura de Souza Santos, *Para Descolonizar Occidente. Más Allá del Pensamiento Abismal* [*To Decolonize the Occident: Beyond Abysmal Thought*] (Prometeo Libros 2010).

[45] ibid.

[46] In Ancient Greek τό π ος or 'tópos' means 'place' or 'location'. 'Topoi' is its plural. Nowadays, it is used in order to mean premises, common and accepted

Indeed, there is a tension between tolerating those groups that are different from the official identity, the 'others', by creating special institutions or exceptions to the rules in order to be more democratic, on one hand, and the impossibility of applying unique criteria to equalize all citizens without falling in the trap of a dialectic suicide.

Citizenship and the 'Other'

The terms 'nation' and 'citizenship' are modern concepts. The word 'nation' is a reference to a conception of social integration and has three components: the economic, the diplomatic, and the identity that defines a feeling of belonging.[47] Citizens identify with a community and the very nature of identity infers that external factors are rejected. For example, it becomes important to suppress conceptions of the 'other' such as the idea that immigrants are strange to the community, they have different customs and languages, they might take advantage of a societies public services, they might take people's jobs, among others.[48] However, pre-existing indigenous values are external factors, they are not part of the 'same', and although they inhabit the territory, they are inevitably part of the 'other'.[49] This explains why, when a state begins the process of 'nation building', the government assumes that citizens will respond to the values of that *volksgeist* ('national spirit'). There are many cultural products that show how a homogenous nation is built and constantly reproduced. Between those products we can find laws which are made from the perspective of the 'same' and do not comprehend the challenges faced by the 'others'. It follows that it is not uncommon that norms are affected by identity and feelings of belonging: the establishment of symbolic forms of inclusion and exclusion develop.

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affirmations. But this notion is not new either: Aristotle already spoke about Topics between the different rhetorical methods.

[47] Quijada (n 22).

[48] Alejandro Grimson, 'Nuevas Xenofobias, Nuevas Políticas Étnicas en Argentina' ['New Xenophobes, New Ethnic Politics in Argentina'] in Alejandro Grimson and Elizabeth Jelin (eds) *Migraciones Regionales hacia la Argentina: Diferencias, Desigualdades y Derechos* (Prometeo Libros 2006) 37.

[49] Villavicencio, 'Ciudadanos para una Nación' (n 16) 70-80.

Case Study: Mexican Constitutional Law and the Denial of a Right to Equality

An examination of the recent Mexican case *Joel Cruz Chávez y Otros*,[50] that came before the Mexican Electoral Tribunal of the Federal Judiciary (Tribunal Electoral del Poder Judicial de la Federación, TEPJF), excellently illustrates the tension that exists between formal constitutional guarantees of equality and the practical implications of such rights.

On January 11th 2007, a group of twenty citizens from the indigenous community of Tanetze de Zaragoza, Oaxaca, Mexico, went to the state's justice department and reported that their rights to vote (according to community traditions) had been violated. Additionally, this group requested that new elections be carried out so that they could elect new representatives.

The reason for this request dates back to 2002 when the Mexican legislature made the decision to disenfranchise powers from the municipalities and arbitrarily designated municipal administrators. After several meetings and proposals, in December 2006, the legislature ratified an agreement that declared the impossibility of carrying out new elections. On December 30th 2006, this decision was published in the official newspaper. The result of this decision was that the indigenous people would not be able to vote or elect local authorities. The indigenous people made a claim against the legislature and claimed that they had a right to elect their local authorities. The problem was however, they did not make this claim within the designated timeframe. Additionally, in their claim, they neglected to state the legal act that was violated. More specifically, the claiming indigenous group did not state whether they were making a claim against the legislative act of 2002, the administrative act that ratified the agreement or the publication of the decision in the official newspaper. Nevertheless, the official claim brought by

[50] Juicio para la Protección de los Derechos Político Electorales del Ciudadano, Expediente SUP-JDC-11/2007, Tribunal Electoral del Poder Judicial de la Federación (Distrito Federal) *Joel Cruz Chávez y Otros.* [*The State v Chávez and others* (Trial to Protect the Political and Electoral Rights of Citizens) SUP-JDC-11/2007 Mexican Electoral Tribunal of the Federal Judiciary].

the indigenous group involved two interpretative challenges. These interpretative challenges were as follows:

1) To determine clearly which act was under revision and that had caused damage to the actors (indeed, in the lawsuit, there was no explicit description).

2) The extemporaneous manner in which the group presented their lawsuit due to the fact that the deadline occurred three days after the publication in the official newspaper (the legal timeframe was from January 2nd - 5th 2007).

According to the TEPJF, both matters involved formal and substantive arguments regarding the wide degree of interpretation that was required in materializing access to the state's justice system and the incorporation of indigenous communities rights in the state's legal system. In these terms, there were two constitutional articles causing interpretative problems:

> Article 2: … A. This article recognizes and enforces the right of indigenous peoples and communities to self-determination and individual autonomy: … VIII: Submit all kind of legal lawsuits to the Mexican Courts. In order to enforce this right, every judgment and procedure in which an indigenous group is a contesting party, indigenous practices and cultural traditions shall be taken under consideration. Furthermore, Indigenous individuals have a right to be advised by interpreters and lawyers who are familiar with indigenous culture and language.[51]
>
> Article 17: … every person shall be entitled to a fair trial in a court of law. Courts' rulings shall be issued within the legal timetables. …[52]

Of interest in this case was the issue dealing with the designated time periods in which a claim could be brought before the tribunal. In administrative terms, the official newspaper acts as the communication media between the state and its citizens. The purpose of this newspaper is to inform citizens of changes in the law

[51] ibid.

[52] ibid.

so that they have the necessary knowledge to act within the law. Because the indigenous communities were not able to understand the newspapers, they were not aware of the law. Thus, what was required was an exception to the norm. The problem is, to make an exception for some groups and not require them to pay attention to legal news puts into question the very notion of equality under the law (as indigenous and non-indigenous communities are both considered citizens).

It is important to point out that Mexico recognizes multiculturalism in its constitution but it does not go so far as to clarify that the Mexican nation is an indivisible one. Article 2 specifies that multicultural integration is based on the indigenous peoples that are those 'inhabiting the country since even before the conquest took place and who have lived according to their own social, economic, cultural and political institutions ... .'[53]

The formal recognition that Mexico is a multicultural society and the instauration of the plural legal system are tools that are designed to quell the tension between the 'same' and the 'other'. Paradoxically, the very concepts that create a demand for constitutional law: unity and plurality, simplicity and complexity, in the Mexican and Latin American context, create additional demands for a reinterpretation of the principle of constitutional supremacy.[54]

In the *Chávez* case there were two constitutional rights that were in conflict. The first was access to the state's justice system as covered under article 17 of the Political Constitution of the United Mexican States. The second was the indigenous peoples right to political participation: article 2(A)(VIII) of the same text.

In their decision, the judges defined the right to judicial protection as a public subjective right. That is, every person has the right to access in an unobstructed way, an independent and impartial court—within the legally specified timeframe. In terms of deadlines (statutes of limitations), the legislator is responsible for establishing deadlines that are in accordance with justice and administrative timetables. More specifically, the legislator creates legal limitations for the right

[53] ibid.

[54] Médici, *The Horizontal Constitution* (n 5) 27-47.

to gain access to the justice system, in order to create an unobstructed, efficient and reliable legal mechanisms. However, all laws apply equally to all citizens regardless of group membership. For example, factors such as identity, whether people are immigrants, nationals, European descendants, indigenous people, etc., are all considered irrelevant under the law. It is important to highlight that the requirements that allow for all citizens to have access to justice can act as real obstacles to obtaining such rights for other groups. More specifically, even when citizen's rights are legally acclaimed, citizens may not be able to access these rights if there are normative obstacles that do not attend to the different circumstances of the population and adapt to the communities heterogeneity.

Considering the second claim, the TEPJF found that because the plaintiffs could not state which article of the constitution had been violated, rights that protected the indigenous communities could not be claimed. Indeed, the indigenous communities were only able to state that such rights guaranteed a special protection attending their particular historical, social and cultural circumstances.[55] Considering the marginal circumstances in which the indigenous people live and the disadvantages they face when attempting to gain access to the legal system, particularly, to justice, it is important to consider the importance of reforming the system so that the justice system can avoid excluding specific groups from exercising their rights. In accordance with this last point, the decision in *Chávez* stated that article 2(A)(VIII) does not create an independent and exclusive legal sphere only for the indigenous communities. On the contrary, it is a statement that entails special care.

This guarantee provided by article 2(A)(VIII) is different than the one declared in article 17 as not only does it remove the technical obstacles and economic rights, but it also aims to avoid the timing, geographic, social and cultural circumstances that traditionally have put the indigenous communities in a situation of legal discrimination

[55] The court found that 'The constitutional right of the indigenous groups and of their members to have an unobstructed access to the state's justice has a broad normative content, that might be considered as a structural principle in the constitutional building' (author's own translation): *Chávez* (n 48).

and has also crated obstacles that prevent them from gaining access to the justice system.

Despite the findings noted above, the TEPJF did note that the state is obligated to respect human rights and, therefore, there is a duty to provide corrective compensation that will assure those who live in disadvantageous circumstances that their rights are being respected by the state. If such circumstances were not the case there would be a risk that rights would become mere rhetorical statements, leaving a blatant violation of human dignity.[56]

With regard to indigenous people who live in rural areas and have limited access to transportation, modern communications technology, low levels of education, and who live in poverty, it appears that the publications of an official newspaper are not effective in communicating the intended messages to these communities. More specifically, in communities such as the one in which the claiming party in *Chávez* belonged, the official publications did not have adequate levels of circulation to effectively communicate the laws.[57]

Due to the fact that the official publication was sent to an indigenous community—and considering that one of the problems that this case brings to light is that under certain circumstances, minority groups are unable to exercise their political rights—the proper remedy would have been to communicate, in an effective way, the relevantly information to the community so that they would have had the opportunity to form an opinion. The normative authorities should have taken into account the particular conditions of the community and their cultural characteristics, that is, they should have estimated the social, political and geographic conditions of the town of Tanetze de Zaragoza and checked that their inhabitants had full access, knowledge, and comprehension of the act that was to have an effect on their rights.[58]

In evaluating the situation, the TEPJF found that it was not right to require the citizens of Tanetze de Zaragoza to be attentive to the authority's acts and announcements that are spread by the official

[56] *Chávez* (n 50) [44].

[57] ibid [47].

[58] ibid [48]-[49].

newspaper because the informational elements did not guarantee the opportune material access to the official newspaper.[59]

Finally, and considering what was written above, the claim of the indigenous people should not be considered 'out of time' since the elections had not been carried out and the violation of rights therefore continued in a successive way.

Conclusion

The concept of citizenship is a legal construction.[60] It implies *belonging to* a state, by way of inhabiting a given legal jurisdiction that functions as a normative validity field. It also implies being a passive subject of rights and obligations that the norms and institutions attribute to their citizens. According to Kelsen's theory, the state identifies itself with a normative system and, therefore, the state's existence depends on the obedience and recognition from its normative subjects. The problem in practice is that this notion of state presupposes a cultural homogeneity in the population so that any single legal proposal should be received in the same terms and in the same way in every part of the state. Obviously, this is not the case: a citizen is not defined by his or her adherence to the law—that is, the quantity of people that obeys a law does not define the law's validity if the systems that produced it do not take into account what kind of people or cultures inhabit the state's territory. In this sense, it is difficult to think of the obedience or the general recognition from the whole set of normative subjects when most of them are ruled by different institutions. According to Kelsen, the unity of the normative system is an essential requirement, and the existence of other and parallel normative systems cannot be admitted for it to function. That is why constitutional institutions that accept and encourage multiculturalism and legal pluralism are needed. However,

[59] '… it is not questionable that it cannot be entailed to citizens of the town of Tanetze de Zaragoza to be attentive to the acts and announcements of the authority that are spread by the official newspaper because there is no evidence that suggest that it distributes the newspaper in the town that we are talking about' (author's own translation): *Chávez* (n 50).

[60] Kelsen (n 3).

when the constitution itself is another piece of the normative system—i.e., the system that establishes what is to be accepted—it is usually and problematically granted a kind of superior status compared to the institutions of the 'other'.

In moral and rhetorical terms, modern thought is defined by the democratic politic form of government and the preferred option that it, more than any other system of government, prioritizes the equality of all the state's members. In this context, normative systems have the obligation of admitting the impossibility of imposing a constitution that would elevate certain institutions over others, particularly those that are recognized as valuable to minority cultures. Governments and constitutions, then, have an obligation to: 1) install a democratic political regime that encourages the acceptance of diversity and the recognition of multiculturalism and legal pluralism, and; 2) refuse to elevate institutions of the 'same' over those of the 'others'. A constitution must therefore be a harmonizing document—a resource for the unity across legal and socioeconomic plurality—and not an admission letter of what can be and what cannot be.

In the case-study of *Chávez*, we saw that the constitution creates a multicultural society and gives indigenous people the chance of being subjects of their own institutions. However, this constitutional prescription is substantively inadequate: citizens need to see the effects of concrete measures that prove that the constitutional statements work—particularly when legal acts that affect individuals are communicated in order to guarantee their (citizens') right to a proper defence. The ideal should be a *uniformity of citizenship*, for which the efficiency of every communication must be presumed.

Nevertheless, some cases' create challenges for democracy when they are perceived as unfair, or if they are made by a regime that excludes a category or categories of citizens. Thus, as I've demonstrated throughout this paper, the need to adapt general rules to particular cases is essential to preserving democratic principles. It is therefore relevant to remark that despite constitutional rhetorical efforts, in these kinds of cases it is possible to recognize that common legislation is still inspired by a modern colonial logic.

In *Chávez*, the tribunal had to interpret whether the official newspaper notification system was reliable for communicating legal

acts to every citizen, or if some exceptions had to be made. The judges considered the differences in territorial distribution of the newspaper, as well as obstacles that that could prevent access to reading and understanding it when (or if) it was delivered to indigenous communities. Accordingly, the main accomplishment than can be seen in this case is that a state's organ understood the need to consider the particular circumstances of the indigenous communities and argued that cultural differences should not only be admitted and tolerated but also be protected by concrete measures and decisions. In addition, it is important to point out that these measures are not an exception nor a specific measure designed to save the democratic characteristic of a state. What is meant by this is that the measure should not be conceived as a gift conceded by the 'same' to the 'other' because this does nothing to calm the tension. On the contrary, such a characterisation makes tension explicit as limits are imposed by one group to let the others know what they are, or are not, allowed to do.

To conclude, it is important to state that a normative system that is truly plural must be integrationist, and must emphasize harmonization—i.e., it must treat all cultures and their institutions in equal terms, without giving supremacy to one. The true democratic challenge given by the presence of the 'others' is not how to *tolerate* different groups, but the coexistence and dynamic dialogue between cultures that recognize each other's incompleteness.