KYMLICKA’S MULTICULTURAL ODYSSEYS - A COMMENT

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I. GENERAL

The book gives us a lot of fascinating data, of a historical and comparative nature, and thus belongs to political science more than to proper political philosophy. My colleagues lament the fact that a first rate political philosopher is spending so much time on trying to connect disciplines and address questions that might help us make the world better and not only on philosophical argument. At least, they suggest, this may make philosophical discussions less focused.

I celebrate Kymlicka’s willingness to delve into these questions. I in fact think that this kind of work may be more helpful to the pursuits of political philosophy than many ‘pure’ essays on the limits of multicultural citizenship as it goes back to the big questions of the nature of good practical philosophy. Is it just the articulation of the presuppositions of thought and the meaning of key terms, or does it also involve clarification of what a moral world order would be? And should philosophers stop short at identifying what morality requires, or must they also question how a moral order may be implemented and what are the needed institutional and political structures that might either hinder it or make it flourish? In a complex world, can one determine what morality requires without understanding the constraints of real human, social and political situations?

I do not think there is one right answer to these questions. The choices of what one should do are complex and ultimately very personal. As I said, Kymlicka is willing to enter into the messy world of interdisciplinary work. In fact he is doing what he himself identifies as a necessary element of making progress if we want to spread around the world the virtues of a normative world order that includes a greater respect for what he calls ‘liberal multiculturalism’ – a firmer recognition of the importance

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of one’s culture and the need to recognize not only individual human rights but rights connected to one’s membership in ethnic and cultural groups.

Kymlicka argues that spreading this political ideal – like spreading the actual enforcement of the ideal of universal human rights – requires combining the insights of three distinct disciplines: normative political philosophy, comparative political science, and international law. He observes that a part of the problem with this process is the fact that these insights are not in fact integrated. Therefore he seeks to leave the safe waters of political philosophy only, and produces a work of great uniqueness and importance.

I happen to share Kymlicka’s view that insensitivity to historical and empirical differences between societies and situations, and the relative inattention given to institutional features of the international community (or their absence or weakness) are key elements in understanding the challenges facing the attempt to spread human rights and minority rights around the globe. I also believe that Kymlicka’s work illustrates how a solid philosophical training in rigorous thinking and valid arguments helps him in presenting the mass of empirical evidence in a fruitful way.

Moreover, Kymlicka’s normative political vision is neither absent from this work, nor is it just presupposed in it. The book is inspired by the wish to make the dissemination of Liberal Multiculturalism (LMC) effective and successful. Its structure and emphasis are dictated by the fact that Kymlicka realizes that there are serious problems with disseminating this ideal from the democratic West to the post-Communist and the post-colonial worlds. Kymlicka does devote some of the time to the articulation and justification of the ideal against some challenges. A lot of his previous philosophical work is the basis of this discussion, but his main concern is the fact that he sees serious obstacles to the process. Unlike some other writers, he is not willing to dismiss them as only signs of moral weakness that should be addressed by more moralizing and stricter enforcement. His effort thus may prove to be helpful in promoting human rights themselves, not just the understanding of their nature and justifications.

He sets out to first analyze the obstacles to the dissemination of this ideal and second, the conditions that explain its relative success in the West and its relative failure elsewhere. Kymlicka seeks to identify ways of making progress that will overcome these difficulties he had identified. He looks at the conceptual and institutional means adopted in order to spread this ideal and their limitations, and warns that these are not fully consistent and therefore are likely not to be stable.

The book is extremely rich and it is impossible to even choose a point or two that will do the thesis of the book justice or permit a serious critical discussion.
Nonetheless, this is my task here. So I will make a few short points, all underlined by my main suggestion: that we should take Kymlicka’s own premises more seriously than even he at times does.

I argue for three connected theses. First, Kymlicka suggests that the lessons of the West’s success with LMC teach us that promoting LMC in post-Communist and post-colonial countries should be based on developing stronger Human Rights norms and institutions. I read the lessons differently: Human Rights are indeed an important part of the background conditions for the successes in the West. However, promoting LMC globally requires attention to sources and preconditions identified by Kymlicka, which are mostly beyond Human Rights. Secondly, this is not just a contingent fact about Human Rights but a feature of the characteristics of this special discourse. Third, Kymlicka’s guidelines on how to promote global LMC should therefore be amended, so that attention to elements of international politics and local contingencies will be much more central than invocations of norms of the Human Rights Discourse. Finally, I sketch a few issues in the Israeli-Palestinian conflict in which issues raised by Kymlicka’s account are very central. I sketch them as a way of illustrating the fruitfulness of his approach.

II. GENERALIZING FROM THE WEST AND ITS LIMITS

I like the way Kymlicka seeks to generalize the on the whole successful experience with LMC from the West: identifying what factors encourage the process and the achievements, and what were its preconditions. These help him both analyze and explain the relative weakness of the processes in post-Communist and post-colonial states and to suggest ways to move forward. I want to look a bit more closely at this move. While the strategy is valid and fruitful - it seems that at the end, Kymlicka lets his wish that LMC will be effectively disseminated obscure both some important features of the Western experience and some of the obstacles facing its dissemination to other parts of the world.

I accept Kymlicka’s argument that in the West, the combination of many conditions explains success. It includes the solid democratic tradition, the advance of Human Rights and their protection serving both as a mobilizer of claims and a basis for a sense of past injustice, and as an effective constraint on what empowered communities can do, coupled with the absence of security issues, and the relative weakness of the minorities vis-à-vis the state, all combined to create a democratic dialogue that ended up with acceptable levels of LMC. This level is not uniform and in many occasions it is contested and challenged, but the conversation about these issues has become a
matter of democratic politics. While Kymlicka concedes that there is some backlash vis-à-vis immigrants, one does not notice a similar weakness in upholding the gains made by indigenous people and national minorities.¹

Now when we try to disseminate LMC further there is resistance. Kymlicka is decent enough to concede that this is not only because these states are backward or anachronistic. States themselves, as well as present majorities, face real or imagined geo-political risks that make the issues securitized and the stakes high. There are complex histories and complex present relationships. The Human Rights Discourse spreads and inspires demands of minorities and indigenous peoples – but it is not effective enough to reassure the majorities that they can afford to concede. Furthermore, in many contexts, the present majority does not feel that it has wronged the present minority. Rather, it used to be the repressed minority and it feels no guilt or compassion towards the plight of the present minority (which is often connected to a strong state in which they are the majority close by).²

I further agree with Kymlicka that attempts to disseminate the achievement of the West to the post-Communist world had only modest success. Clearly the attempt of Europe and the International community (IC) to make these countries adopt LMC by publishing best practices did not work. Attempts to create robust targeted norms for homeland national minorities ended up with weak semi-section 27 generic norms,³ despite the fact that what these minorities want is more like what indigenous peoples want and get – rights to recognition, territorial base, language rights and self government. Many states see the weak standards not as starters but as the maximum requirement. Thus these weak norms are unlikely to address the real issues. The disappointing result is explained by the fact that states were reluctant AND that the conditions were not there.

¹ It is not clear what the paradigmatic cases of successful rights for national minorities in the West are. Presumably, we are looking at Canada, Belgium and Switzerland. France does not recognize the existence of such minorities at all. Belgium is not a very happy union and in Canada we are talking about linguistic and cultural minorities, without the special challenges often connected with national minorities.


³ Id. at 196-231. While the effort was to identify rights of national minorities that will be much stronger and broader than the ‘generic’ rights granted, e.g. by section 27 of the International Convention on Civil and Political Rights (ICCPR), and grant them not only liberties but also rights of self-rule and autonomy, the attempt to design such rights in a way that would seriously impose duties on States was not successful.
The result of this international and European effort is – according to Kymlicka – disappointing and unstable. The EC managed to exert some pressure by making minority rights a condition for joining the EU. In some cases, when there was a threat of violent conflict, ad hoc interventions often generated arrangements closer to LMC than the generic rights demanded. Progressive arrangements are often the result of international pressures and are seen as prizes for belligerence rather than as the outcomes of progressive democratic deliberations within the states themselves.

Kymlicka would rather have stronger binding norms. But what about the missing conditions? Kymlicka suggests sequencing but concedes such a development is not very likely. His practical bottom line is political: make sure standards are not seen as maximum, plus real work on the conditions. I agree. At times, though, we also hear that it would be better if the regional or international forces could have designed stronger, targeted, norms that would give national minorities some of the recognition given to indigenous peoples. Here is where I am afraid Kymlicka is not taking the move he himself proposes sufficiently seriously.

Now we should return to the West. Progress in the West was NOT made because there were binding international norms that pressured Western countries to concede to minorities within them. Rather, it was the outcome of democratic politics within these countries, generated by the preferences and the decisions of the political actors within these states. True, universal Human Rights Discourse was an important factor in these processes. But the Human Rights Discourse norms were not the targeted norms Kymlicka would like to see.

I am afraid the way I read Kymlicka’s own description is that the task of diffusing LMC or any acceptable inter group arrangement must be left to the local political actors, with guidance and incentives, etc. Political pressure may be fine – if it comes with the power and the willingness to respond if and when the risks materialize. The International Community at the moment is not a very effective power that can assure a state that it will protect it if things do not develop in the ideal way one hopes for. Furthermore, the attempt by Europe to enhance LMC in post-Communist states through the development of targeted norms is itself problematic. It is not motivated mainly by a disinterested wish to see LMC disseminated but by the wish to prevent violent conflict and waves of refugees in their own backyard. Not surprisingly,

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4 See, e.g., the agreement re Albanian rights in Macedonia.
5 Recent events in Georgia are a good illustration of the reluctance or inability of the international community to intervene effectively when external force is used to force an arrangement concerning inter-group relations within a state.
European states themselves do not want to articulate targeted norms that will be too demanding. They want to maintain the power to decide for themselves how to deal with their own national minorities.6

Western countries are even less concerned, usually, with the situation in post-colonial countries. The progress that Kymlicka notes on norms of indigenous people (as distinct from the arrangements regarding the rights of these groups in fact implemented by Western states), is as far as I can see quite misleading. Western countries are not enthusiastic about these declarations. If there is an attempt to make the declarations into conventions, I am afraid the affected countries will simply not sign the convention. We’ll have the situation we have seen with the Convention on the Right of Migrant Workers – destination countries did not sign it.7 The New settler states will not ratify such norms because the claims they may legitimate are much broader than what they are willing to give voluntarily. It is precisely the broad recognition the declaration gives to claims of the indigenous peoples to territory and self government that would make states in which such people reside very reluctant to make them into norms binding on them. The sources and preconditions that allowed present arrangements of LMC in the West are not likely, I think, to also generate political endorsement of the targeted norms relating to indigenous peoples.

Kymlicka’s move is not a simple generalization from the arrangements in the West. He proposes informing the comparative analysis by a more differentiated analysis. Nonetheless he seeks to use the normative power of the LMC ideal as a force to encourage its dissemination. However, my reading of his data brings me to the conclusion that if we want to generalize from the West, we must leave the desirable details of arrangements between majorities and minorities to local politics. If we want to encourage the dissemination of LMC, Kymlicka’s analysis is indeed very valuable. We should seek to create incentives for states to reach arrangements respecting LMC, and we should work towards creating the conditions that are conducive to such arrangements. If we are successful in doing that, there are good chances that we shall indeed see the further dissemination of LMC. However, if these conditions are not met, and if we can not effectively guarantee them, we shall just have to be glad

6 Spain and France will be very reluctant to be forced by the new targeted Human Rights norms to grant autonomy rights to the Basques or Catalans within their countries. Thus they are unlikely to support the development of Human Rights norms imposing such obligations.

for our good fortune. We cannot in good faith demand that majorities in states where these conditions do not obtain, volunteer to grant minorities rights that they think may in fact endanger them. And in all probability, if we do demand such arrangements, states will usually not be inclined to follow our demands, and the power of the Human Rights Discourse itself will be eroded, because these demands will seem hypocritical and politicized.

This prediction is less a matter of normative analysis than it is a matter of politics. In fact, in post Communist countries the picture may be a bit better than one would have expected. In the two decades since the fall of the Soviet Union, the fear of ethnic conflict has not materialized in most places. In some cases positive incentives work. Some post-Communist countries seem to have reached an acceptable balance between democratization and stability.

The tensions between generic and targeted rights, and between the universal Human Rights Discourse and addressing specific conflicts to seek peace and stability, are more immanent. These are the subject of the next section.

III. GENERIC VS. TARGETED NORMS; PEACE AND STABILITY VS. HUMAN RIGHTS DISCOURSE

We saw that Kymlicka thinks that the aspirations of national minorities cannot be met by the kind of generic, universal norms like section 27 of the ICCPR. Even the framework European Convention on the Rights of National Minorities did not really address their wishes for self government. More targeted norms, of the kind that have been developed for indigenous peoples, must be developed.

But is this really the right track even in theory? I suggest that what we see here is a structural tension within different features of the Human Rights Discourse and their legitimacy. Kymlicka’s normative argument is ultimately based on the wish to invoke for Human Rights only one of their strong features – moral validity and power – without taking their other aspect – effectiveness and enforceability - sufficiently seriously. This is a common mistake. In fact, one of the strengths of Kymlicka’s account is that he is very aware of this dangerous tendency. But despite this awareness he, too, falls victim to its seductive power.

I cannot go into this subject in any detail. 8 Let me just say that there are two types of theories of rights as distinct normative entities. One stresses their moral, 

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8 For a systematic account of theories of rights see Matthew Kramer, N. E. Simmonds and Hillel Steiner, A Debate Over Rights: Philosophical Enquiries (1998).
justificatory power as justifying the imposition of duties on others. Rights in this sense are distinguished from claims or wishes or interests because of their special moral force. They are ‘trumps’ because they can defeat the wishes and preferences of others. When I have a right I do not need to depend on the good wishes or the generosity of others. They are under a duty to permit or even provide me with what I am entitled to. The other stresses their effectiveness and enforceability. I have a right rather than an interest when I live under a normative system in which I have the ability or power to make the person or organ obligated by the right to perform his duty. One may well say with Joseph Raz that the first sense is the more basic one. I have rights when there is the moral foundation for imposing duties on others. An important type of right is the institutionalized one - where I can effectively secure that the rights I have are in fact respected. Yet for many, a moral right without enforceability is just ‘nonsense upon stilts’, and the possibility of control is what distinguishes a right from a mere claim or a mere wish.

The Human Rights revolution is an attempt to combine the two insights. One of the many features of the revolution in international law and in international relations is the slow development of institutions whose task is to develop and to monitor and encourage implementation of Human Rights norms. In fact, this is the rationale and the institutional structure that Kymlicka is invoking.

Thus the Human Rights Discourse aims to create a moral reality that transcends the political will and power of particular states and their political decision-making processes. In the previous section I argued that in fact Human Rights Discourse does not usually succeed in forcing states to do what they do not wish to do. This is unfortunately true even in cases in which the rights concerned are core Human Rights (e.g. the right not to be tortured). Here I want to suggest that the logic of the Human Rights Discourse is in principle unable to achieve the task that Kymlicka wants it

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9 This is often called the interest theory of rights. A major spokesperson is Joseph Raz. See Joseph Raz, The Morality of Freedom (1986).

10 Stressing the element of ‘trumping power’ first came from Dworkin’s famous essay: Ronald Dworkin, Rights as Trumps, in Theories of Rights 153-167 (Jeremy Waldron ed. 1984).

11 This theory of rights is often called the ‘control’ theory of rights. A major spokesperson is HLA Hart in his Definition and Theory in Jurisprudence (1953).

12 In the expression made famous by J. Bentham in his Anarchical Fallacies: Being an Examination of the Declarations of Rights Issued During the French Revolution, in 2 The Works of Jeremy Bentham (1843).
to achieve – dictate the details of arrangements between majorities and minorities beyond the kind of ‘generic’ demands of section 27.13

That is because the reason Human Rights have the power to trump the will of political majorities and sovereign states is their universality. But universality means that these duties will be applicable to all societies at all times. As such they are by definition very ‘thin’ and cannot respond to the specific details of the balance of powers and the history of relations between individuals and groups. They cannot make specific claims to recognition and self government and historic territories the subject of universal demands. Article 27 cited above – is indeed universal because the duties it imposes are general and negative. True, these were interpreted in a way to include some positive recognition,14 but it is not an accident that national minorities are not mentioned. The ICCPR was written against the background of the serious destabilizing effects of the rights of national (as well as linguistic) minorities, and their contribution to the eruption of World War II.

When Kymlicka talks about the aspirations of national minorities to a measure of self rule and territorial recognition, he does not acknowledge the richness of contingencies: the relative size of the minority, the history in relations, the potential for secession or subversion, or of the risk of the eruption of civic violence or of foreign interventions. Obviously, other things being equal, better relationships among majority and minority are good for the minority as well as for the stability of the state and the whole population. A better sense of participation and inclusion on behalf of the minority seems both just and prudent. In some situations, however, the minority is not seeking mere integration in the larger society while maintaining its own culture. It is unlikely that the formulation of targeted rights for national minorities could include in a meaningful way the accounting for of this variety of considerations.15

13 “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”


15 A powerful example of the inevitable thinness of international human rights because of their universality is provided by the Human Rights Committee decision in the Joslin case (2002). Two Lesbian women from New Zealand argued that the fact New Zealand did not recognize their right to marry violated their civil rights to family and equality. The majority of the committee rejected both claims while two members concurred. The formulation of the right to marry specifically mentioned man and woman, but these two members thought that denial of marriage or recognition to same sex couples could amount to discrimination. They refrained from stating this since New...
When we add this element into the picture, we understand that the instability between the categories of indigenous peoples and national minorities is not simply the natural result of differential norms. The instability goes further: the stronger norms of indigenous peoples are not universal and cannot be made universal. From the perspective of the indigenous peoples they do reflect norms of great moral force yet they cannot obtain anything like the actual almost universal recognition that most other international Human Rights documents have achieved. The rights to life and to dignity, the right not to be discriminated against and the right not to be tortured belong to the core of what we think of as the most basic entitlements of each and every individual. Article 27 affirms the core rights of individuals as members of groups, that the importance of membership should not be denied and the freedom of acting on such membership should not be defied. Yet this is a very far cry from the kinds of entitlements enumerated in the draft Declaration of the Rights of Indigenous Peoples. Basically, they are entitlements being based on the recognition that these peoples had been historically wronged, expelled and dispossessed. Their claimed rights are an attempt to remedy this past denial. The claims are that, as much as possible, their past control over their resources would be returned to them. These claims are all deeply controversial and their chances of becoming binding international law are not very great.

The reality is complex even for rights that clearly belong to the core rights mentioned above. The issues re-emerge even in the democratic Western states when crises like September 11 hit. In real crises, when states and individuals think that the demands that these Human Rights place on them threaten their existence or welfare - they may not only infringe the rights, but also seek to re-interpret them so that their actions are deemed justified. This process – for clearly recognized rights – shows both the strengths and the limits of the Human Rights Discourse. No state wants to declare openly that it stands in clear violation of these norms. Yet no state will be willing to sacrifice critical interests just to protect a given interpretation of those rights.

Precisely for this reason, states are careful about expanding the realm of recognized rights. Rights of indigenous peoples, migrant workers or national minorities are in a different league. States, especially those whose freedom of action might be seriously Zealand recognized the petitioners and their children as families, and the petitioners could not show illustrations of discrimination between them and heterosexual couples. We can see how the concurring members were losing sight of the important distinction between what seemed to them a desirable state of affairs and universal human rights. If there is indeed a universal human right here, they should have been willing to hold that all countries, including very conservative ones, are under a duty to not discriminate against same sex couples!
limited by the new norms, are not very likely to join such legislative efforts, and this applies to Western democracies just as it does to other countries. Serious differences in the possible force of different claims of rights was recognized by the international community when it translated the Universal Declaration of Human Rights into the two different Human Rights conventions – the ICCPR and the ICSECR – with their different standards of achievements and monitoring and implementation mechanisms.

It is not an accident that the post World War II world, while it made the Human Rights Discourse an integral part of its mandate, restricted effective international action at the beginning only to threats to peace. The fact that today the struggle to promote Human Rights has been added to most of these formulations is very significant – but not so simple. There is a huge gap between the declarations and between the ability and the willingness of the international community to intervene in order to promote Human Rights. Kymlicka himself noticed that ad hoc interventions in terms of minority rights are often the result of the use of violence or the credible threat of use of violence by minorities. Under these circumstances, we cannot seriously say that the Human Rights Discourse has created a fully institutionalized system of rights.

The articulation of ‘stronger’ Human Rights norms for national minorities, showing how the demands of LMC should be applied in such situations, might be difficult. A convention of this sort which will be signed by a very small number of states, mostly ones which stand to benefit from the convention, may be worse than the present situation. Such a reality will highlight the fact that while these rights will be presented as aspiring to be universal, the very limited signature will indicate that they are very far from being accepted as universal.

IV. GOING FORWARD

So there are at least two levels to the discussion. One is how to promote human rights, and the other is how to promote desirable political arrangements around the globe. We cannot improve the effectiveness of the latter ideal by presenting all its manifestations as matters of Human Rights. This will not work and will weaken the special mechanism built to promote Human Rights themselves.

16 It used to be the case that the debates over the scope of humanitarian interventions concerned when such interventions were permissible. Now it seems that a more serious problem is that the international community does not interfere even in cases where such intervention seems not only permissible but even mandatory, such as in cases where it is needed to prevent large-scale genocide, as it was in Rwanda. See Ruth Gavison, Taking States Seriously and the HRD: An Essay in Honor of M. Walzer, (forthcoming) READING WALZER (2011).
How much of LMC should be seen as truly a matter of minority rights? How much of these arrangements should be seen not as a matter of rights within a given state or set of states, but as universal human rights? Kymlicka does not explicitly address the question in this way, although he does seem to presuppose that the move is much simpler than I think it is. I agree with Kymlicka that on the whole LMC has succeeded as a part of a general commitment to Human Rights, and that those who advocate it clearly see it as a development and implementation of the Human Rights Discourse. Yet I believe that we should distinguish between universal Human Rights norms, which should remain generic, and international work towards the promotion of standards that go beyond these norms. The conditions for LMC – especially security and a general high level of democracy, effective government and respect for Human Rights – both individual and collective – for all – should be matters of international resolute action and concern; much more than they are at present times. When these conditions are met, it may be possible that more and more societies around the globe will feel that they can and that they want to generate within them arrangements that resemble LMC in the way suggested by Kymlicka.

To achieve this goal, guidelines do need to be more targeted and context-sensitive. They must be based on detailed studies of the relevant societies and their structures, histories and processes. International help may indeed be critical. It should not, however, be presented as incentives to apply detailed universal norms. Rather, it must come as a part of international action designed to help the relevant societies deal effectively and equitably with internal conflicts and predicaments. True, the detailed proposed arrangements may be ones derived from an analysis of the norms, including the Human Rights norms, applicable to the situation. States should not be allowed to diverge from their Human Rights commitments. But it is likely that detailed proposed arrangements will have to go beyond what can be determined by claims of rights alone. It is these further elements – and the supporting incentives offered by the international community – that might make the proposals realistic.

Stressing the particular features and requirements of the particular situation may help us avoid the instability of the categories. We learn from the experience of other states and societies, but we do not seek to apply to any particular conflict norms that are designed to deal with a general type of a situation, such as minority rights or the rights of indigenous peoples. This attitude will permit the international community to respond to real fears and needs of the situation and to address them with steps designed to mitigate them.

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17 See especially Kymlicka, supra note 2, at Chapter 2.
This approach may suggest that we need to re-draw the line between Human Rights bodies and other international bodies with different responsibilities. Use Human Rights Discourse as a constraining minimal framework identifying aspirations but concentrate on dealing with needs, claims and fears. Use pressure and incentives not only or mainly to make people accept deals and arrangements but to strengthen the conditions required for success.

Targeted norms may create the opposite fear to generic ones – they seem to dictate the political arrangement rather than suggest guidelines that the parties then are free to negotiate. I would therefore tend to take Kymlicka’s analysis in a different direction. Given the vast data that he himself suggests – I would recommend that the international community create a resolute system of support and incentives to help states and societies reach political situations in which the conditions will be more conducive to LMC and in which political powers within states and societies will be encouraged to move in directions that will generate internal arrangements that will be more just and stable for all individuals and groups living within them. In fact, this might be a good way to help along the processes of sequencing that Kymlicka concedes are often required for desirable developments.\(^{18}\)

This is indeed an urgent task. I am not sure the main actors in the international community are willing to embrace it. At times, it seems that they are acting in ways that are counterproductive to the goals that they themselves profess.

Take Cyprus as an example. The conflict between the Greek south and the Turkish north is relatively old but has become non-violent. It is currently not a source of threat to world peace, but it is an unstable situation. Part of the problem that had created the Turkish invasion of 1974 was the fact that the Turkish minority in Cyprus was not well treated. That invasion created two semi-autonomous parts, one Turkish and one Greek. While the border between the two regions is now open – there is no freedom of movement nor cooperation between the two parts of the island.

This seems like a classical case in which an international intervention could have put pressure on the two communities to resolve their differences in a way that would give both groups individual and collective security and even could have become a paradigm of stable and beneficial LMC. Indeed, the former UN Secretary General Anan studied the issues and presented the two communities with a blueprint for reconciliation. The proposed arrangement recognized the needs of both communities for a territorial base and some autonomy, while encouraging political and economic

\(^{18}\) *Id.* at 304-10.
cooperation. It seemed like a fair compromise. What was needed to promote a deal were incentive structures put in place for both communities to see this compromise as better for them than all plausible alternatives. However, the Greeks felt that the concessions required of them (recognizing Turkish autonomy in the North and giving up on their ‘right of return’) were too high and they rejected the plan. This was based on the knowledge that irrespective of the fate of the plan – the Greek part of Cyprus would be admitted into the EU, as indeed it was.

It seems as if at least Europe acted here in a way that made a stable LMC arrangement less likely than its alternative. After Greek Cyprus was admitted into the EU, the long-term prospects for the Turks in Cyprus are not good. They have little leverage to make it worthwhile for the Greeks to reach an agreement with them. As far as the Greeks are concerned, the present status quo seems better for them than a federal arrangement under which they legitimize the Turkish autonomy in the North.

This discussion brings to light another major institutional issue about the international community, one that Kymlicka himself refers to. Kymlicka says that one of the factors making the dissemination of LMC in post colonial countries harder is the fact that these countries often doubt not only the message but also the messenger. Indeed, to persuade a conflicted society that it should reach an agreement giving the present minority more power and rights, the majority needs to feel secure that the concessions will not be a way of weakening it to the point of defeat. When the pressure to move on is external, and the majority feels that the agents having the power to pressure are not likely to make sure the compromise is in fact implemented - they are unlikely to make the concessions unless they have no choice.

Unfortunately, the international community – if we can indeed see it as one coherent agent – has not been a very credible and principled agent. There are interesting and important processes within it which do not tend to generate credibility. Moreover, we are not moving towards an effective world government that can be relied upon to provide the kind of background conditions that Kymlicka himself suggests are needed if we are to move into effective dissemination of LMC.

V. An Invitation to Look at Israel/Palestine

Part of my great appreciation for the fact that Kymlicka has invested so much time in studying in detail conflict situations around the world is the fact that I agree with him.

19 Id. at 257-61.
that details are critical, and that ultimately arrangements must be based on a detailed appreciation of the vernacular. In fact, the complex Canadian experience has given us both Kymlicka and Charles Taylor, two of the political philosophers with the greatest sensitivity to the importance of culture. Naturally, a lot of my own thoughts about these issues are inspired by my own preoccupation with the dilemmas faced by my country – Israel.

Many think that their story is *sui generic*. The conflict among Jews and Palestinians, both within Israel and in the larger area of Palestine/Land of Israel does not fall easily into the post-Communist/post-colonial divide Kymlicka works with. To the best of my knowledge, Kymlicka has never published a sustained analysis of this case study. There are passing references to the conflict in this work yet when I was reading it I found myself thinking very often of the ways the analysis was relevant to our present conflict. In this last section I want to raise some of the issues on which I found Kymlicka’s framework of discussion most stimulating and intriguing.

### A. ARE PALESTINIANS IN ISRAEL AN INDIGENOUS PEOPLE OR A NATIONAL HOMELAND MINORITY?

Kymlicka does notice the fact that some of the leaders of the Palestinian minority in Israel describe themselves as an ‘indigenous people’.\(^{20}\) This tendency probably reflects the fact mentioned by Kymlicka that the rights granted to indigenous peoples are much broader in nature than those granted to national homeland minorities,\(^{21}\) or it may be related to the fact that Jews at times claim that Arabs should not claim rights to language etc. that were never expected by Jews in the Diaspora. Arabs then want to emphasize (rightly) that they are native and should not be treated like immigrants.\(^{22}\) Kymlicka also expresses doubt whether Palestinians in Israel are indeed an indigenous people in the original understanding of this term. I agree.\(^{23}\) I believe the Palestinians

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\(^{20}\) Kymlicka described the Palestinians as akin to European national minorities. *See Kymlicka, supra* note 2, at 267.

\(^{21}\) This seems to be the way Kymlicka sees the process. *Id.*, at 285.

\(^{22}\) It is indeed part of the problem with article 27 of the ICCPR that it is now applied to all minorities, including immigrants. The European framework agreement and their agreement regarding language rights apply first and foremost to the rights of native minorities.

\(^{23}\) Some argue that while most Palestinians in Israel are indeed a native national minority, the Bedouins are an indigenous people. While Bedouins do live a life that is much less urbanized and civilized than most Arabs and Jews in the region, I am not sure that they would fall under that category as well – which supports Kymlicka’s claim that the categories themselves are very inaccurate and unstable.
in Israel are a homeland minority, which forms a part of the people that lived here for generations. They clearly want recognition that this is indeed their homeland and that there are normative implications to this fact, mainly a right to self-determination. I am not sure that labeling them an indigenous people does justice to their national and cultural identity and to the history of the conflict.

In the conflict here, however, we can see another implication of this debate. If the Palestinian minority in Israel is an indigenous people, what does that make of the Palestinians outside Israel? Do they form one indigenous people? If there is a Palestinian state – will it still make sense for the Palestinians in Israel to claim that they are an indigenous people? How do the Palestinians as an indigenous people relate to the other Arab nations around them? Are all the people still living under colonial rule in the world indigenous people? The extension of section 27 to immigrants thus contributed to the instability of the distinction between national minorities and indigenous peoples.

B. WHAT IS THE STATUS OF JEWS IN ISRAEL?

As Chaim Gans has noted, Kymlicka is preoccupied with the rights of minorities. This is despite the fact that he mentions that in the post-Communist world at least part of the complexity is connected to the instability of minority-majority relations. Against this background, it is significant to ask how the Jews, who are presently a majority within Israel, are seen by themselves and others. In fact, the different perception of the Jews is a unique element of the Israeli-Palestinian conflict. Jews see themselves as a people ‘returning’ to their homeland and therefore see as quite natural the rights that they have because they now form the majority in Israel. This is the case despite the fact that at the height of the Zionist project, in 1947, they constituted only one third of the population; and that at the beginning of the 20th century they were hardly 5%! Arabs, on the other hand, often describe the Jews as colonialists and settlers-immigrants, who dispossessed them from their lands.24 Clearly, this divergent description is at the core of the conflict. Some Jews think the whole land of Israel is the ancient and historic homeland of the Jews, most Jews think the territory between the Sea and the

24 Kymlicka makes a short reference to these claims on pg. 278, note 33. At pg. 259 Kymlicka refers to the perception within the Moslem world that Western powers are politicized and hypocritical, unconcerned “with liberating Muslim minorities that have been incorporated into other states in violation of international law, as in Kashmir or Palestine.”
Jordan River is the homeland of both Jews and Palestinian Arabs. Many Palestinians, however, think that the Jews do not belong in Israel. Some draw the conclusion that they should return to their ‘homes’ elsewhere; others are willing to concede that those who are already here could stay; all of them resent the preference to Jews granted under Israel’s Law of Return, 1950. However, that law is seen by most Jews as the core of their own right to self-determination.25

C. SHOULD THE RIGHTS OF PALESTINIANS WITHIN ISRAEL DEPEND ON WHETHER THERE IS A PALESTINIAN STATE?

An interesting question raised by Kymlicka’s analysis is the relevance of the availability of a kin state in which the minority is a majority to the just arrangement between a majority and a minority within a given state. It seems that Kymlicka does not think this availability is relevant and Chaim Gans has commented on that fact. Indeed, the arrangement adopted for Macedonia was not based on the fact that Albanians had their own state.26 I wonder whether Kymlicka would change his mind when the political separation between two states was the result of both a determination by the UN that the communities needed a state each, and a war that was started because the Arabs refused to accept partition.

I should note that the UN resolution in fact sought to guarantee both economic cooperation between the two countries, and a high level of protection for both individual and collective rights of members of one people who would have remained in the nation state of the other people. The resolution mentioned in particular the duty of each of the states to provide the minority with a school system in their own language. There was no mention, however, of self rule in any other way.27


26 Kymlicka discusses the rights of Albanians in Macedonia as an illustration of a case in which the majority declined to recognize minority rights due to professed fears and a perception of threat but in which external pressures pushed in a direction of LMC [e.g. pg. 192-193]. Many Macedonians believe that external pressures made them do things that will in fact endanger their ability to exercise self- determination in their own country. It seems the jury is still out on this question, especially in view of the fact that the majority-minority relations are not stable (The number of Albanians grows more quickly than that of the Macedonians).

D. THE REALITY OF THE SECURITY ISSUE

Kymlicka rightly stresses that the presence of real threats and security issues is one of the most important reasons for the relative lack of success of minority rights and LMC in countries other than the democratic, affluent West. He also reminds us of the well-known fact that security threats are often not the reason but the excuse for measures that violate minority rights. At times the perception of threats is sincere but wrong, and at times the invocation of security is a cynical manipulation in order to dismiss claims for freedom and representation. As Kymlicka stresses, some help or incentives to take risks may in fact persuade even reluctant and hesitant majorities that the risks are well worth taking. This in fact did happen in some countries, belying those who were arguing that security required permanent emergencies and strict security measures.

In fact, the debate about how real the security issues in the Israeli-Palestinian conflict are, and what are the political implications of such issues, is one of the deepest contentious issues within it. In 1947 no one doubted the seriousness of the security issue for the Jewish state. In fact, some were not sure Israel will be able to survive the Arab military resistance. Yet after Israel’s victory there were debates about how the new state should treat the 150,000 Arabs left within it. The military regime applied to most of them became increasingly unpopular among progressive Jews, until it was removed in 1966, a short time before the Six Days War of 1967. And once the “New Historians” started to look at the 1947-49 war more critically, some argued that Israel’s victory was in fact easy to predict, and that at least after the initial stage, the war was no longer defensive but aggressive.28

Today there are debates among Israeli Jews concerning the real security threat posed by both Palestinians outside Israel and by the Palestinian minority within Israel. They affect ideological and political stances within Israel. A detailed discussion of this fascinating issue goes well beyond the scope of this comment.

My purpose here is not to take a stand on these complicated issues. Rather it is to point out that the debate is conducted also among Jews. It is now exemplified very clearly in the debate between the one state solution (OSS) and the two states solution (TSS) endorsed by the international community. Most advocates of the OSS understand that Jews will be a minority in the population. Some celebrate this fact and others think that the OSS reality will in fact develop into an acceptable form of coexistence

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28 Kymlicka does list the situation of Israel and the Arab minority as one among many in which there is a perceived threat. See Kymlicka, supra note 2, at 256.
respecting the rights of both peoples to freedom and dignity. The Peel Commission in 1937, the majority of UNSCOP in 1947, and the UN General Assembly on the 29th of November 1947 did not share this optimism and most Jews today do not think that an OSS will give Jews physical and cultural security.

Any intervention by the international community will have to take this into account. It seems that the fact that the international community still prefers the TSS reflects the judgment that it will indeed be very difficult to defend Jews within an OSS. However, if the TSS is extremely difficult or maybe even impossible to achieve – the international community will have to encourage thinking about a model that responds to the needs and the fears of both Jews and Palestinians.

E. SEQUENCING, POWER AND THE SENSE OF INJUSTICE

In fact, what I have said above suggests that the Israeli-Palestinian conflict is a classic case where sequencing is badly required. Neither of the parties trusts the other. Both parties have earned the suspicion of the other. There is also the question of the sequencing of dealing with the rights of the Palestinian minority within Israel and the resolution or at least stabilization of the Israeli-Palestinian conflict.

When we add into the picture the fact that the Palestinians are also animated by a very strong sense of injustice, sequencing is even harder to achieve. That is because sequencing requires gradual changes in the status quo ante until the parties build mutual trust and incentives can be put in place for the parties not to believe that they will be better off returning to violence. However, it is precisely this gradual progress that is difficult to achieve in such complex settings.

We see this very difficulty now when it seems impossible to bring the parties back to the table to even start talking. Again, I do not want to provide an analysis of this situation, but it surely does not bode well for the kind of cautious progress advocated by Kymlicka. The tragedy is that one can easily understand the deadlock. The problem of those who want to make progress is not understanding, however; it is finding a way out of the vicious circle of violence.

F. THE RIGHT OF RETURN AND THE DANGERS OF THE HUMAN RIGHTS DISCOURSE

Finally, I will put on the table one last point which is central both for the Israeli-Palestinian conflict and to the lessons of the processes described so well by Kymlicka in this book: The Palestinians’ claim that Palestinian refugees and all their descendents have a right under international law to return to their homes within Israel.
I cannot go into this important question in detail. Suffice it to say that the issue brings into high relief both issues of dealing with the history of the conflict and its contradictory narratives, and issues of the applicability of the Human Rights Discourse to complex situations of ethnic conflict.

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I have found Kymlicka’s book extremely significant and stimulating. I hope he is intrigued by this discussion of his book to develop his own thoughts and offer us his insights on the general themes and on the particular issues relating to our own conflict.

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