

The Decline, but not Demise, of Multiculturalism

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1. Introduction

Some years ago, Nathan Glazer wrote a book entitled "We are all Multiculturalists Now"¹. Well, things have slightly changed since then. Writes Francis Fukuyama: we must "recognize that the old multicultural model was a failure in such countries as the Netherlands and Britain and that it needs to be replaced by more energetic efforts to integrate non-Western populations into a common liberal culture"².

What went wrong? The fault lies partially in the ambiguity of the term: shortly after the July 2005 London terror attacks, the BBC network conducted a public opinion survey to check whether the British willingness to pursue multiculturalism had been

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¹ (Harvard University Press, 1998). His book deals mainly with the implications of multiculturalism on the curricula of American schools.

² "Identity, Immigration and Liberal Democracy", Journal of Democracy volume 17(2) (April 2006) 5 at p.15.

affected by the terror. The results of the survey³ were unexpected: 62 percent of the surveyed men and women claimed that "multiculturalism turns England into a better place to be and live in". At the same time, 58% of the group thought that "people who come to live in England must adopt the values and traditions of the British culture". A surprising resemblance was discovered between the Moslem community and other communities concerning the immigrants' duty to acquire the English language. Thus, we may ask, what kind of multiculturalism are the poll participants aiming at? Is it the attainment of traditional British culture or a different cultural mosaic, where the British way of life is merely one component? Few concepts have become so popular yet so ambiguous as multiculturalism.

This article consists of six parts. The first part presents the multicultural reality, along with the reasons for its growth and its characteristics. Within this framework, the ambiguity and various interpretations of the multicultural point of view will be shown, as well as the theoretical basis and the international juridical development in comparative mainly European law. In the second part, the process of reexamining multiculturalism – even before the Islamist crisis – will be discussed. The third part will focus on the Islamist – as distinct from Moslem – crisis and its aftermath and implications for the concept of multiculturalism. The fourth part will consist of a brief discussion of multiculturalism in international law; the fifth part will present the multicultural approach in Israel, stressing its unique nature as well as its strong and weak points.

The sixth part focuses on the development of a new approach, viewed by the author as more practical than the existing ones, which aims to achieve an appropriate balance between the various components of a pluralistic society - between liberal tolerance and minority cultures. This equilibrium must be reached within the frame of the tolerance principle. Within the same context, we shall argue that western liberalism is not a "culture" *per se*. Western liberalism has managed to create the foundation for true equality by abandoning the traditional cultural and religious values that perpetuate the patriarchal status. In that sense, liberalism differs from traditional culture because it has created a new system of norms constructed mainly on intellectual principles of justice. On that premise, we shall argue that the

³ "How Multicultural is Britain?" [BBC News](#) August 9, 2005.

statement that all cultures are equal is problematic – theoretically and methodologically.

2. The multicultural reality in the west

2.1. Multiculturalism as an ambiguous concept

Multiculturalism is essentially an ambiguous concept: it describes a *de facto* situation, while aiming towards a desired normative one⁴.

The ***de facto situation*** was created mainly by the current make-up of multinational, multireligious and multicultural societies in countries which, until recently, were relatively homogeneous. Most countries in Western Europe belong to this category. In the past, these were almost homogeneous nation-states and are still left with a dominant Christian religion. In these countries, the "foreigners" issue was usually anchored in the human rights and civil liberties issues, or - in countries with national minorities - in minority rights. After WW1, the minority rights in such states were recognized through bilateral agreements and through the accepted norms of the League of Nations. These arrangements raised uneasy questions but they did not attempt to redefine the society of a nation-state as a multicultural society. The main reason for that was that in pre-war Europe the minorities were strictly defined – Austrians in Italy, Germans in Czechoslovakia and Poland, Hungarians in almost all states bordering Hungary etc. In addition, minorities, as a rule, were protégés of adjoining countries – and in post-1933 Germany, German minorities had an aggressive country which used them as a military and political instrument. The exception were the Jewish communities, who had no sponsoring state, but were eager to be absorbed into the majority even when adhering to their own Jewish tradition. The increasing tendency of secular Jews to integrate into modern society, as well as the acceptance by traditional Judaism of the State's authority, prevented the usual frictions between the majority and minorities, except for the deeply rooted Judo-phobia, which led to the en masse extermination of European Jews.

Until after the WW2 period, there was no real challenge to the hegemony of the majority in western democracies. Most legal conflicts focused on minority protection,

⁴ Lawrence Friedman, in his book "The Horizontal Society" (Yale U. Press, 1999) regards multiculturalism as a fact as well as an ideology, p. 183. He also acknowledges the difficulty in defining the purpose of multiculturalism and plural equality: "It is easier to define what plural equality is not, and what it is against, than what it is for. It is against the idea that there is or can be or should be a single canon, a single hierarchy, a single form of identity in this country." Ibid at p. 174.

including the existence of schools in minority languages and on sporadic collisions between religious norms and the majority's accepted norm - for example, the Jewish kosher animal slaughter ("Shechitah"), which seemed wrong in the eyes of parts of western society. Europe learned to live with these problems and granting rights to the minority was looked upon as part of the tax a democratic regime pays for the welfare of all its citizens.

The post WW2 period changed all that; waves of massive immigration transformed the population mix in most West European countries. This immigration, on an unprecedented scale, became possible due to the flourishing of Western Europe, as opposed to the Third World's backwardness as well as due to the rise of the new right of asylum. Economic prosperity brought increased demand for working immigrants and encouraged economic and political refugees from Third World to immigrate to Europe. In Britain, which gradually lost its empire, there was an additional reason: Britain aimed to preserve its status of mother country and allowed massive immigration from countries formerly part of the British Empire. The new European economy needed en masse labor immigration from low income countries (part of them Moslem). The demand for political asylum also increased substantially. This demand became enforceable with the 1951 Refugee Convention and was anchored in the domestic laws of European countries dealing with the right to political asylum.

All of the above created a totally novel situation in Europe. The European countries were transfigured from countries exporting immigrants to countries importing them. The face of the "old world" changed and countries used to the majority's hegemony found themselves in a cultural, religious and linguistic mosaic. In addition, the status of the majority's Christian religion, weakened due to the new liberal secularism and the demand to reform legal rules with a religious origin, such as the ban on homosexual relations, limitation on abortions, the restrictions placed on divorce, and other questioning the traditional framework of marriage. This, in turn, caused the Christian majority's hold to wane and increased the cultural and religious diversity. In effect, not only did society become more heterogeneous but its majority also was transformed. Anyone who examines, for example, the British society before WW2 and compares it with British society after WW2, sees two entirely different societies not only because of their composition but also because of the norms characterizing the majority.

This change is evident in countries which were until recently officially religious. Catholic Spain of 1992 signed an agreement between the government and the local Jewish, Moslem and Protestant bodies, establishing the Institution of Pluralism and Peaceful Coexistence, which promised – even after the Islamist terror attacks of March 2004 – to offer Islam equal treatment to other religions. The director of the Institution, Mercedes Rico Carabeas, stated that: "In Spain, the problem is pluralism. We stopped being a totally Catholic state⁵". But in Spain, as in the BBC survey, ambiguity persists: the Spanish Institution insists that despite its faith in multiculturalism, imams in mosques should learn Spanish.

Moreover, the process of unification within the framework of the European Union enhanced this pluralistic reality in two aspects: the united Europe established freedom of movement among its members and border controls were in effect eliminated in most Union countries. This process enhanced the heterogeneity of the Union's population. The linguistic and cultural mix increasingly enfeebled the status of the hegemonic nation-state. In addition, the European unionization process was accompanied by a new tribalism, which emphasized adherence not to the nation state, but to an older cultural and linguistic tradition. These processes of decentralization as well as regional demands for autonomy and independence have accompanied the processes of European unification. In Spain, Belgium and Britain, these demands caused the formation of federalist or decentralized governments. These processes intensified the general feeling that the modern state is no longer unitary, but comprises various cultural groups, in which the majority is only one component – first among equals.

In East and Central Europe, this process took a different turn. The Soviet Union was, until its dissolution, at least officially, a multinational, multicultural superpower. The various republics and the various peoples, except Jews⁶, were given permission to use their own native languages in the educational systems. The dismantling of the Soviet Union, and even more so the loss of control over the occupied countries of the Warsaw Pact, created a new reality in which a cultural and linguistic plethora exists. In the Russian Federation itself, there are self-asserting national minorities,

⁵ "Spain struggles to come to terms with its Muslims", The Economist, July 28, 2005

⁶ In the Soviet Union, the Jews were recognized as a nationality, but various excuses denied them Jewish education as well as Hebrew and Yiddish media. Only in the autonomous zone of Birobidjan in the Far East, was Yiddish recognized as an official language.

which in the past were hidden under the wings of the Bolshevik dictatorship, and are now seeking recognition of their uniqueness⁷.

The existence of assertive national minorities is seen as dangerous by the Russian national majority in two ways: the fear of a national security risk and the fear that human rights of Russians will not be enforced properly. As an entry condition to the EU and the Council of Europe, Western Europe required the newly formed states to have a system that enforces minority rights. The new states reluctantly accepted this demand, but the national minority problems were not solved by imposing such rules and entry conditions⁸, and at least in one case – the Albanians in Macedonia – almost led to civil war, which was prevented by the intervention of the international community and change of the constitution in Macedonia⁹. All this, without mentioning the civil wars which have accompanied the breakdown of Yugoslavia.

While Europe has found itself at crossroads, in the "New World", which used to be an immigration target from Europe and includes the USA, Canada, Australia and New Zealand, the social reality has not changed in essence. These countries, from their earliest days, required immigrants to absorb into the majority culture and its language. However, these countries encountered the subject of multiculturalism not because of a changing demographic reality, but because of the new concept of collective rights of immigrant minorities.

This brings us to the second aspect of multiculturalism: striving towards a desirable state, i.e. the demand to change the prevailing political and legal norms to fit the new reality. The multicultural approach stems from the growing recognition of minorities' collective rights, from the need to emphasize the rights of the other and of

⁷ This problem is especially acute where Moslem minorities do not accept Russian nationalism or its Christian symbols. Thus, in Nizhnii Novgorod a Moslem protest arose against the symbol of the Russian Federation, which includes a crucifix and a figure of St George killing the dragon. See "Islam and The State", *Russian Regional Report* 10(23), December 21, 2005.

⁸ Especially interesting is the case of Hungary, which legislated a special law granting cultural and financial rights to ethnic Hungarians located in neighboring countries. This law, partially amended due to the Europe's Council pressure, illustrated again the mosaic character and the old-new minority problems in East and Central European countries, which joined the human rights regime of the Council of Europe. For this law, see *Legislation on Kin-Minorities, Hungary Act LXII of 2001 on Hungarians living in Neighboring Countries* (Venice Commission, 2001) at [http://venice.coe.int/docs/2002/CDL\(2002\)077-e.asp](http://venice.coe.int/docs/2002/CDL(2002)077-e.asp). Similar laws exist in Bulgaria, Slovenia, Slovakia, Austria, Russia, Italy, Romania and Greece. For legislative analysis see the website of Venice Commission, *ibid*.

⁹ On changes in the Macedonian constitution see: Biljana Belamaric "Attempting to Resolve an Ethnic Conflict: The Language of the 2001 Macedonian Constitution " 4(1) *Southeast European Politics* (2003) 25.

the different and the demand that the state, as an institution, prescribe rules that reflect the interests of all groups and of all "others". This has led to the demand that the state itself be without cultural content and perform only a neutral function. The Canadian scholar Will Kymlika developed in his influential books¹⁰ an extensive theory about the multicultural society in which all strata are equal and the state functions without cultural partiality, except for well-defined areas such as language, rest days and national symbols. This new thinking has had a tremendous impact in the public arena. The academic community in North America has embraced these principles and only very few academic institutions have no study programs of the "other": women, Afro-Americans, and, occasionally, gay studies.

This aspect of multiculturalism raises the question of the existence of the right to culture and the issues of collective identities. Indeed, in those countries possessing a multicultural reality, these questions are the focus of intense academic and political debate.

2.2. The Development of the Multicultural Approach

The thinking which envisaged multiculturalism as a supreme goal stems from a deep stratum – from the after shock of WW2, the horrors of the Nazi regime and especially from the insight that nationalism may cause hatred of the other and the different and is responsible for the darkest period in human history. As opposed to that, multiculturalism seemed the appropriate humane response, which, together with the human rights regime, could prevent the return of similar crimes in the future¹¹. The politics of identity and equal rights of minorities were born together with the trend that denied the existence of one historical truth – the majority's truth, which ignores the truth of the defeated, of the minority, of the other.

In Western Europe, these trends also stemmed from the deep and sincere repentance of the colonialist past, its conquests, its exploitation, its wars and its

¹⁰ Kymlika is the author of the following books which were published by Oxford University Press: *Liberalism, Community and Culture* (1989), *Contemporary Political Philosophy* (1990, second edition 2002), *Multicultural Citizenship* (1995), *Finding our Way: Rethinking Ethnocultural Relations in Canada* (1998) and *Politics in the Vernacular : Nationalism , Multiculturalism and Citizenship* (2001); *The Rights of Minority Cultures* (1995); he co-authored the following books : *Ethnicity and Group Rights* (NYU 1997) with Wayne Norman, *Citizenship in Diverse Societies* (OUP 2000), *Can Liberal Pluralism be Exported?* (OUP 2001).

¹¹The multicultural approach generally regards social diversity as a positive, independent phenomenon ascribing to it a creative social role. In doing so, it marches the extra mile beyond a policy of tolerance and respect for the other, obliging the state to promote cultural diversity. For an exhaustive exposition of this right, see "cultural liberty in today's diverse world" in U.N Human Development Report for 2004, pp 1-36.

victims in the Third World. The perception of the exploited Third World has been a unifying credo. The Third World was the 'other' – other culturally, religiously and linguistically. These others, so it was conceived, needed special protection for their collective rights.

Attainment of such an equality with the 'others' was a goal worth fighting for; the neutral state would be able to grant real equality, as opposed to the mere hospitality, of the hosting Christian nations. This equality was supposed to atone for the crimes of the colonial period.

The concept of atonement has played a central role in the public and academic thinking and functioned in Western Europe as the central focus of leftist radicalism – a focus which could have filled the void created by the deep disappointment with communism¹². In the USA, which had no colonial past to atone for, the new thinking related to the injustice suffered by Afro-Americans, the inhuman attitude towards the Indian population and the patronizing attitude of the white majority towards the different 'others'.

Thus, in both European and American thought, the right of the others to a multi-cultural regime seemed like a worthy redemption of past sins.

A word of caution: despite the distinction occasionally made by scholars between immigrant and indigenous minorities (which became a minority due to change of border or the proclamation of a new state), international law and European practice do not differentiate between these two types of minorities. The two European Conventions concerning minorities¹³ do not make this distinction¹⁴. Some UN

¹² In this matter as well, there is a tendency towards revision of the function of the French colonialism. The writer Max Galo notes that it was the Socialist Party which supported "the civilizing mission" (*la mission civilatrice*) of French colonialism and that the phenomena of colonialism was complex and must not be treated superficially. See: "Colonisation: la tentation de la penitence", Le Figaro, November 30, 2005.. In addition, the National Assembly passed on 23.02.2005 a law in which Article 4 makes history studies mandatory in schools, offering "recognition of the positive function fulfilled by the French presence overseas, especially in North Africa". This law caused many protests and was eventually annulled by the French Constitutional Council.

¹³ European Charter for Regional or Minority Languages, Nov. 5, 1992, Europe. T.S. no.148, conventions.coe.int/treaty/en/Treaties/Html/148.htm, Framework Convention for the Protection of National Minorities (ETS No. 157, 1998). For more on the subject of the European Union's approach to minority languages, see: R. F. Weber "Individual Rights and Group Rights in the European Union's Approach to Minority Languages", *Duke Journal of Comparative & International Law*, Vol. 17, 2007(August 17, 2006), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=924622

¹⁴ This distinction does not appear in the following international documents: the Universal Declaration of Human Rights; the treaty concerning the eradication of all racial discrimination patterns; the international convention concerning economic, social and cultural rights; the international convention

organizations have been pondering resolutions concerning indigenous people, but these are mere proposals, not to be translated into the language of international law¹⁵. Furthermore, the distinction itself is temporary because at some stage or another, the immigrants' offspring become indigenous.

Obviously, the concept of multiculturalism has had a tremendous impact on European democracies. For example, the Netherlands and Britain have not demanded, up to recently, from immigrants to be absorbed into the majority's culture or be fully integrated into the adoptive societies. They have not even demanded (again, until recently) the knowledge of the country's language and history as a condition for immigration and do not demand, or even expect immigrant communities to embrace the dress code and life style of the host country.

Indeed, the new concept of multiculturalism has manifested itself in Europe more by the absence of demands for integration than by granting specific collective rights. Thus, some European countries reluctantly came to terms with Islamic forced matchmaking of minors and with propaganda - including anti-Semitism – that collided with the values of Western society. Some Moslem communities demanded the establishment of *Sha'aria* courts and a parallel, publicly funded, Islamic education system. Until recently, it seemed appropriate to strive to fulfill at least part of these demands in the light of the spirit of this new era. However, during this period, something – the Islamist crisis - occurred which clashed with the "spirit of the new era".

It is worthwhile clarifying that until this crisis, West European states faced immigration waves that did not lead to any real cultural collision. West European countries, chiefly Germany, absorbed millions of immigrants from the Soviet Union -

concerning civil and political rights; children's rights treaties; and in conventions against discrimination in education. The exception is the convention of the International Labor Organization (ILO), adopted on June 27, 1989 - Convention Concerning Indigenous and Tribal People in Independent Countries (n.169) – which came into effect on September 5, 1991, and in which there is a distinction between immigrant minority and indigenous minority. See <http://www.pdhre.org/rights/indigenous.html> However, this convention has been ratified by 14 countries only and except Netherlands, Denmark and Norway, the rest of these countries lack any democratic tradition.

¹⁵ See the comprehensive report: M. Cobo, "Study of the Problem of Discrimination Against Indigenous Populations" (Economic and Social Council Resolution 2000/35, *United Nations Publications*, Sales No. E86 XIV .3), at <http://www.unhcrh.ch/Huridocda/Huridoca.nsf>.

Report on the 20th Session of the Working Group on Indigenous Populations (2002) at http://www.unpo.org/news_detail.php, *Indigenous People* at <http://www.sdnpsd.org>.

The following definitions are suggested by the author: an immigrant minority immigrated from its origin country to the hosting country; an indigenous minority inhabited on the territory of the host nation before its birth, an original minority is the first to have ever inhabited on the territory of the state, for example Indians in USA and aborigines in Australia.

before and after its collapse - and from Eastern and Southern Europe. These immigrants were culturally absorbed within the host society with varying degrees of success and with no demands for an independent culture. Nobody in Europe ever demanded, for example, separate Portuguese education for the millions of immigrants from Portugal. The exception was the model of the non-Christian minority – the Jewish model - with its separate – mainly voluntary and privately funded - education systems. It is not coincidental that the Jewish model is currently being replicated by the Moslem organizations in their quest to achieve equal status for their institutions and schools. However, due to the reasons mentioned above, there was no clash between the Jewish communities of Europe and the European culture of the majority.

3. Reexamining Multiculturalism in Western Countries

Despite all the talk about collective rights and of the intrinsic equality of all of society's components, the immigration from the Third World has not achieved quintessential equality. It is hard to speak in general terms, because different societies attained equality with various degrees of success and in most cases countries do not publish in their official statistics ethnicity and religion.

Nevertheless, from the little data available on economy, health and education, one may conclude that gaps between the immigrant population and the population of the host country are very high and are strictly contradicting the high aims promoted and aimed for by the champions of multiculturalism¹⁶. For example, the ethnic riots in France in October–November 2005 uncovered tremendous gaps in all areas of life – economic status, employment, education and health – compared to the established French population. These gaps exist in other countries in Europe¹⁷.

¹⁶ 48% of the British Moslems reported that they were active economically in comparison with 65% of the Christians and 67% of the Jews. See *The Economist*, July 16, 2005; A. Rubinstein *Israeli Arabs and Jews: Dispelling the Myths, Narrowing the Gaps* (American Jewish Committee, NY, 2003).

¹⁷As to gaps in employment, see: "Racism and Xenophobia in the EU Member States: Trends, Developments and Good Practice" (EUMC Annual Report 2005- part 2) 35-36 available at: http://www.eumc.eu.int/eumc/index.php?fuseaction=content.dsp_cat_content&catid=3fb38ad3e22bb&contentid=42b943c7300a2. In Finland, for example the unemployment rate for citizens of Iraqi origin is 64% as opposed to 7% for indigenous Finns .For gaps in education, see *Ibid*, at pp. 68-70. Proof of gaps in the education field may be observed in the results of the PISA test conducted by OECD. The results of the test from 2003 indicate that children of immigrants, even if born in Europe, achieve lower educational results in comparison with the general population. For gaps in the field of health, see World Migration 2005: Costs and Benefits of International Migration, 331. In

Similarly, no equality has been achieved regarding the political representation of minority groups. In a melting pot system of integration, political representation is of a lesser importance due to the fact that minority groups are supposed to vanish after a transitional phase which eventually leads to the creation of one unified society. However, according to the multicultural concept, political representation is of utmost importance, since it involves the equal distribution of common resources to various strata of the society. Indeed, the right of representation is an essential component of multiculturalism. Nevertheless, in European countries, a significant gap has emerged between the proclaimed aims of multiculturalism and the monolithic representation in parliaments, governments and courts of Law¹⁸.

This under-representation of minority groups exists despite the specific recommendations of the Lund Committee¹⁹. The committee's Recommendations, named after the Swedish city, dealt with the effective participation of national minorities in public life, and sought to attain such a partnership in Parliaments, and in other sectors of public life. These recommendations - a continuation of the Oslo recommendations concerning language rights of national minorities from 1998, and the 1996 Hague Resolution concerning the rights to education of the same minorities - specifically stated that :

"Effective participation of national minorities in Public life is an essential component of a peaceful and democratic society. Experience in Europe and elsewhere has shown that, in order to promote such participation, governments often need to establish specific arrangements for national minorities. These Recommendations aim to facilitate the inclusion of minorities within the State and enable minorities to maintain their own identity and characteristic, thereby promoting the good governance and integrity of the State."

some countries, ethnic minorities display a higher rate of infant mortality than the general population. The report is available at:<http://www.iom.int/iomwebsite/Publication/ServletSearchPublication?event=detail&id=4171>.

¹⁸ After the French riots, *The Economist* reported that there are no "blacks or colored people from Continental France in the National Assembly ". See "France's riots", *The Economist*, November 10, 2005; The Human Development Report for 2004 measures political representation of ethnic minorities in OECD countries and finds that, for instance, in France and Switzerland, there is no representation whatsoever to those minorities in the lower house. *Ibid*, at p. 35.

¹⁹ *The Lund Recommendations on the Effective Participation of National Minorities in Public Life* (1999) ISBN 90 - 7598905 - 9. Available at: osce.org/documents/hcnm/1999/09/2698_en.pdf

Yet this aim is far from been achieved. As a matter of fact, European countries, which originally adopted these common goals of minority representation have recently begun re-examining the multicultural approach, comparing it to the American view which holds that the individual who becomes a citizen, owes allegiance to his new country and is not entitled to different, separate status as a member of a community.

By contrast, the political institutions of Britain and France have recognized the separate identity of the group. The British government formally recognized "the British Moslem Council" – a body uniting a number of Islamic institutions – as a representative body; France renounced one of its basic republican principles and chose, in a similar way, to recognize the French Council of Islamic Faith (CFCM). In both cases, the aim was evident: to find avenues to the heart of Islamic communities and thus neutralize radical influences. However, after the terror events in London in July 2005 and the plot to explode trans-Atlantic airplanes in summer 2006 - perpetrated by native British citizens of Moslem origin – and after the 2005 riots in France, views were voiced that the American approach is to be preferred. Thus, it is argued that not only were there no terror events perpetrated by American–Moslems in the US, but that the 9/11 attacks on the Twin Towers were committed by foreigners without any American–Moslem participation²⁰.

Even before the outburst of Islamist terror, the question of a collision between the majority and the culture of the minority became relevant. The *fatwa* proclaimed by the rulers of Iran against the writer Salman Rushdie - because of his alleged vilification of the Prophet Mohammed in "The Satanic Verses"- which instructed Moslems to kill him, uncovered brutally the gap between Islam and its radical interpreters. A row of abhorrent abuses on children of African origin, including cases of ritual murder, stunned public opinion in Britain²¹. The multitude of cases of

²⁰ Pierre Yves Dubois wrote in Le Figaro, November 8, 2005 (translation from French): "America's model may not be egalitarian, but it is integrationist. While the US may not have resolved the matter of its ghettos, it has reduced unemployment among its minorities. Capitalism does incite minorities to integrate into the economic system". Fukuyama, op. cit at note 2, stresses this difference: "Many Europeans express skepticism about whether Muslim immigrants (can)... integrate. In the U.S., by contrast, first generation Guatemalan or Vietnamese can say proudly after taking the oath or citizenship that they are Americans and no one will laugh at them for that" (at p.14). Amartya Sen is partially incensed by the British Government imposing religious identity through the likes of the Muslim Council: "This parceling out of the nation can only weaken civil society"; Kenan Malik, "Illusions of Identity", Prospect, August 2006

²¹In 2006, a British Government report found 38 documented cases since 2000 of children being "beaten, burnt, starved, cut neglected or isolated by family members who believed they were cursed".

transporting young girls to their country of origin and forcing upon them pre-arranged marriages by Moslem immigrant families have been uncovered in their full severity in a few European countries. In Italy, a case of "honor killing", where a Pakistani father murdered his daughter and buried her body in the garden, shook the country and stalled the government's plan to liberalize immigration laws²². Anti-Semitism and Holocaust denial by Moslem students' in French schools have habitually made headlines during the last years.

This conflict has begun to be waged on an ever-expanding front: from dress code - especially with regard to the veil covering women's faces - to female circumcision, forced marriages and polygamy. The thinkers who formatted the multicultural concept had no uniform answer to this emerging clash. Kymlika has advocated limiting the right to culture only to those respecting others' rights²³. However, this limitation may be interpreted in many ways. Kymlika also makes a useful distinction between the minority trying to defend itself from the majority ("external defense") and the minority trying to enforce its way of life on members of its own community. In the latter case, there should be no collective cultural right²⁴.

Nevertheless, these distinctions are not always helpful, as will be seen further on. The question of cultural rights has, as a rule, not been decided upon by legislators. Parliaments intervened in radical cases, for instance, in the case of female circumcision, a habit brought to the west by a few groups of immigrants from Africa and the Middle East. During the 90s', France prosecuted parents of families from Mali, Mauritania, Gambia and Senegal for the crime of performing circumcision on their daughters. So did other countries: in 1985, the British Parliament passed a special law concerning this issue²⁵; in September 1996, the American Congress followed suit²⁶ and required the American administration to persuade the World Bank to prevent financial aid to 28 African states where such circumcision is practiced.

The London Times, June 30, 2006; "Faiths that abuse children by ritual should face Law", at p.6. Particularly horrid was the finding of a torso of a child, named "Adam", in the Thames. Ms. Beverly Hughes, the Children Minister, commented: "Child abuse can never be acceptable in any culture". Ibid.

²² The Independent on Sunday, August 20, 2006.

²³ "A liberal theory of minority rights...must explain how minority rights are limited by principles of individual liberty, democracy and social justice". Kymlika, *Multicultural Citizenship supra* note 10, at p. 4.

²⁴ W. Kymlika " Multiculturalism and Minority Rights: West and East" *Journal on Ethno-politics and Minority Issue in Europe* (henceforth JEMIE) 4/2002.

²⁵ *Prohibition of Female Circumcision Act*, 1985, c. 38.

²⁶ *Criminalization of Female Genital Mutilation Act*, 18 U.S.C § 116 (1996).

Other countries, such as Australia, followed the same path. The right of the minority to preserve its 'own culture' was thus statutorily superseded by the need to protect the individual. In the USA, only marginal groups challenged this consensus, with the aim of creating a fair compromise between the multicultural approach, and the values of the American society²⁷. These groups did not succeed in preventing the criminal sanctions against female circumcision despite the fact that male circumcision is permitted as a religious act by Jews and Moslems and is accepted by others. One may argue there is no essential difference between the two types of circumcision, a discussion which is beyond the scope of our article. It is possible, however, that the subject of male circumcision will reach the public and legislative debate in the future²⁸.

On the subject of polygamy – an acceptable norm in the immigrant communities of Africa and Middle East - the legislators did not cave in to the demands for its authorization and maintained its interdiction on bigamy; long ago, the U.S. Supreme Court confirmed this interdiction with regard to the Mormon community, where polygamy is a religious precept²⁹. The interdiction on polygamy is regarded as a protection of the woman's right, even when she consents to it.³⁰

It is not coincidental that a large part of these clashes concern women rights, since they embody the difference between the Western society, with its emphasis on equal rights, and the traditional cultures in general – the Moslem ones in particular. Susan Moller Okin raises this question in her book "Is Multiculturalism Bad for

²⁷ A group of doctors in Seattle tried to establish such a compromise by suggesting that the circumcision will be performed by doctors in the hospital, employing local anesthesia and on condition that the incision be minor and agreed upon by the daughter. See D.L. Coleman "The Seattle Compromise: Multicultural Sensitivity and Americanization " *47 Duke L.J.* 717 (1998) 47. Also see: "Shari'a, Legality, and the Freedom to Invent New Forms: Americans Drafting an Islamic Model Penal Code", *University of Penn Law School, Public Law Working Paper No. 06-26 (2006)* regarding the challenges of drafting a penal code based upon the Shari'a. (at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921117)

²⁸ The subject is discussed in the book *Male and Female Circumcision: Medical, Legal and Ethical Considerations in Pediatric Practice* (Denniston and others eds. Kluwer Academic, 1999). In England and in the U.S., NGO's seek to annul the practice of circumcision and aid their members in rehabilitating the foreskin surgically. Ibid.

²⁹ ***Reynolds v. United States*, 98 U.S. 145** (1878)

³⁰ Following the riots in Parisian suburbs at the end of 2005, the Ministry of Interior, Nicholas Sarkozy, emphasized the problem of immigrants' polygamy as a central issue and said that he intends to take steps against it. See: "Regroupement familial et polygamie aux banc des accusés" Le Monde, January 17, 2005. The allegation voiced in France was that an exceptionally high number of youth taking part in the riots came from polygamous families, the reason being their failure to integrate into the French society.

Women?³¹. Her arguments point out the evident contradiction between the need to protect women and the need to defend the collective culture. The author explains: "we were wrong" – referring to the liberal Left - "when we thought that feminism and multiculturalism align with each other". Indeed, a traditional culture is usually a culture based on the patriarchal society and on the low status of women. In 2005, for example, in the Ontario province, Canada, a law was proposed to empower the *Sha'aria* tribunals with the authority to arbitrate marital disputes; the vehement protests against the law, which led to its annulment, were organized primarily by women, including Moslem ones³².

Susan Okin presents an unequivocal stance – fierce opposition to granting collective rights to culture which clashes with the principles of women's equality. Granting such a collective right "does not match the basic liberal value of individual freedom". She thus summarizes her position on collective rights:

The particular aspects that concern me here is the claim, made in the context of basically liberal democracies, that minority cultures or ways of life are not sufficiently protected by ensuring the individual rights of their members and as a consequence should also be protected with special group rights or privileges³³.

The author adds a scathing declaration:

Group rights are potentially, and in many cases, actually, antifeminist. They substantially limit the capacities of women and girls of that culture to live with human dignity equal to that of men and boys, and to live as freely chosen lives as they can.

³¹ S.M. Okin, "Is Multiculturalism Bad for Women?" In: *Is Multiculturalism Bad for Women* (J. Cohen, M. Howard and M.C. Nussbaum eds., Princeton University Press, 1999) 9-24; and in her main book: S.M.Okin *Justice, Gender and the Family* (Basic Books, N.Y., 1989).

³² The bill would have authorized litigation in a Sharia court and according to law. On 11.09.2005, the Ontario prime minister announced the annulment of this bill, see D. Pipes, "The Islamic Index in Europe ", *Maariv- Opinions*, October 2, 2005 (in Hebrew); Similarly, in Britain, some Islamic leaders demanded, in a meeting with The Communities Minister, the application of Sharia law to Moslems in Britain, as well as demanding special religious bank holidays: The London *Daily Mail*, August 15, 2005, p. 1. For more on Muslim minorities in Canada see: Roach, Kent, "National Security, Multiculturalism and Muslim Minorities" (October 2006). U Toronto, Legal Studies Research Paper No. 938451 Available at SSRN: <http://ssrn.com/abstract=938451>

³³ Okin, *supra* note 31

The author rejects the distinction between the public domain – where the offense is forbidden even if it derives from the minority culture, and the private domain of the individual – where the offending behavior is supposedly permitted. The writer mentions Kymlika's condition, which allows the recognition of a minority culture only if it does not discriminate between man and woman, and adds:

The subordination of women is often **informal and private** and that **virtually no culture in the world today, minority or majority**, could pass Kymlika's "no sex discrimination" test if it were applied in the private sphere. Those who defend group rights on liberal grounds need to address these very private culturally reinforced kinds of discrimination.

Susan Okin's objections do not relate to feminism only. Her rationale is valid in wider contexts. Prof. Yael (Yuli) Tamir, presently the Israeli Minister of Education, in her response to Okin's article, states that these principles must be extended to cover all human rights issues:

The issue she raises extends far beyond feminist concerns. It is a word of caution calling upon liberal political theorists and liberal political activists to acknowledge that group rights strengthen dominant subgroups within each culture and privilege conservative interpretations of culture over reformative and innovative ones³⁴.

The opposite stand is apparent in Prof. H. Bagaha's response: Bagaha claims that Okin's position reflects the condescending "liberal Western culture's superiority over other cultures":

Okin's narrative begins by pitting multiculturalism against feminism but then grows seamlessly into a comparative and evaluative judgment on minority

³⁴ Y. Tamir, "Siding with the Underdogs" in: *Is Multiculturalism Bad for Women? Supra* note 31; and see her article "Against Collective Rights" in *Multicultural Questions* (ed. C. Joppke and S. Luked, London OUP, (1999))

cultures (largely represented by cultural defense cases) delivered from the point of view of Western liberal cultures (represented by the eloquent testimony of academic feminists). In my view, however, issues related to group rights or cultural defense must be placed in the context of the ongoing lives of minorities in the metropolitan cultures of the West if we are to understand the deprivation and discrimination that shape their affective lives, often alienated from the comforts of citizenship³⁵."

In other words, according to Prof. Bagaha, the values Susan Muller Okin speaks for are but an expression of one culture out of many others, all equal³⁶.

Okin's and Tamir's words trigger a more essential question. Even if we assume that the country's law grants full protection to women, even if it ignores women's alleged consent to be victimized, there is still one bothersome question: Does not the simple preservation of the traditional culture, within a multicultural frame, create a situation of internal social pressure, which the law is incapable of dealing with and which places women in an inferior position? In Britain and France there has recently been talk of criminalizing coerced marriages³⁷. It is doubtful whether any law can intervene in communities where familial pressure is exerted to coerce young girls into arranged marriages. Thus, full implementation of multiculturalism must result in impairing the status of women.

This approach is reinforced in the articles of Prof. Frances Raday. The author, in her analysis of the clash between the universal principle of equality and the multicultural principles of communities, deplors the injury to the principle of equality – especially in the personal status law. She opposes the relative value system intrinsic to multiculturalism and points out the logical failure of cultural relativity:

The idea is that moral consciousness is unconsciously acquired in the process of growing up in a specific cultural environment. From this description

³⁵H. K. Bhabha " Liberalism's Sacred Cow – A Response to Susan Okin", In *Is Multiculturalism Bad for Women? Supra* note 31.

³⁶The argument about cultural equality is expressed in: *Whose Justice? Which Rationality?* by A. MacIntyre (Duckworth, 1988). The author argues that the concepts of justice and law evolve from certain social regimes and can be placed under rational examination, only within the cultural tradition of the society that created them.

³⁷For a description of the widespread phenomenon of forced marriages in France and methods to combat it see: L'EXPRESS, November 24, 2005, p.42-44.

of the way in which human morality evolves there have been those who have concluded that there is no objective social justice and that each cultural system has its own internal validity which should be tolerated³⁸

This leads to the conclusion that:

Cultural relativism is another name for moral nihilism³⁹.

All these questions were pertinent even before the Islamist crisis. The Islamist crisis only exacerbated the dilemmas and intensified the collision between individual rights and collective rights. This will be discussed herewith.

4. The Islamist Crisis and its Aftermath

The Islamist crisis commenced during mid 90s, with the outburst of terror acts on a large scale, which culminated with 9/11 in the U.S. The visible change in attitudes to multiculturalism commenced in the Netherlands. Various Dutch governments subscribed to multiculturalism and permitted large scale immigration from Moslem states. Netherlands also absorbed an ever-increasing number of political asylum seekers (3500 persons in 1955 as opposed to 43,000 in the year 2000) and funded the construction and maintenance of mosques and Moslem schools. Few opposed this policy. Fritz Bolkstein, the former Secretary of Defense and leader of the Liberal Party, demanded that immigrants learn Dutch language and history, but his demand was rejected by the majority.

Gradually, things changed. First came public opinion polls which indicated that a large part of the Moroccan community in Holland supported the attack on the Twin Towers – a finding which shocked liberal public opinion. The assassination of the parliamentary candidate Pim Fortuyn in May 2002, on the eve of elections, was also significant. Pim Fortuyn founded a party named "Rotterdam in Which You Can Live", with an anti-multicultural agenda. Fortuyn was not assassinated by an Islamist, but his predicted electoral success - and subsequently his murder - shattered the

³⁸ F. Raday, "Religion , Multiculturalism and Equality: The Israeli Case" 25 *Israel Book of Human Rights* (1995) 193,202.

³⁹ *Ibid*, at p .204.

accepted stereotypes of the Right and Left⁴⁰. The real shock came with the murder of film director Theo Van Gogh, in broad daylight, in Amsterdam, in November 2003. Van Gogh, together with MP Ayan Hirsi Ali⁴¹, a Moslem refugee from Somalia, directed a short movie named "Capitulation", which analyzed women's humiliation in Islamic societies. The assassin, a Dutchman of Moroccan origin, shot Theo Van Gogh, tried to decapitate him and finally stuck a letter through a knife into the victim's chest - in which he claimed that Holland is dominated by Jewish influence and called for Jihad against the Somali MP.

The 26-year-old murderer was a clear product of multiculturalism, a graduate of a prestigious school, who underwent a process of radicalization and extremism in a mosque in Amsterdam. He was tried and convicted for life in prison after refusing to defend himself, because he did not recognize the authority of the Dutch Court. The words of the murderer shocked Dutch public opinion no less than the murder itself. Not only did he refuse to express remorse for the brutal murder, but he stated that he did not feel the pain of the mother of the murdered because she was an "infidel"⁴². Following this murder, the Dutch press started reporting on emigration out of Holland. Demographic reports were published predicting Moslem majorities in major Dutch cities. Parliament passed a strict Bill of Immigration and a new government appointed a Special Secretary for Immigration, who demanded that all immigrants study Dutch and reiterate the values of the society in which they seek to live. The number of political asylum seekers decreased dramatically and the police started to take a hard line in its inspections in the immigrant areas⁴³. Holland started to employ legislative measures to preserve its culture and Dutch values. Each immigrant to Holland currently has to study about 300 hours of Dutch culture, its values, language and history. These courses are taught at the immigrants' expense in Dutch embassies in various countries and in the end each immigrant must

⁴⁰ Fortuyn was denounced as a rightist racist and was sometimes labeled the "Dutch LePen", but his personality and his party shattered this seemingly politically correct label, since he himself was a declared homosexual and the second in rank on his party was a black businessman.

⁴¹ Author of The Caged Virgin: An Emancipation Proclamation for Women and Islam, (Free Press, 2006); as to her attack on multiculturalism, see pp. 60-63.

⁴² R. Cohen "A European Model for Immigration Falters", Herald Tribune, October 17, 2005.

⁴³ The British press followed closely the developments in the Netherlands and some papers warned against similar developments in Britain. Reports of massive emigration of Dutch people out of Holland were "due to over-satiety from multiculturalism". Multiculturalism was also given as the reasons for a massive departure of British people out of London. See: "Exodus as Dutch Middle Class Seek New Life", The Daily Telegraph, December 11, 2005; "Lessons for Britain as Fearful Dutch Turn Their Backs on Multicultural Society", The Sunday Express, December 20, 2004.

successfully pass a test on the knowledge of Dutch culture. Only afterwards will a temporary resident status in Holland be granted⁴⁴.

But Holland is only one example of the trend taking place recently in European countries. The word "multiculturalism" has begun to bear a slightly pejorative connotation⁴⁵. Helmut Schmidt, the former German Chancellor, mentioned that the decision to import guest-workers in the 60's was erroneous; the Prime Minister of Bavaria, Edmund Stoiber, said that "Germany is no place for traders of hate and women oppressors" and that "immigrants must adopt German values". Denmark passed a new immigration law requiring that immigrants possess stronger affinity with Denmark than with any other country; each prospective immigrant to Denmark is required to pass a test of Danish culture, history and language. The immigrants who successfully pass the test will not be allowed into Denmark until they sign a "Declaration of Integration" in which they undertake to adopt the Danish liberal democratic values, such as the interdiction of spanking children and female circumcision⁴⁶. In France, after the generally observed prohibition on wearing the Moslem scarf in schools⁴⁷, deliberation about Moslem students' school behavior commenced. The French press has been reporting anti-Semitic manifestations, open admiration of suicide bombers and denial of the Holocaust among Moslem students⁴⁸. The riots which erupted in autumn 2005 caused the government to enact severe limitations on the right to immigrate to France. Britain is facing a major crisis

⁴⁴D. Rennie, "Dutch Plan Test Aimed at Curbing Muslim Migrants". *The Daily Telegraph*, February 5, 2005; A. Browne "Dutch Unveil the Toughest Face in Europe with a Ban on the Burka" *The Times*, October 13, 2005; "Netherlands Introduces Dutch Language Test for Immigrants" (21.02.2006), "Immigrants Asked to Speak Dutch in Netherlands" (9.02.2006) (*Europe Immigrations News*, at http://www.workpermit.com/news/europe_immigration.htm

EU and US Approaches to the Management of Immigration – the Netherlands (J. Niessen, Y. Schibel & R. Magoni eds., 2003) available at: http://www.coe.int/T/e/human_rights/Minorities/2_FRAMEWORK
http://www.publiekrecht.leidenuniv.nl/content_docs

[/Documenten%20Immigratierecht/netherlands.pdf](#). See also Brian Moynahan, "Putting the Fear of God into Holland", *Times Online*, February 27, 2005.

For an extensive description and debate on integration of Islamic communities in Europe, before the Islamic crisis, see *Islams d'Europe, Integrations ou insertion communautaire* Paris, Editions de l'Aube, 1995.

⁴⁵ The examples and facts are taken from B. Moynahan, "Putting the Fear of God into Holland", *Times Online*, February 27, 2005.

⁴⁶ *Declaration on Active Participation in Acquiring Danish Language Skills and Achieving Integration into Danish Society*, see website of Danish Immigration Authority at: [<http://www.udlst.dk>].

⁴⁷ The interdiction, despite facing intense Moslem opposition, succeeded. *Le Figaro*, September 20, 2005, reports that "only a dozen female students refused to take their scarf off". However, a new problem has been created: Moslem students displaying an increase in anti-Semitism and an objection to Holocaust studies.

⁴⁸ "Après le voile, la polemique se porte sur les enseignements", *Le Figaro*, November 20, 2005.

with regard to multiculturalism after the terror events in London. For example, the Minister of Interior in the Shadow Government of the Tory Party David Davis mentioned that "people from different cultures must respect the British way of life"⁴⁹. Other party leaders, such as Michael Portillo, expressed similar views⁵⁰. But the real shock came earlier, when Trevor Phillips, head of Interracial Equality Committee, stated that "multiculturalism belongs to a different time" and that "it must be abandoned"; he added words that not so long ago would have been considered heresy: "we must emphasize that there exists a hard British nucleus (including all immigrants) ...the fact that immigrants are not taught Shakespeare is bad"⁵¹. After the terror wave, although Prime Minister Tony Blair continued to talk about multiculturalism, the Labor Government not only hardened the entry conditions to Britain but also started to enforce the knowledge of English language as a condition for citizenship. The Archbishop of York, the first non-white person to perform this function in England, vigorously attacked multiculturalism, a concept which "betrayed the English". He preached for the acquisition of a new English identity, including the demand that all English people celebrate St. George's Day⁵². Michael Nazir Ali, the Bishop of Rochester, a son of an Islamic father who converted to Christianity, declared that "Multiculturalism is to blame for perverting young Muslims"⁵³.

In the wake of the foiled attempts by British-born Moslems to blow up transatlantic airplanes, in August 2006, the whole tenor of the public debate was transformed: in public opinion polls a new mood became apparent: in the Spectator/YouGov poll conducted in August 2006, 73% of British questioned thought that "we are in a world war against Islamic terrorists who threaten the west's way of life" as opposed to 8% who thought otherwise.⁵⁴ Similarly, in the Telegraph/YouGov poll, the percentage of those who thought Islam posed a threat rose up from 32 in

⁴⁹ "Why Cultural Tolerance Cuts Both Ways", The Daily Telegraph, August 3, 2005.

⁵⁰ M. Portillo, "Multiculturalism has Failed but Tolerance Can Save Us", The Sunday Times, July 17, 2005.

⁵¹ Consequently, the mayor of London, Ken Livingstone, berated Trevor Phillips, who is of west Indian origin, for "pandering to the right"; The Daily Telegraph, September 1, 2006.

⁵² "Multiculturalism has betrayed the English, Archbishop says", Times Online, November 22, 2005. A sharp attack on multiculturalism – "a concept encouraging hatred and racism" – was expressed by the British organization CIVITAS in a public statement published after the London subway attacks. See: "Report attacks multiculturalism", BBC News, September 30, 2005, P. West, "The Poverty of Multiculturalism", *CIVITAS- The Institute of Study of Civil Society*, October 6, 2005 at: <http://www.civitas.org.uk/press/prcs46.php>.

⁵³ Article by the Bishop of Rochester in The Daily Telegraph, August 15, 2006.

⁵⁴ The London Spectator, August 19, 2006, p.17 and www.spectator.co.uk.

2001 to 46 in 2005 and 53 in August 2006.⁵⁵ Finally, there were signs of a change of heart from inside the Labor establishment. After a meeting with Moslem leaders, in which a demand for Moslem Bank Holidays was made, the Communities Secretary, Ms. Ruth Kelly, has announced the establishment of a new commission on Integration and Cohesion charged with reexamination of present minorities policy. Miss Kelly expressed this new mood by asking publicly: "In our attempt to avoid imposing a single British identity and culture, has multiculturalism ended up in creating separate communities living in isolation of each other with no common bonds?"⁵⁶

The English case is indeed of great interest, as within a short space of time, mainly because of the Islamic crisis, the attitude to the non-British has alternated from traditional colonialist attitudes to the post-colonialist idea of group rights and multicultural attitudes and back to a modified vision of British hegemony. A leader in *The Daily Telegraph* gives expression to this modified vision of Britishness: "The correct way forward is obvious. As a country, we ought to insist on certain shared civic virtues – personal freedom, parliamentary democracy, the rule of law – without fussing about how people eat, dress or pray. This is not a new formula. For hundreds of years, most British subjects were neither white nor Christian. Yet, twice in the previous century, millions of Empire and Commonwealth volunteers crossed half the world to fight for a country they have never seen because they believed in what Britain stood for. It is that vision of nationhood, civic rather than ethnic, that we ought to be promoting. Yet it is that vision on which the now discredited multiculturalists, to their shame, have turned their backs."⁵⁷

France has gone through a similar process. Public opinion, embarrassed by the failure of multiculturalism, gravitated towards reevaluating the concept. The French philosopher Alain Finkelkraut stated that: "it is said that the republican model

⁵⁵ *The London Daily Telegraph*, August 25, 2006, p.4.

⁵⁶ *The Sunday Telegraph*, August 27, 2006 at p.15. Also see *The Economist*, October 21, 2006 on how the British government is now re-evaluation its multicultural approach following the foiled terrorist attempt to blow up transatlantic jets in August 2006.

⁵⁷ *The Daily Telegraph*, August 28, 2006, Concurrently with this mood, and as a reaction against devolution, a new emphasis on Englishness, as distinct from Britishness, began to be felt; see, "The Return of England", a symposium, *Prospect*, August 2006, pp.38-45. As to the debate on multiculturalism in Britain, *Le Figaro* notes that the majority in Britain, though skeptical about multiculturalism, does not want to follow the French republican model of integration: "Londres s'interroge sur le multiculturalisme" *Le Figaro*, September 6, 2006.

collapsed with these riots. But the multicultural model is in no better shape – neither in Holland and nor in Britain⁵⁸.

In other countries, legal measures have been implemented by legislation or by decree⁵⁹. An example that illustrates the above is the "cultural questionnaires", which spread as a means of limiting the immigration incompatible with local culture. Germany, Britain, Canada and the U.S. require immigrants to fill out a questionnaire before entering the country. These questionnaires test the immigrant's outlook concerning historical knowledge, acquaintance with democratic and liberal values that define the host-country. A potential immigrant, whose culture contradicts basic democratic values, will be interviewed and if necessary, his application will be rejected⁶⁰. The clearly stated goal of these measures is to prevent immigration whose culture is incompatible with democratic liberal values.

The most striking example of the clash between multiculturalism and the principles of democratic regime came from an unexpected direction: in the beginning of September 2005, a wave of violent riots erupted in the Moslem world against Danish embassies, because of caricatures published in a Danish newspaper, in which the Prophet Mohammad was depicted in a negative light. Most Western newspapers, despite their support of free speech, were afraid to publish the caricatures. The *France Soir* newspaper, which published them under the headline "Yes, there is a right to publish caricatures of God", received scathing criticism and its editor was fired by the owners. The Moslem reaction, which included a boycott of Danish products, dramatically illustrated the nature of the clash between the preservation of minority culture values on one hand, and democracy and freedom of speech on the other⁶¹.

⁵⁸ Haaretz Supplement , November 18, 2005 (in Hebrew).

⁵⁹ This is the norm in France, Holland, Denmark, Norway, Germany, US and other countries. See the legislation at: http://www.workpermit.com/news/europe_immigration.htm, <http://www.euractiv.com/Article?tcaturi=tcm:29-117508-16&type=LinkDossier>.

⁶⁰ H.D. S. Greenway, "Muslim undesirables need not apply", The Boston Globe, January 24, 2006; E. Rothstein "Putting citizenship to the test", International Herald Tribune, February 25, 2006.

⁶¹ P. Reynolds "Cartoons and the Globalization of Protests", BBC News, February 22, 2006; T. Buch Andersen "Danish Muslims Split Over Cartoons" BBC News, February 8, 2006 at: <http://www.bbc.co.uk>.

Thus, the multicultural subject – a banner which in the recent past, not even right-wing parties dared dispute – has become controversial in many countries in Europe⁶². An article in the New York Times summarizes this mood:

The multicultural fantasy in Europe – its eclipse can be seen most poignantly in Holland, the most self-defined liberal of all European countries – was that, in due course, assuming that the proper resources were committed and benevolence deployed, Islamic and other immigrants would eventually become liberals. As it's said, they would come "to accept" the values of their new countries. It was never clear how this vision was supposed to coexist with multiculturalism's other main assumption, which was that group identity should be maintained. But by now that question is largely academic: the European vision of multiculturalism, in all its simultaneous good will and self – congratulation is no longer sustainable. And most Europeans know it. What they don't know is what to do next⁶³.

Moreover, because the demand for equality between religions, and the wish to equalize the status of the Islam with that of other religions, including Christianity, countries have been forced to renounce accepted religious norms. Thus, in the Ontario province in Canada, the revocation of the draft law which sought to introduce *Sha'aria* arbitration among Moslems, required that the same ruling be applied to Rabbinic and Christian tribunals; In France, the interdiction of wearing "the Islamic Scarf" gave birth to interdictions against wearing Jewish and Christian symbols and

⁶² In October 2005, heavy riots broke out in Birmingham between the black community and the Asian one. The Chairman of the Interracial Equality Commission, Trevor Philips as well as the Daily Telegraph found a connection between these riots and the multicultural concept. The Daily Telegraph, October 25, 2005, "Questions for Galloway that refuse to go Away".

⁶³ D. Rieff, " Multiculturalism in Europe" , New York Times, August 14, 2005. A similar sentiment is expressed by Noble Prize laureate Amartya Sen in his book: *Identity and Violence: The Illusion of Destiny* (New York. 2006), in which the author says that violence "is promoted by a sense of inevitability about some allegedly unique – often belligerent – identity that we are to have." On the other hand, the riots in France – a country which adopted a republican model of one language and one culture – strengthened in the eyes of others the multicultural model. The liberal London daily The Independent stated: "The French may scorn Britain's policy of multiculturalism, but these riots must surely confirm the failure of the French insistence on integration and assimilation. In practice, decades of neglect of the problems of immigrant minorities have led to deepening alienation. The violent consequences of that neglect are now unfolding on the streets ". See: "An explosion of anger", The Independent, November 4, 2005.

according to Prof. Daniel Pipes, "French nuns must, for the first time, remove their hair covering for their identity card or passport⁶⁴".

Furthermore, the Islamist crisis highlighted a number of inherent problems in multicultural thinking. The first problem questions the legitimacy of a culture that does not accept the fundamental values of the host society which - as is the case in the U.S, France, Germany and many other countries – are enshrined in constitutional documents. What is the standing of a group, which in the name of tolerance, tries to establish an intolerant regime? This question has been pushed aside for years, although, as seen above, Kymlicka wrote in his works that the equal treatment of other cultures does not apply to cases in which this culture is not tolerant of the rights of its fellow-citizens. Fukuyama puts this idea very succinctly: "Liberalism cannot ultimately be based on group rights because not all groups uphold liberal values⁶⁵".

The second problem questions individual rights in a cultural community lacking tolerance and liberal values. From a purely legal point of view, in western democratic regimes, the problem has not arisen. Individual rights allegedly supersede any collective right – even in those cases in which collective rights are recognized. However, the law does not address all issues; the question which remains open is how should the legal system react when social pressure – lacking the legal power of enforcement – is placed on the individual, as in forced marriages of young girls, or ostracism of homosexuals etc.

The third problem, concerns the relation between minority and majority rights. Two justifications form the basis upon which group rights are established: the first states that in a free market, in which only the individual's rights are protected, the minority culture is eroded when it competes with the majority culture because of the unequal conditions; the majority culture is always preferred for the purpose of integration into the host society. Therefore, the minorities' collective rights to their own education, religion, language, and culture must be "artificially" protected, to prevent their disappearance, as was the case in many immigration-absorbing countries in the new world.

⁶⁴ Pipes, see *supra* note 32. The State of Israel chose a slightly different path and granted a general exemption from ID photo to women who declare that they are not to be photographed on religious grounds. Article 25 of the Law of Population Registration, 1954.

⁶⁵ Fukuyama, *supra* note 2 at p.15.

Why is such a disappearance negative? This leads us to the second justification of group rights: the individual's right to self-fulfillment can be satisfied only when anchored in right to his culture. The individual, when forced to acclimatize to an alien culture, does not utilize to its fullest his rights to equality as an individual in society.

But what about the majority's right to preserve its own culture? The hidden assumption is that the majority has the means and will find ways to preserve its status⁶⁶. The Islamist crisis revealed that the fears which exist within the host majority of losing its hegemony demographically and culturally. When accompanied by brutal terror, it appears to many that the threat to the majority is transformed into an existential one.

Defending the majority's rights to culture has ramifications beyond the realm of terror: This threat relates to the social stability and the society's ability to function as a stable liberal democracy, with a specific identity of its own. The multicultural concept ignores the need for such stability in societies in which various cultural minorities live.

This need is specifically poignant in Central and Eastern Europe, where the question of national minorities engenders, as we have seen above, a different meaning than in the West. It is enough to recall the hard conflicts in countries like Macedonia, Estonia or the Caucasian states to assess the severity of this problem. Second, the majority claims occasionally that it hankers to belong to liberal Western Europe, which preserves human rights, while the minority jeopardizes this tendency. Thus in the Baltic states in general – Estonia, in particular – the majority's fear of the Russian minority, a legacy of the Soviet empire, is totally different from the usual image of a minority merely striving to preserve its culture⁶⁷. Kymlika deals

⁶⁶ A. Margalit and M. Halbertal, "Liberalism and the right to culture" 61(3) **Social Research** 491, explain that: "Another problem associated with the privileges granted to minority groups for the sake of preserving their culture is the apparent inequality engendered by giving the minority privileges that are denied to the majority. There is an apparent paradox here in that the state is supposed to be neutral with respect to the majority culture while intervening substantially to assist minorities. But these seemingly nonegalitarian minority privileges are justified by the fact that the majority culture is able to maintain a more or less homogeneous environment even without privileges by virtue of its being the culture of the majority.

Moreover, in most cases the majority preserves its homogeneity by enacting immigration and citizenship laws for the state as a whole, which creates an unequal situation that needs to be balanced by granting privileges to the minority."

http://www.findarticles.com/p/articles/mi_m2267/is_n3_v61/ai_15853259/pg_10.

⁶⁷ *JEMIE* 1/2003 D. Smith, "Minority Rights, Multiculturalism and EU Enlargement: the Case of Estonia", pp. 1-38.

extensively with this issue and emphasizes the distinction between the minorities in the West and minorities in former Soviet Union states⁶⁸. The issue will be analyzed further on.

5. Multiculturalism in International Law

Human rights are anchored in international documents and treaties, while the right to culture is anchored in the interdiction of discrimination. Theoretically, there is a clear distinction between the two – the most basic human right is the right to equality, to be like everybody else, while the right to culture is the right to be different from the majority. Europe has been trying to reach a compromise between these two rights.

The European Council's Framework Treaty for the Protection of National Minorities partly expresses the multicultural concept⁶⁹. Although the convention mentions only the rights of individuals belonging to national minorities and defines its goal to defend human rights – the individual's right to equality despite belonging to a minority – its terminology embraces more than one tenet of multiculturalism. For example, the preamble to the treaty mentions that "a democratic, pluralistic society ... must respect not only the ethnic, linguistic and religious identity of each person belonging to the national minority but also to create proper conditions allowing them to express, maintain and develop this identity". The preamble also deals with the need "to allow cultural diversity because it is not a source of difference of opinion, but a way to enrich society ". Article 4 even instructs states "to adopt ... measures that promote full and effective equality among all minority members in all areas of economy, society, culture and politics". Article 5 seeks to promote "conditions allowing minorities to maintain and develop their culture and the vital elements to their identity such as – religion, language, tradition and cultural heritage". Thus, the convention requires that signatories "refrain from policies or acts with the purpose of

⁶⁸ *Supra* note 24, *Can Liberal Pluralism be Exported?*, West and East, Kymilka and M. Opalsky (Oxford U. Press 2001).

⁶⁹ *Framework Convention for the Protection of National Minorities* (Strasbourg 1995), *Supra* note 13 www._CONVENTION_%28MONITORING%29/1._Texts/H%281995%29010%20E%20FCNM%20and%20Explanatory%20Report.asp.

assimilating the minority members against their wishes"⁷⁰. However, the convention refrains from prescribing guidelines for the public education of minorities. On the contrary, Article 13 allows the minority to establish and manage private schools but also emphasizes that "no financial responsibility will be placed on states." Therefore, the convention does not really fully embrace multiculturalism; nevertheless, it is evident that it was written in the 90's and not after the trauma of the encounter with radical Islam. For example, Article 8 allows freedom of religious speech to the national minority without any reservation regarding public order⁷¹. The convention leaves it to the individual countries to define the identity of national minorities and does not set specific criteria for this purpose⁷².

Needless to say, individual countries interpret the convention in different ways. In France, where the educational system is national, republican and secular, no significant public funding is available for religious schools; in England, with its tradition of publicly funded Anglican schools, this support has been extended to others – including Moslem schools⁷³. In Holland, the constitution ensures, under Article 23, the right of the parents to receive public funding for religious schools. In the U.S., the Constitution prohibits such funding due to the separation of religion from state⁷⁴.

⁷⁰ Article 16 is an example of significant collective rights; it sets the right for minority members to ensure that the demographic composition of the inhabited areas by a minority will not be altered and it aims to limit their rights by the convention.

⁷¹ But article 20 requires the members of the minority "to honor the national legislation" and "the rights of others".

⁷² The European Court for Human Rights discussed the petition of the Silesian Minority in Poland due to the refusal to grant them the right to assemble in order to promote the national awareness of the Silesians in Poland and rehabilitate their culture. The local governor claimed that granting them recognition as a national minority would mean granting rights not given to other groups. The European Court determined that the refusal stems from a worthy purpose and the decision was based on reasonable grounds of a democratic society. The decision was also justified due to the fact that the minority was not prevented from promoting its culture; it was only denied the official acknowledgment as a national minority with preferential status and benefits within the framework of Parliament elections: ECH – 2004-1-001 at CODICES collection; <http://codices/coe.int>. In a similar context, the European Court of Human Rights discussed the petition presented by the members of the Macedonian Minority against the State of Greece, which sought to assemble Macedonian natives in Northern Greece. The explanation given for the refusal to grant the right for assembly and recognition as an ethnic minority was that such a recognition would be against state interests. The European Court decided that the rights of assembly were infringed and that the purpose of assembly is to preserve and develop the local culture. The fear of the Greek government of harm to its territorial integrity was deemed unfounded.

⁷³ "Terrorism and Civil Liberties", *The Economist*, August 13, 2005.

⁷⁴ An additional field in which one may see the principle of multiculturalism in European countries is the preservation of the language of minority and the possibility to receive education in one's language. In **Austria**, the Constitutional Court approved a law for the state of Carinthia regarding minorities' education, which allowed studies in the Slovene language only during the first three years of the basic education, in violation of the convention that has been applied to Austria after WW2. That convention

The influence of the multicultural approach is apparent in European and international documents. An example is the proposal of the "Declaration of the UN Economic and Social Council" on Discrimination against Indigenous People" (1993), a proposal which until now has not been passed⁷⁵. Similar ideas are presented in the Declaration of the High Commissioner of the UN for Human Rights in his millennium report (2000)⁷⁶. The proclamation of the General Assembly on rights of people belonging to national, ethnic, religious and language minorities (1992) clearly endorses the principle of collective rights. Clauses (2)(1)2 and (3) stipulate that :

1. Persons belonging to national or ethnic, religious and linguistic minorities...have the right to enjoy their own culture, to profess and practice their own religion and to use their own language, in private and in public, freely and without interference or any form of discrimination.
2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.
3. Persons belonging to minorities have the right to participate effectively in decisions on the national and where appropriate, regional level concerning

ensured the Slovenian minority (and other minorities) basic education in their own language (See AUT – 2000-1-002 in the CODICES database).

In **Romania**, the Constitutional Court ruled against the petition opposing the Education Act, which allowed the establishing of institutions of higher education in which the language of instruction is not Romanian. The Court decided that by establishing multicultural institutions, the government did not act in a way that discriminates against Romanian citizens but rather furthers equality between national minorities and Romanians and thus acted in accordance with the Constitution that ensures that all members of ethnic minorities have the possibility to study and speak their mother tongue and acquire education in institutions where the language of instruction is their mother tongue. (See ROM -2000-1-004).

Slovakia legislated a law requiring formal applications be filled in Slovakian only. This instruction was deemed to contradict the Slovenian Constitution, which allows national minorities to use their own language in communications with the government (See: SVK-1997-2-007).

In **Macedonia**, the petition opposed allowing minorities to have radio broadcasts in their own language. It was rejected by the Court. The allegation was that broadcasting in other languages than Macedonian might impair the status of the official Macedonian language. The Court ruled that the State must protect the ethnical, cultural, linguistic and religious identity of the people belonging to national minorities and the use of their own language in radio broadcasting, even if broadcast to the entire country, does not create a situation of multilingualism in the country (See MKD – 1998 – 2 – 004); all the above are references to the codices database.

⁷⁵ The preamble states: "Recognizing the right of all people to be different, to consider themselves different and to be respected as such: affirming also that all people contribute to the diversity and richness of civilizations and cultures"; Draft Declaration on the Rights of Indigenous People UN Doc E/CN.4/Sub2/1994/2/Add.1 (1994) at <http://www1.umn.edu/humananrts/instree/decla.htm>.

⁷⁶ "Minority rights are being increasingly recognized as an integral part of the United Nation's work for the promotion and protection of human rights, sustainable human development, peace and security". See K. Annan, Secretary General of the UN, Statement on presenting his Millennium Report (3.4.2000) at: www.ohchr.org/english/issues/minorities.

the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation⁷⁷.

In the implementation of these principles, two opposed extremes may be observed in European countries. At one end is France, which does not recognize in principle national minorities and their languages (the Constitutional Council cancelled a law passed by the National Assembly which granted status to the Corsican language) and did not ratify the European Charter protecting minority languages⁷⁸. At the other end of the spectrum lay Holland, which until recently, incorporated multiculturalism into the officially accepted policy, of both left and of right. The Dutch policy was accepted in other European countries to various degrees. Thus, a vicious circle has been created: the more prone the countries were to preserve the culture of non-European immigrant communities, the more the flow of immigrants to these countries increased and the more forceful became their demand to recognize their group rights. In the end, it is this process which brought about the decline of multiculturalism.

6. Multiculturalism in the State of Israel

Israel is a typical multi-religion state. Its laws continue the Ottoman – British Mandate tradition concerning the separate religious jurisdiction and laws pertaining to family matters. Three short remarks are required in this context, since they have implications on our discussion.

First, the Israeli reality proves that the legal recognition of multi-religiousness and the respect of religious tradition are perceived differently by different communities. The Arab–Moslem and Christian communities willingly support this old arrangement and oppose any departure from the existent status-quo, while the

⁷⁷ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992).

⁷⁸ In 1999, the Constitutional Council of France decided that the European Charter for Regional or Minority Languages violates the principles set by the French Constitution which stipulates that the language of the Republic is French only and allowing use of languages other than French in the Public sector (See FRA-1999-02-005) CODICES database. In Romania, as opposed to France, a similar petition was overruled and it has been established that the ratification of the above European Convention will not impair the status of the Romanian language as an official language.(See : ROM – 2000-01-003).

Jewish community has powerful secular and non-orthodox elements, who strongly resist this status quo that forces upon them the Rabbinical law and jurisdiction.

Second, legislative changes are apparently unlikely to prevail when the religious or secular tradition is deeply embedded in the community's consciousness. Two examples of this issue are the multitude of Jewish marriages contracted outside the Rabbinical Courts, despite the fact that their legal validity it is not clear; and the small number of petitions brought by Moslem women to the secular Family Law Courts.

Third, the autonomy of the Moslem and Jewish communities strongly harms the principle of equality in general, and women's equality in particular.

In spheres unaffected by personal law, Israeli law applies the concept of equality stated in the Israeli Declaration of Independence and in its Basic Laws. The Arab minority has recognized collective rights within the Israeli Jewish state. This approach has led to the recognition that Arabic, as a second official language, should be implemented even in Jewish neighborhoods belonging to mixed Jewish-Arab local authorities⁷⁹. The President of the Supreme Court dealt with the question of equality and of minority assimilation as opposed to segregation and the collective right to be different. Barak J. stated, *inter alia*, in the court ruling *Kadan vs. The State Land Authority*⁸⁰:

The policy of "separate but equal" is unequal by nature. At the basis of this approach lies the concept that separation insults the minority group expelled from the collective, exacerbates the differences between it and the others and reinforces the feelings of social inferiority. Much has been written over the years on this subject, emphasizing that sometimes enacting separate care might be construed into equal treatment or even worse, that segregation is warranted even though it harms equality. This is especially so, among other things, if the desire for separate but equal treatment stems from minority groups who wish to preserve their culture and way of life and to prevent "forced assimilation".

⁷⁹ HCJ 4112/99 *Addalla vs. The Municipality of Tel Aviv*, P.D. 56(5) 393 (in Hebrew).

⁸⁰ HCJ 6698/95 *Ka'adan v. Israel Lands Authority*, 34 *Israel Yearbook on Human Rights* 351 (2004).

Barak J. is thus ready to accept the main claim of "separate but equal" when it is demanded by a minority group seeking to preserve its culture and prevent erosion of its unique identity.

The multicultural approach in Israel is also expressed in principles of affirmative action occasionally enacted in favor of the Arab minority in the Civil Service⁸¹. The duty to ensure proper representation of Arabs was set by the Israeli Legislature with regard to the appointment of directors for governmental companies, and employees in the Civil Service⁸².

A predominant expression of multiculturalism may be found in the existence of a separate Arab educational system, in which the language of instruction is Arabic. The High Court of Justice also adhered to the principle of equality and forced the State authorities to allow Arab citizens to buy land in Jewish settlements⁸³. The only exceptions are: the Jewish Quarter in Jerusalem- intended for Jews only⁸⁴, towns in the Negev – intended for Bedouins only⁸⁵, and the Ultra- Orthodox settlements – intended for orthodox people only⁸⁶. The first case was justified due to the special character of the Old City in Jerusalem, the second case was justified by the special way of life of the Bedouins, necessitating units of land and housing only for them, and the third case was justified by the unique Jewish orthodox way. Moreover, the exemption from military service given as a rule to all Arabs in Israel can also be seen as a group right although, of course, other considerations play their part in this policy.

⁸¹ The long-term government program for proper representation of Arabs and Druze in the Civil Service started already in October 1993, during the Rabin administration. Similar programs were implemented also during the Barak administration in June 1999 and also during the Olmert government in 2006. All these cases were government decisions without supporting legislation. These decisions have been only partially implemented.

⁸² Proper representation was mentioned as early as 1948; the Declaration of Independence states: "We call upon the Arab People, citizens of Israel, to maintain and preserve peace and to take a part constructing the State on the basis of full and equal citizenship and based on proper representations in all State institutions temporary or permanent (emphasis added). The affirmative action is incorporated in article 18A at the **Law of Government Companies** 1975 (April 2000) as well as article 15A in the **Law of Civil Service and Appointments**, 1959. For rulings concerning proper representation of the Arab minority, see HCJ 10026/01 *Addalla vs. State of Israel*, P.D. 57(3) 31 (in Hebrew). The existing legislation regarding affirmative action is very explicit and instructs the government to set goals through the consultation and to set aside specific positions for minority candidates. It also imposes on the government the duty of annual reporting to a Knesset Committee.

⁸³ The Ka'adan case, *supra* note 80, at p. 282.

⁸⁴ HCJ 114/78 *Burkan vs. The Minister of Finance*, P.D. 32(2) 800 (in Hebrew).

⁸⁵ HCJ 528/88 *Avitan vs. The Israeli Land Authority*, P.D. 43(4) 297 (in Hebrew).

⁸⁶ HCJ 4906/98 *The Association " Free People" for the freedom of religion, conscience education and culture vs. Housing Development Ministry*, P.D 54(2) 503 (in Hebrew).

Israel is therefore a multicultural, multilingual, multi-religious and multi-national society not only in its social reality but also in the legislator's and courts' willingness to create exceptions and grant collective rights to the Arab minority. This should not derogate from the fact that the Arab minority in Israel still suffers from budgetary discrimination.

The multicultural approach in Israel encompasses areas beyond these matters; it is included as a key concept in the task force's report on education reform (The Dovrat Committee), ratified by the government of Israel in 2005⁸⁷. The Arab minority in Israel is not an ordinary minority seeking group rights. Indeed, the Arab minority in Israel sees itself as belonging to the Arab Nation, which is a majority in the Middle East and which regards the Jewish majority of Israel as – at best – a minority without any rights to statehood. Israel is characterized by a mixed attitude toward the Arab minority, its culture and its religion. On one hand, this minority is not an equal beneficiary of budgetary allocations and in governmental representation, except for parliamentary representation. On the other hand, Israel is an extreme example of multiculturalism in education and language. Israel inherited from the British Mandate the recognition of Arabic as a second official language and the recognition of a separate Arab educational system teaching in Arabic a separate cultural content. In the past, compared to the Jewish system, this educational system suffered from severe discrimination in resource allocation. This deprivation has been significantly reduced, although not eliminated, throughout the years and, based on the recommendations of the Dovrat Committee, is supposed to vanish entirely. If this happens, the principle of "separate but equal schools" will materialize in Israel in a way hardly paralleled elsewhere.

Despite the severe national conflict and despite the fact that Arab members of the Knesset utter unprecedented attacks on the State of Israel, the comparison with the Moslem minorities in Europe of our days flatters Israel. Notwithstanding justified claims of discrimination against the Arab population, some positive aspects must be mentioned. First, throughout the years, since the founding of the State of Israel, the gaps between Jews and Arabs have been reduced drastically in education, health

⁸⁷ The National Program for Education (National Task Force to promote the education in Israel, 2005) 212 (hereinafter: the Dovrat Report). The chapter on public education (p.212 and further on) opens: "Out of recognition of the fine diversity of the Israeli society as a multicultural society the public education must allow the various communities and to a variety of cultures to be expressed by the contents. (in Hebrew).

and economic achievements. Secondly, between Arab Moslems and Arab Christians, the gaps are larger than the gaps between Jews and Arabs⁸⁸: multiculturalism in Israel must therefore recognize the existence of various communities and traditions within the Arab population. Thirdly, while in Europe and in the Middle East sectarian civic strife has been ignited and violence erupts regularly, in Israel, despite the pressure and ongoing terror, an impressive civic peace is kept and affronts, such as humiliating questionnaires and offensive anti-Moslem caricatures, been notable in their absence. It is also possible that the legal recognition of multiple religions and the bilingualism played a part in maintaining this relative peace. Consequently, in Israel there has been no decline of the multicultural approach. On the contrary, a full recognition of the various Arab communities' right to preserve their culture, religion and language is the accepted norm.

The Israeli state of affairs with regard to its Arab minority is not characteristic of multicultural systems. The reasons are obvious: the national struggle, the mutual suspicion, the influence of what is happening in the occupied territories, the international isolation of Israel and the fact that Arab citizens do not serve in the army and that Arab deputies openly side with Hezbollah, have a great impact on public opinion. The case of the Israeli Arab minority thus includes an aspect of national security. Kymlika discussed the issue regarding situations of this type in Eastern Europe and his ideas are also valid in the context of the Israeli-Arab conflict:

The trend towards greater accommodation of diversity can be blocked or deflected by considerations of security. Whether in the East or West, states will not accord greater powers or resources to groups that are perceived as disloyal, and therefore a threat to the security of the state. In particular, states will not accommodate groups which are seen as likely to collaborate with foreign enemies. Most Western democracies are fortunate that this is rarely an issue. For example, if Quebec gains increased powers, or even independence, no one in the rest of Canada worries that Quebec will start collaborating with Iraq or the Taliban or China to overthrow the Canadian state. Quebecois nationalists may want to secede, but an independent

⁸⁸ A. Rubinstein *Israeli Arabs and Jews : Dispelling the Myths , Narrowing the Gaps* (American Jewish Committee) at: www.ajc.org/site/apps/nl/content3.asp?c=ijlTI2PHKoG&b=846567&ct=1043985.

Quebec would be an ally of Canada not an enemy, and would cooperate together with Canada in NATO and other Western defense and security arrangements. So too with Catalonia: if Catalonia becomes more autonomous or even independent, it will still be an ally, not an enemy of Spain. So too with Scotland vis-à-vis the rest of the United States [...] In most parts of the world, however, minority groups are often seen as a "fifth column", likely to be working for a neighboring enemy. This is particularly a concern where the minority is related to a neighboring state by ethnicity or religion so that the neighboring state claims the right to intervene to protect "its" minority"⁸⁹.

In other words: there is an essential difference between a minority that has a national conflict with the majority and the ordinary situation of minority and majority relations.

Two remarks in this context: first, it is possible that the Israeli recognition of the separate culture, language and religion as well as the recognition of the religious jurisdiction in Family Law has had a calming influence. Secondly, the recognition of the separate Arab culture has always been accompanied by attempts to create cultural bridges between the two peoples. These attempts received the most significant reinforcement in the recommendations of the Dovrat Committee in the section relating to the Arab education. This chapter - for proper disclosure, it was written by a subcommittee chaired by the author - tried to combine the recognition of the 'other' with the principle of equality:

We recommend that the Arab public education in Israel – despite the existence of a national conflict - will express the separate Arabic heritage and the full loyalty to the State of Israel, which is responsible for full equality of rights and duties between all its citizens without discriminating on the basis of religion, race and nationality, in accordance with the legally defined purposes of the Public Education⁹⁰.

⁸⁹ Kymilika, "Multiculturalism and Minority Rights: West and East", *supra* note 24. Kymilka suggested that in such cases the entire international community must join forces in order to convince the majority community and to calm it down through a solution of peace to the national inner country conflict.

⁹⁰ The Dovrat Report, *supra* note 87, p.218.

As opposed to the policy toward the Arab minority and its culture, the Israeli approach toward the cultures of new Jewish immigrants, emphasized the need for consolidation and unification around the existence of Israel as a democratic and Jewish state. This need dictated a policy of integration and of transforming communities separate in their culture and language into one Hebrew-speaking people. There are very few examples in the world of such a bold enterprise. Even so, the means by which this goal was achieved changed radically throughout the years. During the period of massive immigration, after the Proclamation of the State of Israel (the 50's and the 60's) the emphasis was on the melting pot unification process, from which the new, Hebrew-speaking, Zionist new Jew should emerge.

The exile languages – chiefly Arabic, Moroccan Arabic and Yiddish – gradually fell into disuse. The radio stations of the Public Broadcasting gave almost no voice to the separate culture of the various immigrant ethnicities and even French, the second language of the North African new immigrants, was eroded and replaced by English.

All this changed with the massive immigration from the former Soviet Union in the 80's. Under the influence of the new emphasis on multiculturalism, the immigrant absorption policy changed completely. From cultural destruction of the native culture – to its preservation; from waging war on those who do not speak Hebrew – to theater, radio and TV in Russian; from boycotting songs of the native country to cultivating Russian music and culture. From this point of view, in Israel, the multicultural concept has had a unique impact. But, contrary to Holland and Britain, for example, Israel accompanied this new diversity with an emphasis on a common national and linguistic frame. The country-wide system of Hebrew schools, the military service and the shared security experience have created the same common denominator whose absence is felt in other multicultural regimes.

This multicultural approach concerning Jewish immigrants heralds a compromise between the monolithic view of the State and the multicultural perception. The common language and national ethos can co-exist with the cultural and linguistic diversity.

The Israeli experience with multiculturalism is significant: it does not cede its monopoly to the community's language, literature, music, customs, religious folklore

and ways of life. It is true, borderline cases may occur. Is dress code, including the Moslem scarf, part of a culture or does it entail an injury of the general ethos of women's equality? The Supreme Court of Justice in Israel ruled that forbidding Moslem religious dress for girls is permitted only in Christian private schools and that such an interdiction will not be recognized in a public school⁹¹. This is a borderline case which has been resolved in different ways: in France, as we have seen, it is legally forbidden that students come to school wearing religious dress; In Britain, the House of Lords upheld the interdiction on wearing religious dress in schools with their own dress code⁹², and in Canada a Sikh student has been allowed to wear religious dress in schools of Quebec⁹³. Should the custom of multiple wives within the Bedouin community in the Negev be considered an exception to the bigamy interdiction? This may be a marginal matter, but it involves an even bigger problem – what is included in the 'other culture' that needs the protection of the State?

7. Various Approaches to Multiculturalism – Towards a Balanced Solution

One may identify two basic political theories central to multiculturalism: the Community Theory and the Liberal Theory. The community view has various layers. One of them is absolutist. According to it, all cultures are equal; therefore, invalidation of a cultural habit of the minority community is a type of cultural and moral paternalism. The liberal theory, the subject of this article, is different¹⁰⁶. It does not necessarily accept the approach that all cultures are equal. The minority's cultural customs will be considered only within the framework of liberal tolerance. This is the reason why the plea of culture as a defense or justification in criminal law

⁹¹ HCJ 4298/93 *Jabbarin vs. The Minister of Education*, P.D. 48 (5) 199. Justice Goldberg disagreed with the saying about public schools in Israel: "Is there a place in a public religious school for a student who does not wear a Yarmulkeh? I am not convinced that in a clash between the student's freedom of speech and the educational framework, the will of the student will prevail - despite the education for tolerance and pluralism".

⁹² *R. v. Headteacher and Governors of Denbigh High School*, [2006] HL15 (22 March 2006).

⁹³ See decision made unanimously by the Supreme Court of Canada in which the Court received an appeal of a Sikh student against the interdiction to wear a Kharpan (a dagger carried as a religious ordinance under the clothes) in schools in Quebec. Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256, 2006 SCC 6 (2.03.2006), available at: <http://www.lexum.umontreal.ca/csc-scc/en/rec/html/2006scc006.wpd.html>.

In the German state of Baden-Wuerttemberg the court has invalidated a ban on woman teachers wearing religious headscarves because the legislation did not apply also to catholic nuns and therefore was discriminatory. See: <http://jurist.law.pitt.edu/paperchase/2006/07/german-state-court-rejects-headscarf.php>.

is generally not admissible. The criminal law expresses the values of the majority and immigrant communities are bound to observe these values.⁹⁴

The two approaches produce similar difficulties: the first stems from the human rights principle, according to which an individual's rights and his own benefit require the preservation of his culture or is frustrated where the culture does not allow such human rights⁹⁵. The second, the absolutist approach, stems from the relativist approach to various cultures according to which no culture is superior to any other, and there is no objective measure on the basis of which the right for cultural domination may be determined⁹⁶: As all humans are equal, so are the various cultural groups. The idea of equality among humans is thus extended to cover the idea of equality between various cultures in today's heterogeneous society. Seemingly, the idea of cultural collective rights looks as part of the war against racism and xenophobia. However, as we have seen, the matter is more complex: equal rights to different cultures is conditional upon these cultures observing principles of equality among humans⁹⁷. The modern concept of autonomy for every individual is, in itself, foreign to traditional cultures, which are almost always based on a religious basis and are, almost inevitably, patriarchal. Traditional cultures do not usually include the ideas of equality between man and woman, equality of homosexual to heterosexual, the interdiction of corporal punishment, support for single-parent families and the rest of the achievements of the modern, liberal society. Quite the contrary is true: the essence of traditional culture is to heighten the patriarchal status of the bread-winning man, in contrast with the inferior status of the woman. The truth is even more far reaching: the progress that has granted true equality – legal, economic and educational – was created by abandoning the traditional culture and creating a new system of norms constructed on intellectual principles of justice. From this point of view, it may be stated that liberalism – the system of norms of the modern enlightened society – is not a

⁹⁴ As to culture as a defense, a subject with which this article does not deal, see Note, "The Cultural Defense in the Criminal Law" 99 *Harv. L. R.* (1986) 1293. ;Elaine M. Chiu "Culture as Justification, Not Excuse", available at: <http://ssrn.com/abstract=895276>.

⁹⁵ See supra note 11.

⁹⁶ Martin Hollis, "Is Universalism Ethnocentric?" in *Multicultural Questions*, supra note 34 and see, also, supra note 36.

⁹⁷ This is why the traditional American Right has opposed multiculturalism due to universal reasons – "It's bad for mankind" and not because of reasons of White Christian cultural superiority – "Its bad for America." See L. Auster resents this attitude: *The Path to National Suicide : An Essay on Immigration and Multiculturalism* (American Immigration Control, 1990); L. Auster " How Multiculturalism took over America " , FrontPageMagazine.com July 9, 2004.

"culture" *per se* in the accepted sense of the word, because it freed itself from the shackles of the prior traditions in a series of arduous struggles, partially still on-going⁹⁸. It is misleading, therefore, to claim that the equality of cultures is a natural extension of the human equality principle. The autonomy of the group might harm severely the autonomy of the individual. Not only there is no extension of equality here – there is a basic collision between the two concepts of equality⁹⁹.

Absolutist multiculturalism should be dismissed also from a theoretical point. If it is based on the self fulfillment of the individual, within the frame of a collective culture, it cannot apply to a group which does not give the individual the right to self-fulfillment. Kymlika understood this matter, as mentioned before, and therefore qualified this collective right to apply only to tolerant groups which grant equal rights to all. Who are these traditional cultures that grant such rights? If we adopt Kymlika's restriction, the right to group rights will be reduced to matters of language, food, folklore and dress code - and not even these at all times, because a dress code, for example, may convey the inferior status of the woman¹⁰⁰.

Similar difficulties accompany the view which regards multiculturalism as based not on the individual self fulfillment, but on the essential equality of all cultures and the invalidation of the hegemony of one culture over others. However, this idea can be valid only if we assume that there are no binding super-norms, to which all cultures are subordinate. In other words, whoever adopts this relativity, determines that each culture is free – just as every individual is free – to set the rules of conduct

⁹⁸ David Goodhart, the editor of *Prospect* spoke with a *Sunday Times* writer: " People are not born with rights ...Rights are a social construct, a product of history, ideas and institutions. You and I have rights not as human beings, but mainly because we belong to the political and national community called the UK with its infrastructure of laws and institutions". Available at: <http://www.timesonline.co.uk/article/0,,2088-1753602,00.html>.

This claim represents the approach that according to it the human rights are a consequence of a social agreement taking place in a peculiar society and not being part of the cultural heritage. See D. Goodhart, " Human Rights and Terrorism ", *Prospect*, September 4, 2005.

⁹⁹ A dramatic case of such a collision: the FBI prosecuted a Saudi couple living in the US on the charge of turning an employee into a slave. The couple enslaved an Indonesian female worker through threats of systemic rape, did not pay her and kept her in slavery conditions. In other cases, slavery cases in Saudi families living in the US were reported which were not prosecuted due to diplomatic immunity. Slavery is still practiced in Saudi Arabia despite the fact that it has been illegal since 1962. Obviously in this case the Saudi culture will not have any defense. See D. Pipes "Saudis Import Slaves to America", *New York Sun*, June 16, 2005.

¹⁰⁰ Frances Raday brings an example of a ruling from a Turkish Court of 1989, which invalidated the regulation allowing universities to permit a dress code which hides the neck and the hair due to faith. The Court ruled that the regulation contradicts the Turkish secular model as well as the law which requires that all state employees have their head uncovered. See Raday, *supra* note 38, at p. 690. The ruling has also been recently sanctioned by the European Court for Human Rights (*Sahin v. Turkey*, App. No. 44774/98, Eur. Ct. H. R. (Nov. 10, 2005) available at: <http://portal.coe.ge/downloads/Judgments/LEYLA%20SAHIN%20v%20TURKEY.pdf>).

of its society. But a consequence of such an outlook will be to grant equal rights to communities practicing female circumcision, polygamy, animal abuse (including slaughtering animals in the presence of dinner guests), death to homosexuals, racial discrimination and even slavery.

It is obviously possible to bring this concept *ad absurdum*. Seti, the Indian custom of burning the widow with the late husband's corpse, performed by Brahmins and upper castes in India was – until its abolishment by the British regime in 1829 – part of a traditional old culture. Would this custom also fall under the category "all cultures are equal"? One may qualify – as mentioned before – the principle of equality of any culture in a way which makes its recognition dependant on the consent of the individual concerned. But this compromise is not without its problems. The supporters of female circumcision base their claims on the girls' agreement to have their feminine organs severed; many Moslem women support – at least during the period they live in a Moslem country – polygamy; and in our most extreme example, one must remember that many Brahmin widows not only supported the custom of being burned alive, but also saw its annulment as a personal offense (instances of Seti occurred long after its interdiction¹⁰¹). Therefore, the individual's consent in a traditional society is always questionable, because this agreement is achieved through social pressure, overt or covert, and through group indoctrination¹⁰². Moreover, this is in fact an agreement with no path of retreat – as is the case of mutilation of genitals or in killing the woman through fire burning - or an agreement difficult to rescind – such as accepting polygamy.

The modern norms of the liberal, "culture-less" society must therefore invalidate agreements of this type. Furthermore, whoever asserts that all cultures are equal and there is no super-norm which binds human society, will find it difficult to explain why the norm of multiculturalism holds such a status. And if this explanation is thorny in any case regarding any human society, it is even more

¹⁰¹ M. Sen, *Death by Fire* (Penguin, 2001) The author recounts modern stories of Seti.

¹⁰² Frances Raday asks if it may be possible to agree to inequality and her answer is straightforward: "The allegation that a woman is free to choose between equality and inequality in a society, which educates men and women to men ruling women has no basis. One may assume that only few victims of discrimination will be able to liberate themselves from the patterns of a life in discrimination ...if it will be said that in some fields of life such as family , there are women who prefer the inequitable tradition – the role of law is to ensure that the agreement is from wish and awareness and also – that the woman may withdraw from it and free herself from the inequitable tradition and enjoy the right to equality despite the initial agreement at any time in the future, when she is no longer interested." See Raday, *supra* note 38.

arduous to justify it in Western society, which succeeded, after a prolonged struggle, to acknowledge and implement the norms of equality and autonomy of the individual. In this type of society, the struggle for multiculturalism in its absolutist sense may be a regressive step of turning back our society, and regressing to the tradition of inequality. Thus, trends are reversed – progressive turns regressive and the left becomes right¹⁰³.

Therefore, the inevitable conclusion of this article is that cultures are definitely not equal. Cultures which succeeded to integrate an unequal tradition with the new ideas of equality do not need the defense of multiculturalism¹⁰⁴. On the contrary, cultures which have not adapted themselves to modernity, are those that need the defense of multiculturalism¹⁰⁵.

Nobel prize laureate, Amartya Sen, goes beyond that and in his book, Identity and Violence¹⁰⁶, attacks the very emphasis on identity and its politics. He argues against the belief that identity is something which one is born with, a pre-ordained destination. His main message is clear: human beings belong to many identities and it is up to the individual to make a choice between these various allegiances. This

¹⁰³ The almost automatic identification of Leftist movements and of Human Rights NGO's with the Moslems due to the concept of multiculturalism convinced a group of well known French scholars to publish a sharp manifesto: "Sincere activists – and anti-racist organizations...turn themselves into a device held by the hands of fanatics of sexist ideology, homophobic and anti-SemiticWe see how the road to Hell is paved with good intentions: They are put in motion by the highest feelings in the world, the same that argued for equality of genders, and end finding themselves in the same camp with the denying of rights to women; the same people who fight discrimination made an alliance with the preachers of hatred of Israel; the more advanced ones are acting in conjunction with possessors of opinion of Middle Age....This is the Leftist – Islamic Alliance which grows a tumor on the Anti Racism Front". The manifesto asks for support for the equal republican ideas and not to give support to "the Political Islam", which aims to eliminate the republican model. See: Redonner son sens a la lutte contre tous les racisms", France Soir, October 14, 2005. A similar manifesto, under the title "The Euston Manifesto" was written by the British intellectuals, see: Amnon Rubinstein "To the Euston Station" The New York Sun, June 1, 2006, 11.

¹⁰⁴ Such an example is the transition made by the Japanese society from a regime based on a half-godly emperor and on the demand of self sacrifice – a consequence of the Japanese traditional society - to a modern, democratic regime based on freedom and autonomy of the individual. This is not a transition from an original culture to another culture, but a transition from a traditional society to a regime of modern democracy with universal principles.

¹⁰⁵ Kenan Malik writes: "Why should I, as an atheist be expected to show respect for Christian, Islamic or Jewish cultures whose views and arguments I often find reactionary and often despicable? Why should public arrangements be adapted to fit in with the backward, misogynistic, homophobic claims that religions make? What is wrong with me wishing such cultures to "wither away"? And how given that I do view these and many other cultures with contempt, am I supposed to provide them with respect, without disrespecting my own views?"

See K. Malik, "Can multiculturalism work?", New Humanity
http://www.kenanmalik.com/lectures/multiculturalism_if.html.

¹⁰⁶ Allen Lane, London 2006

does not mean that Sen rejects multiculturalism every its meaning of the term: he objects to the idea that diversity should be promoted as a value but does not object to honoring the individual's free choice. He certainly opposes categorizing people according to their ethnic or religion, and he claims that in Britain this view led to regarding all Bangladeshis as Muslims: "Suddenly they had lost all identity other than being Islamic. And suddenly, Bangladeshis stopped being Bangladeshis and were merged with all other Muslims from Morocco to Indonesia"¹⁰⁷. Sen blasts the British brand of multiculturalism which has enabled the government to shrink its duty to facilitate integration "and has encouraged Muslims to see themselves as semi-detached."

Does all of this mean that Western society must return to old hegemonic ideas, to enforcing the majority's norms through a melting pot philosophy? No. The multicultural approach represents the recognition of the new diverse reality and of its contribution to the welfare of the society at large; it also rejects any attempt to uproot cultures and religious traditions through legal measures¹⁰⁸. Thus, the following distinct conclusion emerges: wherever norms of tolerant liberalism – which, in this author's view, must not be defined as a culture – clash with norms of the traditional society, a proper balance between the two must be found. Obviously, this is a matter of balancing and it involves a distinction between the individual and the public, between ordinary people and officials. Even if a society accepts veiled Moslem women in public, it will hardly agree to female police officers or judges performing their job under the cover of a veil. This is, of course, the narrow, non-absolute meaning of the multiculturalism. Seen in this light, multiculturalism is actually not an expression of a society losing its identity, but of a society treating tolerantly various ethnic and religious groups, but refusing to tolerate their anti – tolerance.

This legal balance is not easy, but jurists and judges are adept at applying it. The relevant question is: *What is the extent of the harm of religious–traditional*

¹⁰⁷ Kenan Malik, "Illusions of Identity", *Prospect*, August 26, 2006, pp.64-5

¹⁰⁸ L. Friedman expresses a similar approach in his book, "The Horizontal Society": "Castles and Miller describe the multicultural model of citizenship as a definition of the nation as a political community...with the possibility of admitting newcomers to the community, providing they adhere to the political rules, while at the same time accepting cultural difference and the formation of ethnic communities". Without the political rules, in fact, no multicultural state is possible... The political rules, then, are a prerequisite. But the cultural differences and the ethnic communities are the essence of the multicultural state. It represents the breakdown of the old hegemony; what replaces it are the virtual communities, the subnations, linked through ideology and technology in the new and sharply horizontal state", supra note 4, p. 174.

norms inflicted on the individual? The effect of female circumcision has far more impact than the effect of women covering their hair. In addition, the jurist will ask: *What is the weight of the religious norm in this culture?* For instance, the custom of male circumcision in Jewish and Moslem religions has a different standing than the custom of circumcising women, which is practiced only in part of the Moslem countries. In truth, there will always be borderline cases. The French interdiction of wearing the "Moslem scarf" and prominent religious symbols in public schools constitute such a borderline case. However, the expertise of jurists and judges may be trusted to create a fair balance in the society in which they live. It is hard to believe that a jurist will endorse the criminal interdiction of male circumcision or of wearing a veil in private.

Another distinction is the one made by the Supreme Court of Justice in Israel between *the norms and behavior that religion requires and the norms and behavior that religion allows*¹⁰⁹. For example, Islam does not command polygamy but only allows it, and this is why the interdiction of bigamy does not offend religious norms or the freedom of religion.

The Israeli Parliament discussed such a question concerning *the law on the interdiction of discrimination in services and regarding entrances to leisure places and public places – 2000*. The purpose of the law is "to promote equality and prevent discrimination at entrances to public places". The interdiction of the discrimination relates to a person's gender too. The question that emerged was how should this law be implemented in places serving ultra-orthodox Jews or devout Moslems, who by culture and tradition, require gender separation, without which, they will forego the service or the place¹¹⁰. Opinions were split. Women's organizations requested that separation be vetoed; ultra-orthodox representatives, invoking multiculturalism, insisted that without gender separation, the ultra-orthodox community will not avail itself of the service. In the end, the Committee adopted the following compromise:

¹⁰⁹ H.C. 49/54 Milchem v. Judge of the Sharia Court, 8P.D. 910, 913 (in Hebrew)

¹¹⁰ T. Greenfield, *Is It Really so Benign? Gender Separation in Ultra-Orthodox Bus Lines* (International Conference: Multicultural and the Antidiscrimination Principle, Academic College of Law, 2005), available at: <http://www.rg-law.ac.il/conference05/index.html>.

No discrimination occurs according to this Clause if:

In the existence of separate frameworks for men and women, when lack of separation will prevent part of the public to use the product or the public service, the entrance to a public place, or offering the service in a public place provided that the separation is justified based on, among other things, the nature of the product, whether the public service or the public place is essential, the existence of a reasonable substitute for the service or place and the needs of the public that may be injured by the separation.

It is difficult to achieve a compromise regarding gender separation. It is infinitely harder to achieve a compromise when relating to separation between religions and races. However, each case must be judged on the relevant unique circumstances and based on the above criteria for balance. For example, in this case involving the Jewish ultra-orthodox, or the Moslem public, the religious norms demand (not only allow) separation and the weight of the religious interdiction is so strong and meaningful that the absence of that separation may discourage the religious public from using the service.

This meaning of multiculturalism differs fundamentally from its orthodox interpretation assigned to it in the past.

8. Concluding Remarks

The concept of multiculturalism has multiple connotations. Its growth is based on a factual background: homogeneous societies became heterogeneous; countries 'exporting' emigration became states 'importing' immigrants. In addition, new concepts of equality among different communities and of collective rights gave rise to a new philosophic–social–legal concept which has shaped public opinion. The Islamist crisis administered a serious blow to this concept and led to a renewed awareness of the need to defend the freedom and equality of individuals as well as to the right of the majority preserve its culture and identity. The multicultural approach in its absolutist interpretation – the claim that all cultures are equal and have an equal legal status – has been weakened, but the multicultural approach in its liberal–tolerant interpretation – consideration given to religious traditions and cultures of various communities – remains intact. In cases in which the multicultural approach clashes head-on with human rights, it must vacate its place and withdraw. Otherwise, this collision can be readdressed by balancing the two interests. Demarcation of borders between the two types of collisions and balancing those interests is within the field of expertise of judges and jurists.