Citizenship and the Welfare State: A Critique of David Miller's Theory of Nationality

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Introduction

In the post-war period of its formation, T.H. Marshall's theory of universal social citizenship constituted the "core" social democratic idea of the welfare state (Marshall, 1964; Dahrendorf, 1996; Esping-Andersen, 1990: 21). According to this view, shared rights function as the primary source of social unity and can override other particularistic position-based interests (Marshall, 1964: 111–14). More recently, egalitarian theorists, such as John Rawls, have developed the principle of shared entitlement as a fair source of social unity in pluralist societies (1999a). Rawls argues that shared entitlement to primary social goods can generate an "overlapping consensus" on the legitimacy of just institutions among citizens with diverse private interests (1999b). Shared rights of citizenship is a "political" approach to legitimacy, in which institutions are charged with generating their own bases of support. It is political because justification appeals to the interests of citizens—not to pre-political identities or relationships—in its search for support for redistributive institutions. The present era of welfare state restructuring, however, has raised doubts and concerns regarding basing legitimacy on shared entitlement. As a result, Marshall's theory of universal and institutional citizenship has come under intense and diverse criticism, both of its efficacy and fairness as a mechanism of social unity and source of institutional legitimacy (for example, Klausen, 1995; Kymlicka and Norman, 1995; Rosanvallon, 2000).

This paper explores what can broadly be referred to as a cultural criticism of the motivational efficacy of the institutionalism of rights-based citizenship. Specifically, it examines David Miller's nationality thesis and critique of rights-based citizenship as the motivational foundation of the

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welfare state (1988, 1995, 2000). He argues that institutional sources of legitimacy cannot transcend self-interest in political preference setting, and so without other ethical attachments the legitimacy of comprehensive welfare structures requires broad perceptions of shared socioeconomic risk. When differences in risk are explicit, the legitimacy of redistributive institutions must be moral and rooted in ethical relationships of bounded persons, particularly those of co-nationals. For this reason, an egalitarian society should foster the sense of nationality and the particular obligations of that relationship.

This paper begins with an overview of Marshall's conception of institutional citizenship, its relation to contemporary egalitarian theorists' attempts to deal with the problem of social unity in pluralist societies (particularly Rawls's political liberalism), and Miller's criticism of it. It then distinguishes between two types of cultural positions on institutional legitimacy, and by illuminating his justificatory concerns with regard to the fair accommodation of reasonable pluralism, situates Miller's approach within this classification. It then examines the explanatory, instrumental and ethical dimensions of the nationality thesis with regard to the redistributive politics of the welfare state. The argument to be developed is that institutions can secure their own support and that presenting a cultural argument for the legitimacy of institutions faces inherent difficulties in reconciling its motivational mechanisms with the demands of fairly accommodating societal pluralism. Securing the bases of social unity, while instrumentally necessary for the legitimacy of just institutions, must occur within the political sphere and appeal to the shared political interests of otherwise diverse persons. Persons, as citizens, share the interest of receiving fair treatment from the institutions which bind them in that relationship. Shared rights of citizenship can be theorized as constituting the basis of a coherent theory of liberal nationalism with the motivational capacities to realize social justice in the national welfare state, though its development need not be constrained by those boundaries.

Institutional Citizenship

The basic concern Marshall addresses in his account of citizenship is the problem of legitimacy that stems from the conflict between the egalitarian justification of liberal societies and the presence of market-based inequalities. He argues that extending equal entitlement to a broad range of social rights can bridge this justificatory gap by diminishing the scope of markets ("money incomes") in the distribution of life chances ("real incomes"). The motivational question is how shared social entitlement can be stabilized in a society that is stratified along multiple lines. The universal theory of citizenship mixes the political organization of inter-

Abstract.   For much of the post-war period of welfare state formation, T.H. Marshall's idea of shared entitlement to universal social rights of citizenship formed the theoretical foundations of social democratic political reforms and legitimacy. This approach has been updated by contemporary egalitarian theorists, such as John Rawls. The ongoing politics of restructuring have led to a growing number of arguments against the motivational capacity of an institutional account of social unity. This paper examines a particular argument against rights-based citizenship—David Miller's theory of nationality. Miller argues that "pure" citizenship rests on self-interest, and thus when differences in risk are explicit it can only legitimate minimal redistribution. Strong welfare states require pre-political ties and must be embedded in the ethical relations of shared nationality. Against Miller's position, it is advanced that shared citizenship has both effective motivational and moral dimensions. It can also address the problems the nationality thesis faces in reconciling its account of motivation with the moral diversity that is constitutive of pluralist societies.

Résumé.   Dans l'après-guerre, au moment de la formation des Etats-providence, la mise en place et la justification des politiques social-démocrates s'appuyèrent en grande majorité sur la théorie de T.H. Marshall à propos du rôle joué par les droits sociaux dans l'intégration civique. Cette approche a été actualisée par des théoriciens égalitariens tels que John Rawls. Les politiques actuelles de restructuration de l'Etat-providence ont provoqué la multiplication d'un certain type de critiques soulignant les insuffisances de cette approche institutionnelle du lien social en termes de ressources motivationnelles. Cet article examine l'une ces critiques, formulée par David Miller dans sa théorie sur la nationalité. Miller soutient que la citoyenneté "pure" repose sur l'intérêt personnel et qu'elle ne peut justifier qu'une redistribution minimale, lorsque les différences engagées sont manifestes. Pour affirmer leur autorité, les Etats-providence ont besoin d'être fondés sur des liens prépolitiques et soutenus par les rapports de solidarité d'une nationalité commune. A l'encontre de la position défendue par Miller, on avancera que la citoyenneté possède de façon effective une dimension qui est à la fois morale et motivationnelle. En outre, elle est à même d'affronter les problèmes que soulève la thèse sur la nationalité, en réconciliant sa conception de la motivation avec la diversité morale inhérente aux sociétés pluralistes.

ests towards the consolidation of a particular mode of institutional formation with a moral understanding of legitimacy based on the inherent equality of citizenship.

The most pressing challenge to the stability of egalitarian institutions is the presence of conflicting interests rooted in inequality. In diminishing the political salience of conflicting interests, Marshall argues that equal entitlement to universal rights forms "a new common experience," which alters related expectations and interests in ways that diminish the political importance of class-based interests (1964:102–3). Organizing interests through shared entitlement informs the "political logic" of the universal welfare state (Esping-Andersen, 1990: 67–68; Stephens, 1986). Institutional political economy shows that universal institutions—"those which take from everyone and give to everyone" (Rothstein, 1998: 150)— are more resilient to pressures for reform than are targeted policies because they create concentrated interests around the stability of institutions, which override class-based interests (for example, Pierson, 1994; Swank, 2002). By "framing policy in such a way" as to integrate conflicting interests in an egalitarian system of entitlement, universal social policy instigates a "two-way process" between institutions and supportive interests so that

the universal welfare state functions as a "perpetual motion machine" (Rothstein: 152). The basic idea is a protective one, whereby "policies create new politics" in which program beneficiaries become increasingly prominent political actors (Schattschneider, 1935: 288). A universal policy gives rise to a cross-class interest mobilized behind the stability policy itself.

As mentioned, the institutional source of legitimacy in Marshall's theory of citizenship has been developed by contemporary egalitarian theorists in addressing the problem of fairly constructing social unity for the instrumental purpose of supporting just institutions while respecting the reasonable pluralism that is constitutive of democratic societies. In a pluralist society, Rawls argues that the search for unity must be limited to the political sphere and thus that a conception of justice must generate "its own support" (1999: 154). Rawls holds that political unity is achievable along with societal diversity since, despite the plurality of private ends, there is a relatively general set of available and needed resources to pursue them. Politically, Rawls contends, diverse persons can generalize their specific interests as claims of citizenship, since, "citizens' needs are objective in a way that desires are not; that is, they express requirements of persons with certain highest-order interests who have a certain social role and status. If these requirements are not met, persons cannot maintain their role or status, or achieve essential aims" (1999a: 373–774).

Following Rawls, institutional mechanisms of the distribution of life chances generate their own support among otherwise deep diversity through their justification as "all-purpose means" for the pursuit of disparate ends. Thus, a "public understanding" of justice and unity among persons "holding different and opposing, and even incommensurable, conceptions of the good" can be obtained through the nature of past experiences and subsequent expectations generated by entitlement to the resources needed for the "advancement of final ends and loyalties" (1999a: 361). Because of their generality, social rights of citizenship can be extended into greater spheres of social and economic life without negatively affecting the pursuit of specific ends. As a result, Marshall argues that shared social entitlement causes, "social integration [to] spread from the sphere of sentiment and patriotism into that of material enjoyment" (1964: 96). Constructed and justified as "all-purpose means" rather than as intrinsic goods related to some prior attachment or end, the expansion of entitlement aims to neutrally function as the primary source of integration and unity in pluralist egalitarian political communities.

However, a straightforward interest-based argument for the stability of redistributive institutions faces significant problems. It specifically cannot explain the creation of universal institutions in the face of initial inequality; nor does it provide motivational resources to meet unaddressed and emerging needs and inequalities (Offe, 1987). In a strict interest-

based construction its motivational capacity is largely limited to providing an effective "rear-guard" defence of existing institutions against external pressures for their reform. Thus, as Rothstein argues, because there is "strong reason to question whether self-interest is a sufficient explanation of political behaviour ... the universal welfare state embodies a moral as well as a political logic" (1998: 156). Universal citizenship, Marshall argues, is a "principle of equality" and functions as an ideal "set against structural inequalities" compelling institutional formation towards more just outcomes as a condition of legitimacy. In processes of institutional formation, Marshall contends that the "the citizen is the superstructure of legitimate expectations," and so its condition shapes legitimation imperatives (1964: 104).

The moral dimensions of equal entitlement are also given expression in Rawls's idea of an "overlapping consensus" among diverse citizens on the legitimacy of institutions. He argues that experiencing egalitarian institutions moves support for them beyond material self-interest so that egalitarian political settlements represent more than a "mere" modus vivendi (1999b: 446). Experiencing just institutions leads to what Rawls calls "political virtues"—such as toleration, reasonableness and the sense of fairness—which constitute "political capital" to direct subsequent institutional formation towards justice. Institutional norms can affect the nature of solidarity and specify its motivational capacities in the direction of egalitarianism through the incorporation of the norms of just institutions into political identities, one's sense of justice and related preferences. Universalism in social policy preserves the standing of equality in the politics of the welfare state by reflecting the unconditionality of citizenship in socio-economic distributions, thereby heightening egalitarian norms in the terms of legitimate entitlement claims.

Miller's nationality thesis is based on a skeptical view of the moral possibilities of the shared rights of citizenship, and he attributes the motivational shortcomings of institutional citizenship to what he sees as the central role of self-interest. He argues that the type and intensity of motivation derivable from a "pure" identity of citizenship—that is, one lacking a "communitarian background," and constituted instead by shared institutional entitlement—represents no more than a reciprocal agreement between mutually uninterested persons based on their mutual "participation in a practice from which they stand to benefit" (1995: 71–72). Support for redistributive institutions is, in this case, a form of rational self-insurance (see also Dryzek and Goodin, 1986; Heath, 2006). Rather than creating unity, the development of universal citizenship reflects prior societal unity. In this understanding, the post-war formation of the universal welfare state received its legitimation from the relatively homogenous economic experiences of the working classes in industrial capitalism

and the relatively equal distribution of economic risks across society. With the de-industrialization and disorganization of capitalism, economic identities become fractured and differences in actual risk are made explicit (Rosanvallon, 2000). Acting from self-interest, well-off persons, it is argued, will withdraw their support for redistributive institutions since they no longer perceive themselves as vulnerable to the socioeconomic risks they protect against. As market-based inequality is consolidated in particular roles, the capacity of shared rights of citizenship to legitimize welfare efforts along the insurance model diminishes. To move beyond this limitation, Miller argues that the rights of citizenship must be embedded in the moral relationships of shared nationality; that is, the legitimacy of political rights and institutions requires the deeper, and prior, mutual ethical obligations that exist between co-nationals. We turn now to evaluate Miller's nationality theory of motivation and legitimacy in the welfare state and to ask whether it poses a credible alternative to institutional citizenship that is capable of constructing principled social unity while respecting societal diversity.

Culture and Institutional Legitimacy

Miller's nationality critique of institutional citizenship is a form of a communitarian or cultural position, since it links the possibilities of institutional formation and functioning to pre-political factors. Culture, as an explanatory approach, looks for the presence of a "coherent cluster of attitudes" and a "deep-seated configuration of norms," which inform institutional formation and performance (Jackman and Miller, 2004: 8; also Etzioni, 1996: 140–48; Putnam, 1993: 120, 165). To examine the nationality thesis, it is important to distinguish between two ways the functional role of culture can be understood. First, the role of norms can be understood directly, as the presence of moral agreement and thus generally shared views as to what justice requires. Second, norms can be understood indirectly, as widely held ethical attachments, civic virtues or other informal bases of co-operation that are capable of supporting an array of institutional forms and goals. Miller's nationality thesis attempts to defend the latter view out of justificatory concerns regarding the former in pluralist societies.

His rejection of the first interpretation of the motivational role of culture as direct and shared norms pertains to his egalitarian concern for the fair accommodation of pluralism in justification, which precludes appealing to a specific conception of final ends. For this reason, Miller endorses a distributive (or resource) conception of justice (or view of socialism) over an "aesthetic" understanding (1988: 53). An aesthetic critique of actual capitalism alludes to the teleological Marxist notion of

humans as producers and to the condition of alienation from that end caused by the commodification and division of labour (Marx, 1978: 70–72). In contrast, a distributive critique of free markets does not make similar claims to "comprehensive" doctrines and ends. According to Miller, the aesthetic argument is to be rejected on egalitarian grounds, in favour of a distributive argument. He argues that the aesthetic critique is perfectionist and places a specific doctrine and form of life ahead of other reasonable options, and bases justification of institutions on this partial ranking. Even if such a mechanism is available—one which facilitates, mandates, or privileges the desired end—its justificatory basis is a specific view of the good that has been "elevated to the status of universal truth" (Miller, 1988: 56). Though certainly adding to a democratic critique of capitalism, it is a form of justificatory argument that is incapable of gaining assent in a pluralist society.

Ostensibly, embracing a distributive conception of social justice as a way to reconcile justification of redistributive institutions with pluralism seems to do away with an important role for pre-political unity. Instead, it seems to indicate that a theory of justice must generate its own support in the political sphere as a condition of pluralism. As Rawls asserts, "a democratic society is not and cannot be a community" when a community is posited as "a body of persons united in affirming the same doctrine" (2003: 3). In the proper absence of an assumption of moral agreement, justification, it would appear, must proceed from the political sphere and the shared public identity and interests of citizenship. Miller, however, rejects this implication and seeks to retain an essential role for a second normative understanding of "community" as a precondition of justice.

Instead of shared *thick* beliefs or identity as the basis of legitimate institutions, Miller endorses a more general, soft-communitarian account of community that accords with the second, relational, understanding of the role of cultural norms in institutional formation. According to Miller, "our ideas of distributive justice are powerfully affected by our perception of the relationships generally prevailing in the set of people within which the distribution is going to occur" (1988: 58). Thus, different types of relationships are accompanied by different distributive principles, with more particular relationships possessing deeper obligations, and so "states which in this sense aim to be welfare states and the same time to win democratic legitimacy must be rooted in communities" (1995: 93). While members need not agree with their fellow members on moral matters, they must feel the sense of ethical attachment that is rooted in their relationship, which requires politically promoting its salience. Without felt "communitarian relationships," and their attendant obligations, extensive redistribution will not be considered reasonable by those from whom resources are being taken. According to Miller, "we can only expect them

[the well off] to consent to institutions that enforce the preferred distri-
bution if they regard themselves as bound to the beneficiaries by strong
ties of community" (1988: 59). On the other hand, the demands of jus-
tice in a strictly political relationship will, Miller contends, be minimal
in the Nozickean sense (see Nozick, 1974: 26–28). Egalitarian political
rights, then, are the collectivization of the inter-personal obligations of
communitarian relationships, and "the stronger the ties, the more egali-
tarian the distribution can be" (Miller, 1988: 59). By employing rela-
tional notions of behavioural and attitudinal norms that accompany the
ethical relations of national communities, Miller's nationality thesis is
the less direct version of the cultural position. It is argued below, how-
ever, that consistently maintaining this distinction between the roles of
the two types of norms in a motivational account of the welfare state is
ultimately untenable. This causes significant difficulty in reconciling the
nationality thesis with egalitarian justificatory requirements in pluralist
societies.

Having identified Miller's critique of institutional citizenship and his
justificatory concerns, we now assess the motivational aspects of the
nationality thesis in its explanatory, instrumental and ethical dimensions.

Nationality and Welfare State Formation

Following the nationality thesis, we should expect to observe a strong
correlation in the "world of welfare capitalism" between strong welfare
states and strong national identities. To a certain extent, there is some
truth here. The Scandinavian social democratic welfare states exhibit both
cultural homogeneity and high aggregate welfare expenditures; such is
also the case with certain corporatist welfare states, including France and
Germany (Esping-Andersen, 1990). It is important to note, however, that
these latter regimes, while spending significant portions of their GDP on
welfare generate minimal social redistribution, and work instead towards
income maintenance and "vertical redistribution" over the lifespan of indi-
viduals (Cameron, 1991; Offe, 2000). Despite this distributive structure,
overall spending levels do impact decommodification in welfare states
and so lessen market-determined inequality (Myles, 1998). Neverthe-
less, certain counter-examples to the nationality thesis exist, two of which
Miller directly confronts: the Canadian and American cases.

With the divisions in the Canadian national identity, following the
nationality thesis we would expect to see a weak welfare state and yet
observe a strong welfare state in the Canadian case. While there may be
good reason to question this description of the Canadian welfare state
(Esping-Andersen, 1990), a sufficient proportion of its institutions exhibit
social democratic qualities to permit this labelling—especially in com-

parison to the American case—and the tension it creates in the national-
ity thesis (Olsen, 1994). Miller responds by arguing that during the history
of the formation of the Canadian welfare state, the French–speaking pop-
ulation of Quebec saw themselves as part of "*la nation canadienne-
francaise*." Thus, during this time there was a relatively unified Canadian
identity, which the Canadian welfare state came to embody—"although
French- and English-speakers thought of themselves as different kinds
of Canadians, they held in common a Canadian identity that was more
than merely the fact of membership in a single state" (1995: 95). So the
explanatory aspect of the nationality thesis is not threatened by the Cana-
dian case, but is in fact strengthened as "once again we find that demo-
cratic states that have successfully pursued policies aiming at social justice
have a unifying identity" (1995: 95). Whether or not such a time in Cana-
dian history meaningfully existed, this response misses the broader issue
of more complex identity and "territorially fragmentation" competing
against a unified state that has defined, in large measure, the formation
of the Canadian state (Banting, 1995: 269). This inexhaustively includes
(leaving aside the far more complex issues related to indigenous poli-
tics), in addition to Quebec, the regional politics and identities of west-
ern and eastern Canada. According to Banting, in the building of the
Canadian state rather than representing Canadian unity, social policy has
functioned as an instrument of "national integration on a territorial basis"
(1995: 270). Banting further emphasizes that the ongoing divisions in
the Canadian state continue to drive and explain the formation of social
policy in Canada, as well as elsewhere, "as long as citizens define their
communities locally and nationally, as long as ethnic and linguistic groups
are geographically concentrated, as long as regional economic inequali-
ties persist within political communities, territorial politics will inform
social policy, and the welfare state will be an instrument of statecraft as
well as an instrument of social justice" (1995: 300).

In this alternate reading, the institutions of the Canadian welfare state
are, in part, constitutive of the Canadian nationality. In addition to the
Canadian case, there are numerous other examples in the formation of wel-
fare states in which social policy is part of the political process of creat-
ing national unity. In many cases the state has preceded and strengthened
national identity, and historically its institutions have functioned as a
source of national integration (Kuhnle et al., 1999: 65–69: also Weber,
1977). In the history of the welfare state we see undemocratic elites (Biz-
marck, for example) using social policy to strengthen loyalty to the state,
and to weaken more particular forms of attachment and social protection
that work against national unity and state authority (Rimlinger, 1971;
Weale, 1990). Universal social policy has also been used by social dem-
ocratic reformers with the explicit purpose of weakening sub-national
forms of social protection and acquiring middle-class support for the

welfare state (Esping-Andersen, 1990: 31, 66–67). The legitimation effects of nationality and citizenship can be understood to "cut both ways" (Keating, 2001). The condition of citizenship—its shared experience and related expectations—helps define national identity, which in turn supports the obligations of citizenship (Keating, 2001: 40; Moreno and McEwen, 2005: 8). The importance of the welfare state in identity formation and cohesion is further evidenced by the centrality of social policy in the politics and struggles of sub-state national groups (Beland and Lecours, 2005: 679). Thus, with the historical role of institutions and social policy in developing and sustaining social unity at national levels, strong national identity need not be considered necessary for the development of the welfare state; the causes of the welfare state are plural and it has been used to promote broader solidarity by a variety of interests.

Against the wide range of forces behind welfare state formation, in order to makes sense of positing its institutions as the collectivization of the ethical duties between co-nationals, the nationality thesis is committed to a view of the welfare state as a mechanism for realizing social justice; its explanatory capacity is thus limited by the fact of a plurality of forces behind the welfare state. Nationality, however, may have instrumental value for realizing social justice in ongoing institutional formation and so should be fostered by those who hold that justice requires significant redistribution. Fostering nationality has instrumental value for realizing social justice, Miller argues, because a nation is an ethical community that consists, in part, of obligations for individuals "*qua* members of this nation to support common projects and to fulfil the needs of fellow members" (1995: 73 n. 25). Thus, though social justice was not the original motivation in much of the institutional design of the welfare state, moral principles can be imposed on its subsequent formation in a strong national community. With the stronger ethical attachments of co-nationals, greater redistribution can be achieved since for individual members "being able to contribute to the fulfilment of others is an integral (and *not* an instrumental) part of their own fulfilment" (Tam, 1998: 224). To steer political preferences in a moral direction that is conducive to realizing social justice in institutions, it is important to have the "bounds of nationality and the bounds of the state coincide" and to incorporate new members of the state into the national identity (Miller, 1995: 71–73).

The American case presents a strong counterexample to this argument because it has both a strong sense of national identity and arguably the most paltry and inegalitarian welfare system in the developed world. By way of formulating a response to the American case, Miller introduces a further aspect of the nationality thesis; whereas the moral element appeals only to the presence and "strength" of national identity, a further cultural element adds consideration of the "character" of national identity, and the political virtues it gives rise to (1995: 94). In light of the

American counterexample, it no longer suffices to solely posit "strength" of national identity as determinative, we must additionally assess the prevalent features of national culture, its moral "character." Thus, the American case is accommodated by pointing to its highly individualistic culture, which stresses self-reliance, independence and so forth. So, as it were, despite the strength and salience of American national identity, its character is such that individual Americans are without the type of strong moral obligations to their co-nationals that would lead to the development of strong redistributive institutions. Instead, American political morality favours self-help and a politics of labour market activation through targeted and stigmatizing relief, opportunity discourse and charity (Esping-Andersen, 1990: 73–77; Marmore et al., 1990). Individualistic and self-help cultural norms are barriers to redistributive institutions, and so the nationality thesis stands since the American welfare state accurately reflects America's national culture and political morality.

Recalling the distinction made above regarding the direct and indirect functioning of norms in cultural explanations, the "character" response to the American case is problematic for Miller's nationality thesis. In addressing the American counterexample by adding the character dimension of national identity (in addition to strength or salience), Miller raises an even more potentially problematic issue than the anomalous nature of the American welfare state; if nationality is the key, but it is its character that ultimately matters, what causes the character of a national identity and national culture to take the shape it does? Following the cultural argument, it must be the case that it is the direct norms that are doing the work of defining American cultural identity, that is, the "aggregate properties of society" based on a "configuration of attitudes" that favours self-reliant individualism. Indirect or second–tier norms, like generic or uncharacterized ethical attachment and obligations, are not enough to explain outcomes. Rather, some prior account of deeper-seated norms is required to explain how initially neutral or apolitical variables (like a shared sense of national identity) are conditioned to lead to specific institutional outcomes. Offering such an account will however violate the reasons for Miller's rejection of the perfectionist critique of markets in favour of the distributive argument, namely, that a shared comprehensive doctrine or conception of the good cannot function as a justificatory basis in a pluralist society.

While the welfare state depends on some degree of shared identity to overcome the role of conflicting interests rooted in particularistic attachments in institutional formation, undefined or unprincipled membership is not, on its own, enough to secure the development of egalitarian institutions. Rather, the specific character of shared identities conditions the limits of institutional formation. The more difficult motivational question for egalitarians is how the character of unity can be

fairly conditioned to support justice in institutional formation. An egalitarian theory of motivation must have the capacity to create principled collective identities while respecting the moral diversity of pluralist societies. Miller's liberal-nationalist answer proves unsatisfactory because to answer the character question it must appeal to deeper pre-political norms that we cannot assume are shared. Social unity must begin at the political level, or as Rawls puts it, as a condition of the fact of pluralism a conception of social justice must be able to generate its own support through its institutions (1999: 230). While not ruling out strong national attachment as instrumentally valuable to realizing justice in institutional formation, it is advanced that its relationship to citizenship must be differently ordered than in the nationality thesis, in which egalitarian citizenship depends on strong national ties. To accommodate diversity, the norms of shared liberal nationality must be derived from the ties of citizenship and the institutional forms that are constitutive of that relationship. This section has identified difficulties in the nationality approach to political solidarity and has attempted to outline egalitarian reasons, which appeal to fact of pluralism, for deriving normative social unity from institutions.

The Ethics of Nationality

Keeping the above discussion in mind, we now turn to a discussion of the ethical dimensions of Miller's nationality thesis: whether linking justice to national systems of welfare provision is itself ethical. Doing so will further clarify some of the difficulties faced by the nationality thesis discussed above. To reiterate, Miller's instrumental claim regarding nationality is that the particular moral capacities of nationality, as a formative aspect of individual identity and interests, can uniquely support just institutional formation. This is argued to be so due to the nature of the moral ties between co-nationals, which when appropriately fostered and mobilized will form the support basis for egalitarian policies. Persons, it is maintained, will make greater material sacrifices for those with whom they share a communitarian condition.

The further claim is that instrumentally appealing to these moral ties is in itself ethical. According to Miller, "a proper account of ethics should give weight to national boundaries, and that in particular there is no objection in principle to institutional schemes—such as welfare states—that are designed to deliver benefits exclusively to those who fall within the same boundaries as ourselves" (1995: 11). Thus, Miller argues that we can legitimately have specific "rights and obligations of nationality" (1995: 71). In other words, a nation taken as an "ethical community" in which members owe one another "special obligations"

is "rationally defensible" against universalist claims that relations between persons are not properly "part of the basic subject-matter of ethics" (1995: 49–50). Ethical particularism "invokes a different picture of the ethical universe, in which agents are already encumbered with a variety of ties and commitments" (1995: 50). Pre-political "ties and commitments" provide legitimacy to institutions that promote meeting the obligations attached persons have to one another. The welfare state, according to Miller, is the collectivization of the "special duties" that we rightly owe to our co-nationals. Miller's understanding of the concept of nationality incorporates two basic claims. First, it posits an understanding of the welfare state as institutions designed for the promotion of a view of social justice embedded in pre-political relationships, the demands of which are derived from the nature of the prior moral duties. The second claim is that the persons to whom we owe specific and fairly comprehensive social duties are our co-nationals. Taken together, the welfare state is a structure of justice promoting institutions, which are the collectivization of the special moral duties we rightly owe to our co-nationals as members of a pre-political ethical community.

Miller's combination of these two basic theses into a liberal concept of nationalism is problematic. The main difficulty is positing the *specific* duties related to the institutions of an existing national welfare state as being embedded in a coherent pre-political community. As has been argued, historically social policy has played an active role in creating national identity and often social policy preceded the shared identity amongst those included in the system of social protection. According to Greenfeld, liberal or "civic" nationalism is "identical with citizenship" and such communities are "at least in principle open and voluntaristic" (1992: 11). Because of the unintelligibility of a distinctly liberal nationalism prior to institutionalization, in order to make sense of understanding the welfare state as a mechanism for performing antecedent moral duties of some sort—that is, *if* institutions come from pre-political duties—these duties must be considered general or universal (related to basic human needs and risks).

In contrast to Miller's particularist defence of the welfare state is Goodin's position that rejects attributing national institutions to special duties not derived from universal ones (1988: 679). Goodin argues that "there are, at root, no distinct special duties, but only general ones ... the duties that states ... have *vis a vis* their own citizens are not in any sense special ... they are merely the general duties that everyone has toward everyone else worldwide" (1988: 679, 681). The welfare state has been "assigned responsibility" for meeting the universal obligations we, as persons, have towards one another. The reasons we assign responsibility and create particular obligations are, Goodin argues, largely efficiency concerns; we have "picked" the nation-state to "devolve" general

duties onto thereby creating special (though ultimately derivative) national duties.

Goodin's view accords with Greenfeld's voluntaristic ideal of liberal nationalism, and by positing assigned general duties as the basis of particular obligations and rights, Goodin's universalism overcomes the problems of Miller's particularist approach by allowing for the political particularization of responsibilities to define political community. It does, however, face certain problems of its own. Modern welfare states provide the resources for meeting such a wide array of evolving needs and interests that the needs and interests themselves cannot be understood apart from the context in which they are (politically) defined. Locating and defining duties in pre-political or ethical terms has trouble being reconciled with the comprehensive nature of advanced welfare states in which, as Miller points out, the entitlement of citizens far exceeds a coherent understanding of respecting human rights. The rights and obligations constitutive of citizenship in advanced welfare regimes should be understood in terms of their political-functional development within a continually forming political economy with contextual legitimation imperatives. Legitimacy imperatives in egalitarian political communities are based on working out the demands of equal respect; equal respect is a political virtue and its institutional demands are connected to the expectations and needs of citizens in an evolving institutional context. As needs emerge, or are (re-)defined, and their meeting is institutionalized and transformed into legitimate expectations or rights, identities and duties subsequently evolve as well. The legitimation requirements of the liberal state are not fixed but develop politically (Reiman, 1997: 127). Thus, the extensive network of rights and duties of citizenship in contemporary welfare capitalist regimes cannot be understood as the "assignment" of the general duties we are owed and owe fellow persons. Rather they should be understood as developing endogenously within the processes of the formation of welfare regimes.

We are perhaps left with something of an intractable situation in this rendering of the issue. Miller's particularism cannot support a specifically nationality-based conception of attachment as the basis of national political communities. Obligations must therefore exist prior to the institutionalization of a political community, and in this sense be universal. However, identifying national welfare states as the assigned collectivization of universal moral duties faces difficulties in reconciling the comprehensiveness of advanced welfare states with the idea of universal moral duties. As was suggested, the operative and defining rights and obligations of citizenship should be understood as specific to their institutional context.

To begin a way beyond this impasse it is helpful to identify a common thread between the particularist and universalist views. Social jus-

tice in both is the collectivization of moral obligations between (initially) institutionally unconnected persons. The two perspectives diverge on questions of what individuals, what precepts, and what form of collectivization, but they do share the common assumption that justice arises from considerations of interpersonal, pre-political ethical duties. Institutions, in this view, are *mechanisms* of justice. However, as discussed above, the institutions of the welfare state do not necessarily have as their historical function the pursuit of social justice.

An alternative "political" framework regards institutions not as *mechanisms* of justice but as its *subject* (Rawls, 1999: 3–6). In this understanding, social justice concerns not what we owe to one another as persons (co-nationals, or otherwise) but what sort of institutional formation can be justified to equal citizens. In the subject view, citizenship separates the political from the ethical and creates a distinct political morality. This overcomes numerous difficulties facing justification in pluralist societies by circumscribing the necessary sphere of agreement. While institutions have arisen for reasons other than promoting justice (as ethical duties between persons), justice, as a set of regulative principles of institutional formation, can emerge in a political community that is legitimated by equality of citizenship. Justice, in the first instance, concerns how institutions may not function through the guarantee of equal basic liberties (Pogge, 1989: 213). We can arrive at the positive demands of justice, and the concept of social rights (or "primary goods"), through consideration of the worth of these liberties and because material needs that are capable of expression as claims of citizenship will be sufficiently general and are "thus removed from the political balancing of competing particular interests" (Vernon, 1998: 304). It is therefore possible to retain the importance of an instrumental conception of shared public identities to legitimate just institutions while consistently rejecting a necessary ethical dimension in institutional creation. As a result, this view of citizenship is not necessarily bound by nationality and has the conceptual capacity to transcend it; citizenship transforms institutional structures into political communities with legitimation requirements, and thus, "in principle, the sociopolitical dynamic Marshall identified could also operate on other (territorial/membership) scales" (Wincott, 2006: 183).

The subject view has important implications for theorizing justice at emerging sites of transnational governance. Much like the case of the development of the institutions of the nation-state, democracy and justice are not the foundational goals of these institutions. Throughout the history of the welfare state collective identity had to catch up to expanding institutional structures. In the case of nation-states, substantive goals were subsequently imposed onto their ongoing formation as the idea of equal citizenship took hold in their justification and political reformers

used this basis of equality to pursue social change (Morrison, 2003). The nation-state experience holds important lessons for conditioning the institutions of transnational governance, which lift power beyond established solidarities; in some way, citizenship must be extended to them in order to align their legitimation requirements with egalitarian norms. However challenged, the institutional theory of citizenship holds some resources in this regard, whereas the nationality thesis remains bound by national attachments and faces difficulties in promoting egalitarian goals as governance increasingly occurs beyond these sites.

Conclusion

This paper has defended an institutional conception of citizenship against Miller's nationality argument. In doing so, it maintained that principled social unity—a principled sense of membership in a normative community as central to members' self-understanding—is necessary for the legitimacy and stability of its corresponding institutions. The theoretical challenge is to advance a conception of principled social unity that respects the diversity of members. The motivational aspects of Miller's nationality thesis for providing legitimacy to redistributive institutions were argued against on a number of related grounds. Appealing to a pre-political or pre-citizenship view of nationality has little capacity to explain the creation of welfare states and faces problems in fairly accommodating reasonable societal pluralism; moreover, it lacks resources to be applied to transnational institutions. These difficulties relate to the view of institutions as mechanisms for, rather than as the subject of, the demands of social justice. Both nationally and transnationally, institutions have emerged from a variety of reasons and causes. It is the distribution of their gains that is the subject of social justice. When an institutional structure overlaps with citizenship its legitimation requirements can incorporate elements of social justice based on both its solidaristic and moral capacities. Of course, the motivational capacities of citizenship depend on how it is institutionalized, and thus egalitarians should theorize its condition as a major factor in shaping the prospects for realizing of social justice in the welfare state and beyond.

References

Banting, Keith. 1995. "The Welfare State as Statecraft." In *European Social Policy*, ed. Stephen Liebfried and Paul Pierson. Washington: The Brookings Institute.

Beland, Danil and Andre Lecours. 2005. "The Politics of Territorial Solidarity: Nationalism and Social Policy Reform in Canada, the United Kingdom, and Belgium." *Comparative Political Studies* 38(6): 676–703.

Cameron, David. 1991. "Continuity and Change in French Social Policy." In *The French Welfare State*, ed. John Ambler. New York: New York University Press.

Dahrendorf, Ralf. 1996. "Citizenship and Social Class." In *Citizenship Today: The Contemporary Relevance of T.H. Marshall*, ed. Martin Bulmer and Anthony Rees. London: UCL Press.

Dryzek, John and Robert Goodin. 1986. "Risk Sharing and Social Justice: The Motivational Foundations of the Post-War Welfare State." *British Journal of Political Science* 16(1): 1–34.

Esping-Andersen, Gosta. 1990. *The Three Worlds of Welfare Capitalism*. Princeton: Princeton University Press.

Etzioni, Amitai. 1996. *The New Golden Rule*. New York: Basic Books.

Goodin, Robert. 1988. "What Is So Special about Our Fellow Countrymen?" *Ethics* 98(4): 663–86.

Greenfeld, Liah. 1992. *Nationalism: Five Roads to Modernity*. Cambridge: Harvard University Press.

Heath, Joseph. 2006. "The Benefits of Co-operation." *Philosophy and Public Affairs* 34(4): 313–51.

Jackman, Robert and Ross Miller. 2004. *Before Norms*. Anne Arbour MI: University of Michigan Press.

Keating, Michael. 1996. Nations Against the State: The New Politics of Nationalism in Quebec, Catalonia and Scotland. New York: St. Martin's Press.

Klausen, Jytte. 1995. "Social Rights Advocacy and State Building: T.H. Marshall in the Hands of Social Reformers." *World Politics* 47(2): 244–67.

Kuhnle, Stein, Peter Flora and Derek Urwin and Derek Urwin, eds. 1999. *State Formation, Nation-Building, and Mass Politics in Europe: The Theory of Stein Rokkan*. Oxford: Oxford University Press.

Kymlicka, Will and Wayne Norman. 1995. "Survey of Recent Work on Citizenship." In *Theorizing Citizenship*, ed. Ronald Beiner. Albany: State University of New York Press.

Marmore, Theodore, Jerry L. Mashaw and Phillip L. Harvey. 1990. *America's Misunderstood Welfare State: Persistent Myths, Enduring Realities*. New York: Basic Books.

Marshall, T.H. 1964. *Class, Citizenship and Social Development*. New York: Doubleday & Co.

Marx, Karl. 1978. "Economic and Philosophic Manuscripts of 1844." In *The Marx-Engels Reader*, ed. Robert Tucker. New York: W.W. Norton and Co.

Miller, David. 1988. "In What Sense Must Socialism Be Communitarian?" *Social Policy and Philosophy* 6(2): 51–73.

Miller, David. 1995. *On Nationality*. Oxford: Oxford University Press.

Miller, David. 2000. *Citizenship and National Identity*. Cambridge: Polity.

Moreno, Luis and Nicola McEwen. 2005. "Exploring the Territorial Politics of Welfare." In *The Territorial Politics of Welfare*, ed. N. McEwen and L. Moreno. New York: Routledge.

Morrison, Bruce. 2003. "Transnational Democracy: The Pursuit of a Usable Past." In *Transnational Democracy in Critical and Comparative Perspective: Democracy's Range Considered*, ed. B. Morrison. Burlington: Ashgate.

Myles, John. 1998. "How to Design a 'Liberal' Welfare State: A Comparison of Canada and the United States." *Social Policy & Administration* 32(4): 341–64.

Nozick, Robert. 1974. *Anarchy, State, and Utopia*. New York: Basic Books.

Offe, Claus. 1987. "Democracy against the Welfare State?" *Political Theory* 15(4): 501–37.

Offe, Claus. 2000. "The German Welfare State: Principles, Performance and Prospects after Unification." *Thesis Eleven* 63(1): 11–37.

Olsen, Gregg. 1994. "Locating the Canadian Welfare State: Family Policy and Health Care in Canada, Sweden and the US." *Canadian Journal of Sociology* 19(1): 1–20.

Pierson, Paul. 1994. *Dismantling the Welfare State?* New York: Cambridge University Press.

Pogge, Thomas. 1989. *Realizing Rawls*. New York: Cornell University Press.

Putnam, Robert. 1993. *Making Democracy Work*. New Jersey: Princeton University Press.

Rawls, John. 1999. *A Theory of Justice* (revised edition). Cambridge: Harvard University Press.

Rawls, John. 1999a. "Social Unity and Primary Goods." In *Collected Papers*, ed. Samuel Freeman. Cambridge: Harvard University Press.

Rawls, John. 1999b. "The Idea of an Overlapping Consensus." In *Collected Papers*, ed. S. Freeman. Cambridge: Harvard University Press.

Rawls, John. 2003. *Justice as Fairness*, ed. Erin Kelly. Cambridge: Harvard University Press.

Reiman, Jeffrey. 1997. *Critical Moral Liberalism*. New York: Rowman and Littlefield.

Rimlinger, Gaston. 1971. *Welfare Policy and Industrialization in Europe, America and Russia*. New York: Wiley and Sons.

Rosanvallon, Pierre. 2000. *The New Social Question*. Princeton: Princeton University Press.

Rothstein, Bo. 1998. *Just Institutions Matter*. Cambridge: Cambridge University Press.

Schattschneider, E.E. 1935. *Politics, Pressures, and the Tariff*. New York: Prentice-Hall.

Stephens, John. 1986. *The Transition from Capitalism to Socialism*. Urbana IL: University of Illinois Press.

Swank, Duane. 2002. *Global Capital, Political Institutions, and Policy Change in Developed Welfare States*. Cambridge: Cambridge University Press.

Tam, Henry. 1998. *Communitarianism: A New Agenda for Politics and Citizenship*. Basingstoke: MacMillan.

Vernon, Richard. 1998. "Liberals, Democrats and the Agenda of Politics." *Political Studies* 46(2): 295–308.

Weale, Albert. 1990. "Equality, Social Solidarity and the Welfare State." *Ethics* 100(1): 473–88.

Weber, Eugene. 1977. *Making Peasants into Frenchmen: The Modernization of Rural France, 1870–1914*. London: Chatto and Windus.

Wincott, Daniel. 2006. "Social Policy and Social Citizenship: Britain's Welfare State." *Publius: the Journal of Federalism* 36(1): 169–88.

B. Concepts of Rights

Between Two Worlds: Modern State and Traditional Society in Indonesia

Satjipto Rahardjo

Indonesian political leaders in the mid-20th century attempted to create a new state founded both on the rule of law and on their understandings of traditional Indonesian communal life. They sought simultaneously to "advance" toward modernization and industrialization and to preserve older, village-level norms and values which they projected onto the national legal and political screen. This article examines the inconsistencies inherent in these twin aspirations and the continuing tensions, during a period of rapid growth and economic development, between rights-based conceptions and those based on an ideology of harmony and communal village life.

T̲o use the well-known Tofflerian expression, Indonesia is undergoing several "waves" of structural changes—not successively but simultaneously. We could say that Indonesia is in transition from an agrarian to not just an industrial society but a post-industrial society as well. For Indonesia and other new nations, theories are expected to explain what happens when a country is engaged in a process of great and complex change. A more intricate explanation is needed than the one-step theories provide, like Toennies's Gemeinschaft to Gesellschaft, Maine's Status to Contract, Durkheim's Mechanic to Organic Solidarity, and Spencer's Military to Industrial Society. The more complex theory should explain the stages of development experienced by the now developed countries, but it should also explain "stages" of development that happen at one and the same time.

A State Based on Law

The Constitution of 1945 expressly stipulates that the Republic of Indonesia is a state based on law. A state that emerged in the second half of the 20th century, it has from the very start relied on legal concepts, theories, and doctrines that were al-

ready part of the dominant legal tradition of the world—for example, the *rechtsstaat gedachte* (the "rule of law" tradition). We can observe the bearing of the global tradition on legal thinking in Indonesia by examining, for example, the implementation of policies through legislation and the making of a modern legal structure, as well as the operation of the courts and law offices and the dissemination of modern legal thought in the law schools. In fact, we receive the impression that the transformation is finished—that a society based on a modern legal system has been achieved.

But the picture of the legal sector is incomplete. Transformation has occurred at the formal or state level, while life in the rest of society still proceeds in traditional ways. The legal sector is stratified, with the modern legal system in a thin layer at the top and the age-old structure, processes, and practices forming the substantial component. Nor is the dual system unique to Indonesia; it has also developed in other Asian countries (see, e.g., Mehren 1963; Parker 1984; Wolferen 1990; Hahm 1967).

Classical theories on law and society—in this case, on the development of the modern legal system—proffer stages of development, from archaic to traditional to rational (Weber 1954; Durkheim 1964). These theories suggest that certain stages should be accomplished before the next to achieve a further developed state. Weber, for one, propounded the classical matrix of authorities divided into three stages of development: the traditional authority, the charismatic authority, and the rational legal authority. Weber's thesis was that legal systems develop through a process of rationalization.

The mechanical and linear development exemplified by Weber's old thesis, among others, cannot match the complexity of development experienced by new nation-states in the second half of the 20th century—the "latecomers in modernization" (Eisenstadt 1966). The latecomers—Indonesia is a case in point—are experiencing simultaneous waves of development.

The Making of a Republic

When Indonesia was in its conceptual state in early 1945, the problem of what its founding principles should be was the subject of lively debate. Supomo, a professor of *hukum adat,* the indigenous law, was an ardent advocate of basing the state on original Indonesian conceptions of the individual and society. Long before the discussion in the Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia, a committee established prior to independence to study and make recommendations on the constitution, Supomo had done much pioneering work in dissemination of those principles, which became important in the new republic.

In a speech in Yogyakarta in 1937, Supomo laid out the vari-
ous concepts of the individual employed by Indonesians and
Westerners. He said that the concept of *aku* (I, the self) in the
Indonesian world embraces the whole community of which the
individual forms a part, while in the West the personal pronoun
represents just the individual. Within the Indonesian framework,
conflict is alien, because conceptually there is no opposition be-
tween oneself and the group to which one belongs; rather, there
is a deep feeling of identity. The relationship between the indi-
vidual and society, between the individual and the state, is quite
the contrary in the West, where it is felt that provisions must be
made to protect the individual from the state. In the West, legal
system are designed around this dichotomous view (Poggi 1978).

In a society with a hierarchy, however rudimentary, the Indo-
nesian view of the individual and society can have profound im-
plications, especially when observed from a Western perspective.
One could, for instance, ask questions about how to start organiz-
ing a modern rational-bureaucratic society, of which the modern
state is an important example, without a clear distinction be-
tween the individual and society.

The Indonesian archipelago includes thousands of islands
and hundreds of ethnic groups, and although no absolute uni-
formity in social life exists, still there was thought to be common-
ality. The distinct character of social life in Indonesia was
thought to reside in the sense of a shared communal life, a sense
of oneness, togetherness, and harmony.

In making a state based on the indigenous mode of organiza-
tion, the founders used *desa* (village) republic as a model. They
conceived of the desa republic as an organic construction that
embodies the traditional view of the individual and society. Some
basic characteristics of their theory of the state are:
1. The state exists to protect and serve the interests not of an
   individual or group but of society as a whole.
2. The union between the government and the people should be
   strong—to use the Javanese expression, "*manunggaling kawula
   lan gusti*" ("the oneness of authority and people"). The gov-
   ernment should embody the people's sorrows and wishes and
   all other mental states and aspirations.
3. Individualism is frowned on. The Indonesian state is a joint
   venture of the people based on the principle of *gotong
   royong*—"all works should be accomplished in a spirit of to-
   getherness."
4. Opposition between the state and the people is inconceivable.
   Opposition and conflict are inconsistent with the ideal of a
   negara kekeluargaan, "a state based on the familial concept."

To make the Republic of Indonesia a modern state along the
lines of the desa republic, all the apparatus and institutions of
the old republic were given new forms. The *kepala desa* (head of

the desa) was transformed into the president, and the *rapat desa* into the modern Majelis Permusyawaratan Rakyat, the highest representative council in the republic. However, the power and authority of the kepala desa are in fact without legal limitation; the power of the president, in contrast, is expressly stated in the Constitution of 1945 to be "not unlimited."

Different Development

By looking at the foundation of the Indonesian state we can better understand the ideals and outlook of the founders—their views on the organization of a state and on the state as a legal community—as well as better grasp the fundamental relation between Indonesian law and society.

From the very start, the making of the new state was directed toward building a modern industrial country. The preamble of the Constitution of 1945 states that the world is in the midst of a transformation and that the state will take part in the process. The use of the term *transformation* is just another way to refer to industrialization and urbanization. There was no hint of hesitation on the part of the founding fathers about whether the country should be modernized and industrialized or maintain its traditional form of life. Nor did the installation of industrial plants and modern educational institutions raise protest and disapproval. Before independence the people had been organized politically on the basis of their opposition to Dutch colonization, not on the basis of their opposition to industrialization and modernization.

Theorists of industrialization like W. W. Rostow would argue that a nation could successfully embark on the project of industrializing only if attitudes and infrastructure were supportive. Social, political, and economic institutions should be reorganized to sustain the process. In short, industrializing countries should employ structures like those in the West. In Indonesia, however, the decision was to base the national institutions on indigenous principles. The founding fathers did not transplant or imitate modern structures, patterns, and models of state and society but built a nation according to the traditional pattern of life. Here I am not judging the decision to inflate the desa republic into the modern Republic of Indonesia. I am only observing that two key processes in Indonesia headed in opposite directions: toward industrialization and modernization on the one hand and toward preservation of the old pattern of life on the other. Because of this "reverse development," some problems have arisen in the field of law and society.

The social and economic processes of the country proceed via two-way traffic. One lane of the road is used to develop a fast-growing industrial country through modern institutions and bu-

reaucracy; the other lane is used to keep the modern processes within the bounds of the old principles. The Indonesian state, nearly half a century after it came into being, has achieved some major advances, including the establishment of high-tech industrial projects. Let me give just one illustration. Today, in cooperation with Spain, Indonesia is producing aircraft, a model known as the CN 235.[1] In 1995 Indonesia is expected to be able to produce aircraft without the assistance of another country. Rostow would argue that the presence of such a technologically advanced industry could be sustained only by modern institutions, be they forward linked, backward linked, or laterally linked, but Indonesia has evidently developed in a different way.

Law and Society

Uniformity and centralization are the important principles that guide the politics of legal development in Indonesia, and they also characterize the legal structure and culture of the country. The politics of developing a monolithic legal system is related to the more general strategy of nation building and to the cultural base of the nation, which also has an important function in the development of strategy. As a part of this strategy, the values of unity and harmony are strongly upheld.

Together with Bahasa Indonesia—the national language, Malay in origin—the Hukum Nasional, or the national legal system, is considered a major contribution toward bringing this nation, plural in many aspects, into homogeneity. Hundreds of languages are spoken in Indonesia—Javanese by the most people (about 30% of the population). But Javanese was not adopted as the national language; Malay was chosen instead, even though it was spoken among only a tiny minority. Sociologically speaking, it is difficult to control the strong influence of Javanese on the Indonesian national language.

What happened in the development of the national language also happened more or less in the development of the law. A uniform (national) legal system has been instituted that bypasses the many local traditional social controls. As with the Indonesian language, which must bear the influence of the Javanese language, so, too, the Indonesian legal system must take into account the local traditional legal practices.

The description does not necessarily imply a subversion of the national legal system by the traditional social controls. In a society embedded in a plural structure, complex law enforcement is to be expected; it will be necessary to bend the national legal system to fit community life. Or we might say that the state

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[1] CN is a combination of "C" (for Cassa, the name of the Spanish company) and "N" for Nurtanio, the abbreviated name of the Indonesian aircraft industry—Industri Pesawat Terbang Nurtanio.

legal system is reinterpreted in accordance with local customs
and needs. Reinterpretation is an easy way to avoid the harsh en-
forcement of state law or to make the law more suitable to the
regional and local communities, especially those located far from
Jakarta. It is sometimes said that policymakers, including law-
makers, see all of Indonesia from the capital. Jakarta is becoming
the point of reference from which the whole country is being
controlled, engineered, and measured.

Let me give an example. The residents of Aceh, in the north-
ern part of Indonesia, are well known for their fervent attitude
toward religion—in this case, Islam. This characteristic is mani-
fested, among other ways, in the strong opposition to gambling.
The national law prohibits unauthorized gambling. On one occa-
sion, the regional police chief said that the police would not pro-
tect anyone who gambles. This statement provoked a nationwide
wave of protest, especially from Indonesian lawyers, who believe
that, according to the law, even criminals have the right to police
protection. The police chief reinterpreted the legal prohibition
to conform with the norms of the Aceh community. His under-
standing was that from the sociological point of view, the police
in a community must talk the idiom of the people there if they
expect the community to take part in peacekeeping.

Rapid Development of the Desa

If the Republic of Indonesia is the modern reconstruction of
the age-old desa, then the desa itself is being transformed into a
modern community. So the traditionalization of the modern In-
donesian state goes hand in hand with the modernization of the
traditional community.

During the hundreds of years of colonial domination, a di-
vided society was developed, with modern and traditional sectors.
The cities became modern, while the desas were left alone. The
colonial administration did not engage in a comprehensive pro-
gram to develop the nation as a whole; it created urban clusters.
The desa, being peripheral to the city in the modern capitalistic
economy, was exploited. When the new state was created in 1945,
it was faced with this legacy at the same time that it was charged
with developing the whole nation. The new policy is to make de-
velopment more balanced—to lessen the gap between the mod-
ern and the traditional sectors, the city and the desa.

In the late 1960s a wave of modernization went through the
desas in central Java. At the instigation of a governor eager for
rapid modernization of the desas, many new practices have been
introduced into the formerly quiet and relatively harmonious
communities. The politics of modernizing the desa took definite
shape with the introduction of Act No. 5/1979, dealing with desa
government. What we have here is another kind of reverse devel-

opment: a modern state based on a traditional desa form of gov-
ernment that in the 1970s, 30 years after the establishment of the
new state, attempted to transform that desa into a modern com-
munity. This transformation has created problems as the old, ide-
alized community life has undergone critical changes. Although
the desa act was intended to preserve the autonomy of the desa,
giving it the authority to manage its own affairs, other provisions
in the act have had the effect of considerably impairing the old
desa power. It was the long tradition of the desa that contributed
to its power and competence and that attracted respect, but the
act has challenged the core of that tradition.

With the act, the state has penetrated more deeply into the
desa. Desa government has been reorganized, extending the
reach of the state bureaucracy and giving the state government a
strong presence in the desa. The act deals with subjects like (1)
the formation, division, fusion, and phasing out of the desa; (2)
the structure of desa government; (3) the election, appointment,
and resignation of the desa head; (4) the rights, authority, and
duties of the desa head, (5) the desa ordinance; and (6) desa
income, budget, and expenditures. All in all, the structure of a
modern state and society are being transformed and trans-
planted into the desa. The process in some way contradicts the
original basic idea of building a state based on the structure and
life of a desa republic. Instead of incorporating Indonesian wis-
dom as embodied in the structure and processes of desa life, the
old desa life is now being diluted and transformed into a differ-
ent style of life, called "modern."

Specific problems that arise are the result of a type of devel-
opment that I have already labeled "development from without."
What Act No. 5/1979 proposed was development of the desa
from without—that is, by the intentional implantation of a differ-
ent kind of structure in the desa. In the course of applying the
act, disintegration is in some way brought to the traditional form
and organization of life; one writer referred to it as a cultural
blow (Nasution 1991). Restructuring desa administration means
shaping it to fit a rational-bureaucratic model of organization.
Such restructuring has not developed desa life but, instead, has
transformed the traditional idealized, autonomous, and powerful
desa into a "modern skeleton" (ibid.). From the modernizers'
point of view, the situation can be considered transitional to
achieving a uniform nationwide model of government adminis-
tration, but from a sociological point of view, what we see is a
breakdown of desa life. Of course, the breakdown has long been
under way, but the latest event, the enactment of Act No. 5/1979,
dealt a decisive blow.

Concepts of Rights

How are rights conceived in Indonesia and, for that matter, in most other Southeast Asian countries as well? In the first place, imposing one's rights is considered impolite. There is a story about an Indonesian law professor who lost his luggage. Once he knew that his luggage could not be found, he relaxed and was ready to go away. But his wife pushed hard, so he gave in and proceeded to make a claim. Although as a law professor, he taught his students to be aware of their rights, he did not apply his lectures to himself. In an actual situation, he tried to behave politely.

Certain fundamental rights were added to the Constitution of 1945 only after debate. The rights to express an opinion, to hold a decent job, to obtain an education, and to organize unions are all specified. But to impose one's individuality is considered by some to be an offense against harmonious communal life. This perception of rights creates problems when Indonesia is confronted with questions of human rights.

Given the rapid pace of modernization and industrialization, traditional communal values have met the developing individualistic and liberal patterns of life headlong. The conflict is exemplified by the people's protest against the current course of economic development, which they believe has moved Indonesian society away from an ideal cooperative and familial economy.

In the old days, people managed to express their rights to the kings, not by rioting or using other forms of violent expression, but by simply sitting down together peacefully in white clothes, usually between two banyan trees, in an open field called the *alun-alun*. When the king observed the coming together of people, he knew that there was something they wanted to tell him. This old institution is called the *pepe*—literally, "sitting in the sun." In the quite different society of today, creating and sustaining modern institutions that express the old tradition will be extremely difficult.

Legal Education

Education has not played an important role in legal development in Indonesia. By legal development I also mean the transformation and making of a new state. The legal education system is still set up to train people for the job market. People generally want law schools to continue to educate people to be judges, attorneys, and advocates. Keeping the orientation to the job market means that legal education is dominated by the modern sector—by business, banking, and bureaucracy. The recent move to reform the curriculum reflects this view; the idea is to increase the practical knowledge imparted in a legal education.

This kind of legal education might be appropriate in a nation that was not in transition, for there would be no need to reexamine existing legal concepts and doctrines. But such is not the situation in a nation like Indonesia that is transforming itself and establishing its individuality. Most Southeast Asian countries are undergoing this process; in the United States it happened during the years in which a unique American legal system was formed—the time that an American writer, Grant Gilmore (1977), has called the Age of Discovery. He reports how the making of a distinct American legal practice bewildered those accustomed to the dominant legal tradition (p. 35).

Indonesia, being a society in transition, does not differ much from other nations struggling with modernization and industrialization. At the same time, unlike Singapore, for instance, Indonesia has developed a policy for maintaining the old tradition of statecraft—what we have called reverse development. If legal education is to contribute to the design of a modern Indonesian legal system while helping to preserve the old pattern of social life, then legal educators and others should articulate the kind of educational reforms that are needed to achieve this unique goal. For nearly half a century no such voice has been raised—or if it has, not loudly or persuasively enough.

If the age-old traditional values and indigenous pattern of life are to be maintained, the structure and concepts of the postcolonial legal system, which is based on different assumptions and social values, must be reviewed. The curricula of the law schools of today are not tailored to accommodate the basic reform of the legal system after independence. This does not mean that no effort has been made to make such a reform; rather, the reforms are not comprehensive and systematic enough to match the great change in the legal system. The redefinition of legal concepts has not proceeded well. Only here and there, in some seminars and writings, can we identify an awareness of the need to change the basic legal principles. As recently as 1990, two private law schools, one in Yogyakarta and the other in Bandung, organized seminars on reviewing the national legal principles of today, but did no follow-up. In 1987 the law school of the Diponegoro University in Semarang organized a seminar on the conceptualization of an Indonesia-based legal education.

In the field of constitutional law, there has been substantial legislation to give form to political developments. But the attempt in the Constitution of 1945 to create a modern constitutional system based on traditional patterns has not worked satisfactorily. After nearly half a century the system of a statecraft based on principles of family relationships and harmony—applied even to relationships among the organs of state—is still not firmly established.

A longing for a distinct Indonesian theory pervades the academic community—a theory with more structured, elaborated, and systematically developed legal concepts and constructs, which would give direction to national development. Basic to such a theory would be, for instance, the legal construction of the concepts of ownership and contract, of the criminal justice system, of constitutional law. The question is whether it is possible to develop legal concepts and doctrines nurtured by communal and harmonious values. Furthermore, if law schools are ever to play an important role in building institutions in Indonesia, then educators should express their position clearly as agents of development—that is, by actively and consistently giving form and direction to the processes and changes taking place in law and society in Indonesia.

Conclusion

The legal system in Indonesia has been marked by the long struggle to construct a system based on the pattern of the family or community as set forth by the Constitution. Attachment to the traditional communal life conflicts with modernization and industrialization.

A modern Indonesian legal system could be constructed by instituting a distinct legal culture, not just making formal rules. In instituting such a culture, bureaucrats in the legal system are key. As the promulgators of the Constitution expressly stated, the development of a constitution based on community is of no use if the personnel in the legal bureaucracy are nurtured in the spirit of individualism. It is individualism, not community, that is rapidly expanding, because modernization and industrialization have outstripped the constitutional ideal of the founders of the Indonesian Republic.