

Bast, Jürgen; Orgad, Liav

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Constitutional Identity in the Age of Global Migration

By Jürgen Bast & Liav Orgad***

A. The Dawn of Constitutional Identity

Global migration yields political shifts of historical significance, profoundly shaking up world politics as manifested by the European refugee crisis, the Brexit referendum, and throughout the US election. The refugee crisis—which, from a human rights perspective, is first and foremost a crisis of protection—has enhanced the already-existing discussion on justifiable and unjustifiable attempts by nation-states to safeguard their constitutional “essentials” by reinforcing border controls and using selective immigration and citizenship policies. How can liberal states, or a supranational Union formed by such states, welcome immigrants and treat refugees as future denizens without fundamentally changing their constitutional identity, forsaking their liberal tradition, or slipping into populist nationalism? This question is one of the greatest contemporary challenges in constitutional law and theory nowadays.

In an attempt to address these issues, we held an international conference in Berlin on June 6–7, 2016, titled: “Immigration, Citizenship, and Constitution Identity: Germany in a Global Perspective.” The focus of the conference was the effect of global migration on constitutional identity and the legal and ethical challenges it brings about on global, regional, and national levels. The conference had three goals: (1) exploring whether it is justified to impose immigration restrictions in order to protect constitutional essentials; (2) examining how the EU can increase refugee protection and should govern the refugee crisis; and (3) addressing whether the current situation is an “international constitutional moment” for the promotion of a global compact on forced migration. The discussions revealed an urgent need to further research the interplay between immigration and constitutional identity. In light of the centrality of the topic, and given the troubling developments in Central and Eastern European countries, a second conference was held in Berlin on June 30–July 1, 2017,

* Professor of Public Law and European Law at Justus Liebig University Giessen; Academic Director of the Refugee Law Clinic and convener of the Research Group Migration and Human Rights at the University of Giessen.

** Director, “Global Citizenship Governance,” Robert Schuman Centre for Advanced Studies, European University Institute; Head, “International Citizenship Law” Project Group, WZB Berlin Social Science Center; Project Leader, “Global Migration and Human Rights” Working Group, Global Young Academy; Associate Professor, Lauder School of Government, Diplomacy and Strategy, Interdisciplinary Center (IDC) Herzliya. The editorial is partly drawn on my book, *LIIV ORGAD, THE CULTURAL DEFENSE OF NATIONS: A LIBERAL THEORY OF MAJORITY RIGHTS* (Oxford University Press, 2016). The research is supported by the European Research Council (ERC) Starting Grant (# 716350).

titled “Constitutional Identity in the Age of Global Immigration.” Both conferences were supported by a grant of the Fritz Thyssen Foundation; the outcome is included in this Special Issue.

Debates over migration and identity have become pervasive. In almost all Western societies, people are struggling with similar questions—who should belong to the political community, and what does belonging mean? These topics, long-debated in the fields of political theory, citizenship studies, and immigration law are central now in the field of comparative constitutional law. This Special Issue seeks to support the research in this nascent field and offer new approaches to think of constitutional identity in the age of international migration.

In Europe, in particular, the issue of immigration policy and constitutional identity encounters a complex setting. Legal and political actors are struggling on what defines the EU’s “constitutional identity.” What elements of a “European collective identity” are emerging from its policies toward refugees and migrants? How should the EU govern refugee and other migratory movements, bearing in mind both the EU’s commitment to fundamental values (Article 2 TEU) and the obligation to respect the constitutional identities of Member States (Article 4(2) TEU)? How to reconcile constitutional values, enshrined in the EU Treaties, with illiberal notions of constitutional identity expressed by Member States? These questions are among the most challenging issues on the European agenda and invite theoretical insights, conceptual observations, and comparative perspectives.

B. Social Bonds: Meaning and Belonging in a Global Era

Liberal thinkers agree that political communities should share some bond that binds people together. A social bond is perceived as essential for the instrumental purpose of maintaining a liberal democracy. A mere bond is arguably insufficient; some level of commitment to it should exist. Fellow citizens must perceive the common project—at least in its essentials—as being worthy of respect, otherwise they may not be willing to obey the law and, eventually, the political regime may collapse. Put differently, some level of commitment to a shared bond is an indispensable precondition for the realization of social unity, required for the existence of a liberal state. Jean-Jacques Rousseau summarized this point by noting:¹

But when the social tie begins to loosen, and the state to weaken, when particular interests begin to make themselves felt, and smaller groupings influence the greater one, then the common interest no longer remains unaltered, but is met with opposition, the votes are no longer unanimous, and the general will no longer

¹ JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT (Christopher Betts, trans., Oxford University Press, 1994): 134, at 135 (Book IV, Ch. I).

the will of all; contradiction and argument arise, and the best opinion is not accepted without dispute [W]hen in each man's heart the social bond is broken . . . then the general will falls silent.

The nature of the “center” required for achieving social unity or other related goals—community cohesion, social stability, a sense of solidarity, etc.—is a puzzling issue. Every typology is problematic in capturing the nuances of different societies. Some scholars have adopted different variations of political principles. For John Rawls, the source of social unity depends on the principle of justice and minimal liberal values: Mainly, equality, freedom, and tolerance. Other scholars focus on a thicker bond, which includes different versions of culture. Variants of this approach characterize Will Kymlicka’s “societal culture,” Michael Walzer’s “communities of character,” and David Miller’s “public culture.”² But whatever the bond is, liberal theorists agree that there has to be a core to which most citizens are attached, whether this is a concept of justice, cultural identity, or constitutional identity.

Finding a social bond becomes difficult in the age of globalization. Political communities are no longer culturally isolated, if they ever were; societies are more culturally diverse today than in the 19th century when most nation-states were formed, less homogeneous, and not necessarily bounded by a dominant narrative of collective identity. The bond of citizenship is less exclusive as citizenship itself becomes less central as a primary source for identity. Citizens still share values and common interests, but in the marketplace of identities, the notion of national exceptionalism faces multiple challenges. From Australia to the United States, Britain to the Netherlands, Germany to Japan, Canada to France, nation-states seek to cultivate a unique bond that goes beyond market economy and political liberalism; be global and at the same time, keep a core that distinguishes the “here” from the “there.” Yet, the attempt to specify an identity—to articulate unique national characteristics and ways of doing things—reveals how elusive the concept is. We are witnessing an interesting phenomenon in which states attempt to define the essence of their identity, yet cannot agree upon what exactly it is. It is too early to predict whether we are witnessing the “swan song” of the old structure of collective identity, or its transformation. Whatever it is, finding a basis for social commonality and identification is one of the challenges of the 21st century.

² See, respectively, WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 77, 187–92 (Oxford: Clarendon Press, 2000); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 62 (Basic Books, 1983); DAVID MILLER, *ON NATIONALITY* 22–27, 41–45, 68–70 (Oxford: Clarendon Press, 1995).

C. Global Migration: The Politics of “Us” and “Them”

Immigration has brought to the fore the issue of collective identity. As George Orwell rightly observed, “[i]t is only when you meet someone of a different culture from yourself that you begin to realize what your own beliefs really are.”³ Immigration policy echoes national identity by mirroring not only the qualities that “we” value in others, but also the essentials that define “us” as a nation. Regulating immigration criteria, therefore, invites a discussion on a country’s national identity—who “we” are, and what kind of nation “we” want to be.

Until not so long ago, Western countries had no foreseeable need to set boundaries to their collective identity; it was a given, not something that had to be defined. In the post-World War II international system, Western countries did not struggle with the question “who we are?” or search for a bond to bind them together; most of them had a solid sense, albeit largely imagined, of what was British, French, or German. Global migration, together with other globalization processes and the rise of multiculturalism and minority rights, has led to a reality where it becomes more difficult to know what it means to have a common identity and how justified it is to act upon it. This process is particularly visible in the European Union.

The 2015 refugee crisis has added new dimensions to Europe’s already-existing identity debates. Officials in the Czech Republic, Hungary, Poland, and Slovakia declared an admission preference to Christian refugees in order to defend what they perceive as “constitutional identity” and constructed the identity debate along ethnic and religious lines. Europe is experiencing a surge of nationalism in a magnitude that has not been seen in decades, which may endanger not only liberal constitutionalism but also the future of the Union.

The judgment of Court of Justice of the European Union (CJEU) of September 7, 2017, is a particular case in point. The Court dismissed the applications of Hungary and Slovakia to annul the EU relocation quotas (the distribution of a certain number of persons seeking international protection in the Member States). The CJEU rejected the ethnic and cultural meaning that some Member States tried to attach to it. It made clear that “considerations relating to the ethnic origin of applicants for international protection cannot be taken into account since they are clearly contrary to EU law”; the CJEU further added that “If relocation were to be strictly conditional upon the existence of cultural or linguistic ties between each applicant for international protection and the Member State of relocation, the distribution of those applicants between all the Member States . . . would be impossible.”⁴ In spite of the ruling, the Hungarian government has refused to comply with the relocation scheme—according to which, Hungary shall admit 1,294 refugees—calling the decision a “rape” of EU

³ GEORGE ORWELL, *THE ROAD TO WIGAN PIER* 197 (Harcourt, Brace and Company, 1958).

⁴ C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union*, September 6, 2017.

law. The rhetoric of Hungary and other states creates a division between “us” and “them” where the “other” are not only refugees but also EU institutions. Formulating the debate in such terms puts the EU as a “threat” to Hungary’s sovereignty and constitutional identity.

D. The Identity Puzzle: How to Conceptualize Constitutional Identity?

This Special Issue explores the topic of constitutional identity by addressing five themes: (1) theories of constitutional identity; (2) the changing constitution of migration societies; (3) The rise of illiberal notions of constitutional identity; (4) immigration as a challenge to liberal constitutional identity; and (5) constitutional elements of the international and European legal order. The sections in this Issue correspond, broadly speaking, to five sets of questions.

Conceptually, what is the range of meanings of the term “constitutional identity?” Is constitutional identity real, imagined, or both—and should it matter for a constitutional analysis? What is the normative difference between “constitutional identity” and other societal and philosophical conceptions of collective identity, such as “national identity,” “constitutional essentialism,” and “constitutional patriotism?” What are the normative functions of constitutional identity? In *Constitutional Identity as a Constructed Reality and a Restless Soul*, Monika Polzin provides answers to some of these questions. She delves into the theory of constitutional identity, offers a possible definition to its enigmatic essence, examines different scholarly views to understand it (Jürgen Habermas, Michel Rosenfeld, Gary Jacobsohn), and shows three ways by which it can be constructed (constitutional text, interpretation, application). Pietro Faraguna, in *Constitutional Identity in the EU—A Shield or a Sword?*, suggests a theoretical examination of the functions of constitutional identity in Europe. He presents different conceptions and applications of constitutional identity that enable a better understanding of the concept. Uwe Volkmann’s article *What does a Constitution Expect from Immigrants?* aims at developing a constitutional theory of immigrant integration. He provides an understanding of the constitution that is not merely a written text or an institutional framework for politics. In his view, the constitution is an evolving social practice that reflects the identity of a political community and establishes some “constitutional expectations” towards migrants. The article analyzes the type of these expectations as well as their justifications under different theories of constitutionalism.

Immigration law provides a unique platform to reflect on three issues: defining the “we,” setting criteria for identifying the desired “they,” and finding the core to which “they” should subscribe to become part of “us.” *Empirically*, what is the connection between immigration law and constitutional identity: Is it a mirror of a country’s constitutional identity, or a display of selective elements? Is the concept of constitutional identity used to perpetuate a fixed identity notion (static), or bring changes (dynamic)? What role does immigration policy play in constitutional design? To address this set of issues from a comparative view, this Issue offers two case studies. In *Opening the Ranks of Constitutional Subjects: Immigration, Identity, and Innovation in Italy and Canada*, Francesca Strumia and Asha Kaushal analyze

the nexus between immigration policy and constitutional identity by focusing on Italy and Canada; although they find that immigration law mirrors constitutional narratives of the “self,” they challenge the mirror thesis as a sole explanation and present a more nuanced approach on the nexus between immigration and identity, highlighting recent changes in the context of pro-immigration policies. In *Crafting Constitutional Identity in the Era of Migration and Financial Crises—The Case of Greece*, Dimitra Gamba and Dimosthenis Lentzis elaborate on the identity debates in Greece, indicating that, in spite of the refugee crisis, Greek courts have rarely appealed to constitutional identity; the article explains these surprising findings, among other things, by concluding that Greek constitutional identity is a work-in-progress.

The backlash against immigration is a key factor for the rise of an illiberal brand of constitutional identity. Politicians and courts in Central and Eastern European states use this concept to promote illiberal policies and safeguard themselves from EU law. *Normatively*, from a liberal perspective, what variations of constitutional identity may/should/must not a state adopt? Is a primordial (ethno-religious) identity always unjust? Do those who invented the concept of constitutional identity as a shield against EU law, notably the German Federal Constitutional Court, bear partial responsibility for the illiberal transformation of their brainchild? In *The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts*, Kriszta Kovács presents a troubling appeal to an ethno-cultural understanding of identity in the jurisprudence of East-Central European courts. Focusing on the Czech Republic, Hungary, Poland, and Slovakia, she shows that the concept of constitutional identity has become associated with ethno-cultural politics. In *Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary*, Zsolt Körtvélyesi and Balázs Majtényi focus on Hungary as a case study for demonstrating how the concept of constitutional identity has been used to incorporate exclusive constitutional values that undermines Hungarian democracy. The way the EU handle Hungary, they conclude, will also define “the EU’s own identity.”

Cultural diversity caused by immigration presents a challenge to a country’s identity. Recent tensions have focused on cultural and religious accommodation in education law, labor law, and family law. *Morally*, how legitimate is it for a political community to restrict migration in order to protect some forms and expressions of its constitutional identity? How should a liberal society reconcile the self-determination of individuals belonged to immigrant and minority groups with self-determination of individuals belonged to a majority population? In *Circumcision: Immigration, Religion, History, and Constitutional Identity in Germany and the U.S.*, David Abraham explores the issue of circumcision as a case study for the tension in the religious and cultural identity of individuals *vis-à-vis* majority populations. The case of circumcision illustrates a wider dilemma—how tolerant should a liberal society be toward minority practices that are perceived intolerant by the majority population? In *Five Million Germans Come to Denmark: A Thought Experiment*, Alexander Yakobson isolates the constitutional identity debate from its usual grounds for exclusion (national security, welfare system, etc.) and brings a hypothetical scenario of mass “immigration de-luxe” in the liberal world. How should Denmark react to a massive movement of five million Germans to its

territory, he provokes, and gets into the core of self-determination and the meaning of having an identity in the nation-state. Can Denmark, under this scenario, set a numerical limit and, if so, based on which grounds, and can it be justified from a liberal perspective?

The final section of the Special Issue discusses legal developments from which elements of a constitutional identity beyond the nation-state could emerge. Elspeth Guild reports on *The UN's Search for a Global Compact on Safe, Orderly and Regular Migration*, i.e., the recent attempts in international law-making to strengthen the universal human rights of migrants. Sara Iglesias Sánchez focuses on EU Law. Her paper, *Constitutional Identity and Integration: EU Citizenship and the Emergence of a Supranational Alienage Law*, evaluates the principle of equal treatment between EU citizens and EU foreigners. While both contributions are firmly grounded in positive law and established jurisprudence, they raise imminent *practical* questions. Can human rights, in particular the principle of equal treatment of citizens and foreigners, crystalize as constitutional elements of the international and European legal orders that stabilize a liberal brand of constitutional identity in view of the challenges posed by global migration?

The identity challenges brought about by global migration are here to stay for a long time. New realities challenge fundamental assumptions that have governed constitutional theory for decades, giving rise to an important set of divisive questions. This Special Issue explores these questions from a theoretical and comparative perspective and offers a better understanding of the constitutional challenges and the liberal methods to confront them.