

## Introduction

The clash of ideologies that dominated the era of the Cold War has given way to a clash of identities. At the highest levels of abstraction, the Cold War conflict between liberal capitalism and Marxist communism, as fierce and ideologically charged as it was, was one among two contenders that were equally anchored in the legacy of the Enlightenment and equally committed to universalism. In a nutshell, the project of the Enlightenment consists in adherence to the rule of reason and to promotion of equal liberty for all, and both liberal capitalism and Marxist communism have been *ideologically* aligned with this project though their respective interpretations of its key terms were, to be sure, widely divergent.

Liberal capitalism and Marxist communism appeal to reason and eschew metaphysical claims, and though their conceptions of liberty and equality are in conflict, they both adhere to the view that every human being is ultimately inherently equal to every other human being and that all human beings are equally entitled to liberty. Moreover, whereas liberal capitalism may be strongly committed to negative liberty and Marxist communism dependent on positive liberty<sup>1</sup> to be fully realized through the revolution of the proletariat, and whereas these two ideologies may greatly diverge along the spectrum that extends from purely formal equality to full material equality, they both fully coincide in their universalism.

Liberal capitalism presents itself as optimal for everyone everywhere, and so does Marxist communism. Liberal capitalism may be more open to diversity than Marxist communism as the former is generally tolerant of religion, cultural differences, and a broad array of individual lifestyles, whereas the latter has been historically inimical to all of the above. Nevertheless, the primacy of liberal capitalism remains as supreme as that of Marxist communism. Religious diversity may be welcome by the liberal capitalist, but her tolerance cannot extend to those religious precepts that require actual interference with the liberal capitalist agenda. In short, both of the

<sup>1</sup> For a discussion of the distinction between negative and positive liberty, see Berlin 1970: 118–72.

ideologies in question claim the entire globe as their relevant and legitimate sphere of application and influence.

With the demise of Soviet communism and the end of the Cold War, it seemed logical that liberal capitalism would proceed to practical implementation of its universal vision on a worldwide scale. In part, this has been accomplished through spread of a process of globalization that comprises the deployment of an ever more comprehensively global economy aspiring to a single market that reaches into every corner of the world, and to completely unimpeded worldwide mobility of capital and labor. This is to be complemented by evolution to a fully integrated worldwide system of communication capable of sustaining a veritably global public sphere. At the same time, however, the actual process of universalization of liberal capitalism has been accompanied by a corresponding process of increasing fragmentation and particularization. That latter process is best exemplified by the proliferation of identity politics, whether based on ethnic differences – such as those that led to violence in, and to the breakup of, former Yugoslavia – or cultural/ideological ones – such as the numerous clashes between religious fundamentalists and secularists in various parts of the world. Paradoxically thus, the more the world becomes bound together, the more people, ideas, and goods migrate, the more it also becomes violently split and divided. Globalization thus appears to go hand in hand with balkanization.

Globalization and balkanization do not merely coincide but seem mutually dependent and mutually reinforcing. This is made manifest by the post-communist resurgence of nationalism. As one observer puts it,

Nationalism is typically a reaction to feelings of threatened identity, and nothing is more threatening in this respect than global integration. So the two go together ... although they push in opposite directions. (Beiner 1995: 3)

Identity politics relies on severing the self from the other, based on some particularities or differences that resist all bridging or universalization. Moreover, the centrifugal thrust fueled by the juxtaposition of rapidly disaggregating parts seems prone to being propelled much farther by the politicization of religious fundamentalism. Indeed, if balkanization contradicts globalization by refusing equal liberty to those it casts as ethnically or nationally different, as Habermas observes, religious fundamentalism projected into the political arena for its part, refuses to play by any plausible conception of the rule of reason (Borradori 2003: 72).<sup>2</sup>

<sup>2</sup> This is not to imply that the precepts of fundamentalist religion are necessarily contrary to reason. Rather, whether or not such precepts are amenable to justification according to the rule of reason, the religious fundamentalist would reject appeal to reason as delineated by the Enlightenment as a means of justification. For example, there may well be plausible arguments against a right to abortion that may appeal to reason. The religious fundamentalist, however, is one who insists that the prohibition is

Taken together, identity politics and religious fundamentalism challenge the project of the Enlightenment, in general, and liberalism, in particular. Ethnic-based identity politics stands against the Enlightenment's call for universalization and challenges liberalism's individual-regarding conception of equal liberty and justice (Rosenfeld 1998: 216), by insisting on often incompatible group-regarding equality and justice. Religious fundamentalism, on the other hand, negates downright both the Enlightenment project as a whole and liberalism in all its facets. Furthermore, whereas identity politics with its stress on the differences that set each self against others is inherently anti-universalist, religious fundamentalism can certainly have universalist aspirations. For example, certain religious fundamentalists, such as those that have endorsed Jihadist global terror, believe it to be their duty to spread their religion worldwide, by force if necessary.<sup>3</sup>

If the trend toward identity politics were not coupled with an equally powerful trend toward transnational economic, legal, and political integration (Rosenfeld 2008), one could perhaps envisage a world made up of an increasing diversity of identity-based groups co-existing without interacting with one another throughout the globe. In such a scenario, each identity-based group would have internal autonomy to pursue its own normative objectives and would limit opening toward other groups to what would be strictly necessary to maintain peace among virtually exclusively inward-looking neighbors with commonly agreed borders designed to keep each of them separate from the others. In such a universe, dealings within the same community, or intra-communal dealings, would be maximized, and those among different communities, or inter-communal ones, minimized. Mono-ethnic, mono-religious, mono-cultural, and mono-linguistic nation-states would be the ideal, and each time a new identity group would form it could sever its ties to the larger group with which it happened no longer to identify through peaceful secession, thus gaining autonomy for self-government, self-fulfillment, and self-realization. In short, pursuant to this scenario, the world would tend toward peaceful subdivision into the smallest viable identity-groups operating according to the principles of internal autonomy and external non-interference based above all on reciprocal non-involvement.

Transnational integration, which is taking place to some degree on a worldwide basis, and which is particularly far along in Europe, however, strongly militates against the achievement of any ideal approximating peaceful coexistence and mutual indifference among tightly woven thoroughly homogeneous atomistic group-based entities. As is particularly clear within the ambit of the European Union (EU), the

justified *because* it is imposed by his religion, which, he asserts, is in exclusive possession of the truth and of moral certainty.

<sup>3</sup> See Habeck 2006.

Westphalian nation-state is under siege from above as well as from below (Rosenfeld 2008). Basque or Catalan separatism may threaten the unity of Spain, but the integrity of its sovereignty, as understood in Westphalian terms, also seems compromised by the professed supremacy of EU law as decreed by the EU's European Court of Justice (ECJ) sitting in Luxembourg over inconsistent national law (Id.).

Transnational integration combined with infra-national division and compartmentalization call for combination of new poles of (external) identification and of (internal) differentiation. In other words, as the need for greater convergence on a transnational scale joins the need for greater room for divergence on a national and infra-national scale, appropriate standards of legitimacy and normative validity adapted to these new circumstances are called for. On the one hand, a plurality of non-unified and non-fully integrated legal regimes proliferate. For example, whereas the ECJ claims supremacy for EU law over inconsistent member-state law, several member-state constitutional courts, such as the German, have rejected such supremacy in principle though not, as of this writing, in practice (Rosenfeld 2008:419). Because no formal institutional mechanisms are in place to deal with such conflicts, a citizen of an EU member-state has no protection against inconsistent or even contradictory legal obligations stemming from two separate legal regimes to which that citizen is equally bound.<sup>4</sup> On the other hand, international courts, such as the International Criminal Court (ICC), and transnational Courts, such as the ECJ and the ECtHR, dispense supra-national justice, and both supra-national and infra-national arenas of democracy multiply – even if not always in a full-fledged way as attested by the EU's oft noted “democratic deficit”.<sup>5</sup>

These shifts in the locus and context of law, justice, and democracy necessitate the articulation of normative standards of validity and legitimation that properly account for the proliferation of, and novel forms of interaction among, rapidly shifting poles of identification. Liberalism tailored to the needs of the Westphalian nation-state no longer seems up to the task. Ought such liberalism be perfected or rather superseded? And if no longer viable, should liberalism be replaced by a single integrated set of overall normative criteria? Or, by a plurality of them better suited for a division of tasks among the new multiplicity of intersecting levels and arenas of intersubjective dealings? Has the time come for abandoning what may likely prove a futile quest for overall unity and consistency?

<sup>4</sup> See Garlicki 2008 pointing out that an EU citizen is actually subject to at least three distinct potentially contradictory legal regimes: that of that citizen's member-state as interpreted by the latter's constitutional court; that of the EU as interpreted by the ECJ; and that of the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR) sitting in Strasbourg.

<sup>5</sup> See Resnik 2008:40; Kumm 2008: 135.

The challenge posed by politicized religious fundamentalism<sup>6</sup> is more radical and more daunting than that posed by ethnic-based identity politics. The latter need not entail a wholesale repudiation of liberalism. Catalan or Quebecois separatists can certainly consistently retain a liberal outlook within Catalonia or Quebec while simultaneously asserting identity-based group rights respectively against Spain or Canada. A religious fundamentalist, however, cannot compromise in any way when it comes to the prescriptions of his religion, and must therefore demand that the polity and that all public and private institutions within it comply with the applicable norms imposed by his religion. There may be overlaps between a fundamentalist religion and Enlightenment norms (e.g., the religious assertion that human beings are all created equal by God, that they all possess a soul, and that God has made them free to choose between good and evil, may be understood as sharing a great deal in common with the Enlightenment's commitment to equal liberty for all), but to the religious fundamentalist such overlaps carry no normative implications. There is no room for compromising with, or for opening toward, proponents of the Enlightenment project just because of even significant overlaps such as those mentioned earlier. Indeed, for the religious fundamentalist it is only exactly *what* the true religion prescribes and *because* it does so that counts. Everything else must be dismissed, and there is no room for give and take, even in the political arena, with proponents of other religions or with those who embrace secularism.<sup>7</sup>

The most radical challenge is that posed by “crusading” or by “Jihadist” religions that proclaim the divine right to eliminate anyone or anything that stands in their path to achieving the universal spread of true religion. This challenge, however, is also the one that is easiest to meet from a normative standpoint. The belligerent

<sup>6</sup> Non-politicized religious fundamentalism, in contrast, may well be accommodated within the ambit of a liberal constitutional polity so long as it remains focused intra-communally and so long as its precepts are not grossly violative of the liberal state's public policy, such as would be, for example, forbidding all medical treatment for children with life-threatening diseases. Moreover, a distinction must be drawn, for present purposes, between religious fundamentalism as a *religious* matter and as a *politico-constitutional* matter. From a religious standpoint, a “fundamentalist” is someone who interprets holy texts literally; from a politico-constitutional standpoint, in contrast, a “religious fundamentalist” is one who considers his or her religion as the repository of absolute truth *and* who insists that the state be ruled exclusively pursuant to the dictates of the true religion. Unless otherwise specified, “religious fundamentalism” will be used throughout in its politico-constitutional meaning.

<sup>7</sup> There may be exceptions regarding religious fundamentalism's utter intolerance toward other religions and toward non-religious ideologies, but such exceptions must be exclusively grounded in the teachings of the true religion. For example, for an ultra-orthodox Jew, whereas the state of Israel must be ruled exclusively according to Jewish religious law, the *halacha*, the *halacha* itself allows for Jews in the Diaspora to recognize the legitimacy of the state in which they live so long as the latter complies with the set of norms known as the “Noachide laws.” See Stone 1991. See also March 2009, for an interesting discussion of the contemporary debate among Muslim religious authorities concerning whether or not the Shariah permits Muslim minorities in non-Muslim countries to interact in the political arena with public authorities and other non-Muslim civil society and political actors.

religious fundamentalists, be they radical Christian fundamentalist abortion clinic bombers in the United States or Al Qaeda Islamic fundamentalist global terrorists, pose an existential threat to all others, be they religious or secular. Accordingly, the normative imperatives against such a belligerent stance in the name of religion are clear: Intolerance and, if absolutely necessary, even the use of violence are called for, consistent with all plausible conceptions of the individual's right to survival and to self-defense. More generally, whether a belligerent ideologically intransigent group be religious or secular – those who seek genocide or ethnic cleansing based on an ideology of ethnic purity are no different, for present purposes, than those who assert a religion-based mandate to kill the infidel – any such group ought to be equally fought. Moreover, the normative apparatus furnished by traditional liberalism is amply sufficient to provide an adequate normative framework to all those who face an existential threat posed by religious or ethnocentric fanatics. Indeed, whatever bias it may have in favor of the individual and against the group, traditional liberalism suffices – based on its commitment to individual freedom and to freedom of association for peaceful purposes – to offer both the individual and the group, whether secular or religious, the requisite normative and institutional backing needed to secure survival and ward off the above mentioned existential threats. In other words, whatever divisions they may otherwise have regarding individual versus group rights, or regarding secularism versus state-sponsored religion, all non-belligerent groups in a multi-ethnic, multi-cultural, and multi-religious polity can equally rely on traditional liberalism to provide all the necessary and sufficient normative ammunition required in their confrontations against all variants of belligerent fundamentalism.

Paradoxically, it is not belligerent fundamentalism but non-belligerent religious fundamentalism and certain kinds of politicized or re-politicized religions that pose a much more formidable challenge to the asserted legitimacy of traditional liberalism, or even to that of the somewhat less fully encompassing political liberalism elaborated by Rawls (Rawls 1993). As one observer has noted, there has been a “deprivatization” of religion since the 1980s (Casanova 1994: 3) that involves two interrelated processes: the “repoliticization of the private religious and moral sphere” and the “renormativization of the public economic and political spheres” (Id.: 5–6). This combined with the spread of “strong” religion (Sajo 2009) has amounted to a frontal attack against the separation between the realm of faith and that of reason, which had stood as one of the pillars of the Enlightenment.

Strong de-privatized religion challenges the neutrality of the secular state and traditional liberalism's suitability as a viable normative framework for legitimate relationships between the state and religion (Rosenfeld 2009: 2336–7). If freedom of religion requires allowing religion to implement its edicts and norms in the public sphere lest we end up with a vacuous “naked public square” (Neuhaus 1984), then

freedom *from* religion becomes compromised. Moreover, to the extent that conflicts between religions exist within a polity, not only does freedom from religion for the non-religious become threatened but so does freedom from (the dominant) religion for a significant portion of the religious population within the polity. Thus, for example, if a state were to promote and implement Christian norms and values, then that state might not only impinge on atheists and agnostics but also on Muslims and Jews, inasmuch as certain key precepts of Christianity may be in conflict with those of Islam and Judaism.

The politicization of strong religion is likely to differ from ethnic-based identity politics to the extent that the former may well have universalist aspirations whereas the latter, for the most part, does not. For instance, some politicized religions seek the imposition of a ban on abortion throughout the polity even though other religions and the vast majority of the non-religious within that same polity deem abortion permissible and the right to it desirable, or even necessary to the achievement of equal liberty. On the other hand, as already suggested, the Catalans and the Quebecois tend to be consistently internally liberal and harbor no design to impose the dictates associated with their distinct identity beyond the bounds of the space traditionally reserved for their intra-communal dealings. There are, of course, religions that are compatible with liberalism and religions that do not have universalist ambitions – at least in the sense of not seeking to subject all within a multi-religious polity to their own norms and values – as there are identity groups that are illiberal and even some that resort to ethnic cleansing or to genocide. The point, however, is that all the previously mentioned religions and identity-based positions, with the exception of liberal religions fully compatible with the secular state and with the Enlightenment-based divide between faith and reason, pose a serious challenge to traditional liberalism, though each type of group involved may do so differently and to a different degree. In any case, the moral, legal, and political legitimacy of the liberal state as deployed in its Westphalian framework is profoundly called into question.

Not only, is the institutional value and legitimacy of liberalism under severe challenge, but so are its epistemological foundations. Epistemologically, liberalism is wedded to the modern mindset and approach to the factual and normative issues that confront the polity. Modernism, in turn, is closely associated with the traditional Enlightenment conception of the rule of reason and with the sharp divide between faith and reason. Both of these, however, have been radically attacked by post-modern thought. The post-modern movement defies meaningful encapsulation as it encompasses a diverse and complex array of views expounded by a large number of very different authors. Nevertheless, for present purposes, suffice it to focus on a small number of generally applicable key points. The post-modern challenge builds on the “disenchantment of reason” fueled by the transformation of the Enlightenment’s design to implant the rule of reason into the mere instrumentalization of reason. The

rule of reason aims at discovery and institutionalization of a universally justifiable rational order. What has led to the “disenchantment of reason,” however, has been recourse to reason and scientific methodology for purposes of advancing the narrow interests of the powerful, fostering colonialism and neo-colonialism, exacerbating differences in wealth, and the like (Habermas 2001: 130, 138–40). The reduction of reason to instrumental reason thus seems to turn the means of the Enlightenment against its ends, and particularly against the pursuit of liberty and equality for all.

Whether or not postmodernism is altogether incompatible with the project of the Enlightenment, conceived as one that evolves and adapts over time, is a matter of dispute that will be further addressed in Part III. For now, what is most important are the consequences that postmodernism draws from the instrumentalization of reason. As the latter becomes pervasive, the usefulness and legitimacy of the rule of reason as regulator of the normative order that presides over the relevant social and political institutions diminish to the point of leaving a great vacuum. Social actors become alienated and retreat into subjectivism because recourse to reason has left them powerless to achieve justice in the face of the ravages spread by instrumental reason. This fosters a multiplication of purely subjectively grounded conceptions of the good that escape from the constraints of modernism or of the traditional Enlightenment-based rule of reason (Id.: 58, 88, 140). Post-modern subjectivism, therefore, appears as particularistic and as prone to leading to endless fragmentation and to relativism in law, morals, and politics. In other words, as post-modern discourses proliferate, the clash between conflicting visions of justice and disparate conceptions of the good becomes increasingly magnified with no readily apparent common denominator available to carve out common grounds, or to mediate between the ever-increasing sets of differences that seem irremediably at odds with one another.

Although postmodernism does not entail or call for balkanization, it fits comfortably with the processes of particularization and identity formation that pave the way to balkanization. Moreover, by weakening modernism’s refusal to cede the public sphere to religion, postmodernism unwittingly clears the stage for (re)politicized religion to begin (re)capturing what modernism had set as the exclusive preserve of secularism. Also, the retreat of modernism ironically sets the public stage for the deployment of politicized religions that are universalist in their religious outlook as well as in their political agenda, including belligerent crusading or Jihadists fundamentalist religions.

On the one hand, the relativism associated with postmodernism favors a process of balkanization within the normative realm. Every norm, value, or conception of the good is only justifiable from the perspective of those who identify with it and are already committed to it. Just as in the case of balkanization in the context of nationalism, balkanization in the realm of norms prompts relativization and hence devaluation of the norms embraced by all those who make up the “other,” and to



overvaluation, if not absolutization, of the norms to which one is oneself committed. Accordingly, the coupling of relativism with subjectivism linked to postmodernism results in a dialectic defined by the mutually reinforcing conflict between an ever more fragmented, atomized, and relativized realm of intersubjective and inter-communal dealings and an ever more isolated, narcissistic, all-encompassing, and solipsistic realm of subjective and intra-communal (self) dealings.

On the other hand, a post-modern world marked by increasing solipsistic isolation is demoralizing, and particularly so in light of the great spread and intensification of inter-communal dealings brought about by globalization. One becomes more and more enclosed within one's own truth while at the same time being forced to interface with an increasing number of others who all deny or devalue one's own truth. This predicament provokes, in turn, a yearning to escape from one's solipsistic prison, and, consistent with the dynamics of postmodernism, two seemingly separate moves emerge as promising. The first of these consists in projecting one's own subjective normative perspective outward and, as a consequence, imagining it as being universal; the second, in internalizing a normative perspective coming from "the outside," thus escaping one's merely subjective prison by imagining what is obtained from others as being worthy of being shared with them *because* it is universal.<sup>8</sup>

It now becomes apparent how normative balkanization and the drive toward overcoming, or compensating for, the utter isolation it begets under post-modern conditions favors the rise of particular religions conceived (from the inside) as universal, which claim the right to exclusive rule over all facets of the life of the polity. Relativization casts the ideology of secularism, once privileged under modernism, as one more merely subjective value system. This sets secularism as just one more ideology, one more metaphysical position, and hence the equivalent of one more, among a large number of, competing religions.<sup>9</sup> This allows for a de-relativization of religions that were doubly relativized under modernism through subordination to secularism and through relegation to the private sphere. Furthermore, each particular thus de-relativized religion can now cast itself as universal not only inwardly (as a large number of religions, even under conditions of modernism, do) but also outwardly in the public arena that is typically populated by numerous other religions and non-religious ideologies. At the same time, in the context of pervasive post-modern existential loneliness and anxiety, a de-relativized particular religion that aggressively promotes itself as universally encompassing looms as especially enticing to those who seek to escape from the strictures of their own subjective isolation.

<sup>8</sup> Unless what is internalized coming from others is cast as universal, escape from subjective solitude would only lead to subservience to the arbitrary (viewed from the outside) value order of others.

<sup>9</sup> It is noteworthy, in this respect, that secular public education has been characterized by religious fundamentalists as preaching the "religion" of "secular humanism." See *Smith v. Bd. Of Sch. Comm'rs*, 827 F.2d 684 (11th Cir. 1987) (U.S. Federal Court of Appeals).

Finally, such a religion appears perfectly suited to confront and to counter globalization. Globalization aims at universalization by uprooting the particular and leveling or submerging differences. De-relativized and de-privatized religion, in contrast, projects *its* particular as the universal and wields its universalized particular against the systematic uprooting of identities deployed by the process of globalization in its quest for a uniform worldwide market unimpeded by the vicissitudes of local cultures.

Consistent with this analysis, and with the claim advanced by Habermas that global Jihadist terrorism is a byproduct of the implantation of the global economy (Borradori 2003: 66), it becomes clear how fundamentalist religious terrorists could seek to arrogate to themselves the task of systematically countering globalization. Identity politics cannot defeat the opening of markets by itself as the violence that the push to globalization inflicts on particular identities and cultures can be met arguably only through violence. From a post-modern perspective, the two instances of violence involved could be regarded as equivalent (leaving aside, for the moment, whether they would be equally condemnable or merely equally relativized due a total absence of means to evaluate any normative stance from the outside); from a religious fundamentalist Jihadist perspective, however, the global terrorist's violence would be in the service of the truth and against those bent on uprooting and dismantling it.

As already mentioned, the struggle against belligerent fundamentalist religion is easily normatively justified for all those who do not share the latter's perspective. Leaving aside whether postmodernism is necessarily wedded to relativism, and whether it can *systematically* justify moral condemnation of, and armed struggle against, belligerent fundamentalist religion and the global terrorism associated with it – questions that will be addressed in Chapter 8 – it seems obvious that neither the disenchantment of reason nor the retreat to subjectivism would deter the post-modernist from siding in this confrontation with liberalism as the lesser of two evils. On the other hand, so long as the realm of intersubjective and inter-communal interaction is not reducible to that of the war pitting belligerent fundamentalist religion against all others, postmodernism does pose several serious challenges to liberalism.

Two of these challenges are particularly acute and troubling in the context of the contemporary multi-ethnic, multi-religious, and multi-cultural polity. The first, already alluded to, is the dislodging of secularism from the pedestal on which it stood during the modern era tracing back to the Enlightenment. The second challenge, in turn, is posed by postmodernism's rejection of the possibility of devising neutral state institutions to mediate and do justice among the conflicting conceptions of the good typically present within the contemporary polity. As will be further discussed in Chapter 1, what distinguishes the postmodern from the modern polity is