

# ACCOMMODATING DIFFERENCES: THE PRESENT AND FUTURE OF THE LAW OF DIVERSITY

## AN INTRODUCTION

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### I. ACCOMMODATING DIFFERENCES THROUGH LAW

There is a need for more sophisticated legal instruments to accommodate diversity in pluralistic societies, at least within the Western legal tradition. Since the factors used to differentiate among groups and individuals are potentially infinite, it is the role of the law to choose legally relevant factors, thereby concretizing them. Therefore, accommodation of differences is an ongoing challenge to legal systems. However addressed, this phenomenon implicates the very identity of a society.

By its nature, the law of diversity<sup>1</sup> is always a work in progress. Due to constant change in the social environment and to the internal dynamics of the respective groups, all normative solutions and legal instruments need continuous rebalancing, adaptation, and reconsideration. This makes “one size fits all” and “once and for all” solutions counterproductive and nearly impossible to implement.

Standards are, by definition, uniform and thus neither flexible in adjusting to different situations nor easy to agree upon as binding law. As it has become clear from the numerous—and, in the end, futile—attempts to find a legal definition for “minority,” it seems next to impossible to elaborate binding standards, abstract criteria, and instruments for the protection of minorities or groups petitioning for differential treatment.<sup>2</sup> There is a potential danger for minorities needing protection: abstract standards might not serve their concrete needs. Linguistic minorities and indigenous peoples, for instance, generally have different needs and different claims, thus requiring different instruments for recognition and protection.<sup>3</sup>

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1. One might define the law of diversity as the body of law that has been and is being developed to deal with the issues involved in accommodating the differences represented by diverse groups within a pluralistic society.

2. Binding standards for minority rights are difficult to achieve because they necessarily depend on the ideological perspective adopted. See, e.g., John Packer, *On the Content of Minority Rights*, in *DO WE NEED MINORITY RIGHTS?* 121, 121 (Int'l Studies in Human Rights vol. 46, Juha Rääkkä ed., 1996) (discussing how “basic concepts” of “international standards” have not been agreed upon).

3. While the criteria of blood and race are the natural point of reference in determining who is

The law of diversity is not only constituted of a large variety of legal instruments, legal sources, and interrelated levels of complexities; it is also shaped by a great number of different actors. The rules of the law of diversity are inevitably subject to constant revision with respect to their proportionality, efficiency, and sustainability. These rules are directly linked to the changes of the societal reality that they regulate. Accordingly, the task of finding workable legal solutions to the treatment of diversity is constantly in progress and, given the nature of the issues involved, never completely finished. In light of the need for constant revision of the approaches to and the rules for the legal accommodation of differences, it seems highly appropriate to consider this phenomenon from multiple, transnational legal perspectives. The Essays in this Symposium address from different—sometimes completely different—standpoints recent trends in the complex law of diversity and its associated legal instruments. The only common denominator among the papers is the use of legal methodology.

The reader might be puzzled by the degree of heterogeneity emerging from the following Essays in terms of approaches, analyzed cases, country studies, subject matters, and legal disciplines considered. This heterogeneity is actually one of the symposium's goals: to show how diverse the same law of diversity is and ought to be, while at the same time finding a common ground for legal dialog among scholars from different cultural backgrounds. The following symposium of the *Vermont Law Review* represents the collection of an impressive amount of information and legal wisdom from a variety of legal cultures and disciplines and provides an up-to-date overview of the scholarship pertaining to the law of diversity in the Western legal tradition.

## II. THE CONFERENCE AND THE PROCEEDINGS: STRUCTURE AND PANELS

This symposium is the result of a conference hosted by Vermont Law School (VLS) in September 2005. The conference sprang from the broadly shared assumption that complexity constantly deranges the rules and legal categories set forth to accommodate the increasingly numerous demands for different legal treatment. These demands result from the growing pluralism of our societies.

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a member of an Indian tribe in the United States, the use of the same criteria for identification is firmly rejected in Europe. Framework Convention for the Protection of National Minorities art. 3, Feb. 1, 1995, Europ. T.S. No. 157 (“Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.”).

The participants were asked to deal with the issue of how law is responding to the need to accommodate diversity in various legal fields and in different legal cultures and traditions. The variety of answers reflects the multiplicity of perspectives through which the participants dealt with the issue.

The conference consisted of five panels, followed by a final panel discussion and a keynote speech. Each panel addressed the issue from the standpoint of a different legal discipline: constitutional law, international law, corporate and labor law, private law, and criminal law. All panels were composed of scholars from different countries representing different legal cultures. The presentations and discussions in each panel were followed by lively discussions among all participants, thereby promoting interdisciplinary exchange. Unfortunately, only the Essays and written discussants can be presented here. No written record of the fruitful discussions remains. However, the success of the initiative led to the establishment of a permanent network among the participants and the represented law schools. This network will promote mutually beneficial exchange in the future as new topics arise.

The first panel focused on constitutional law. Manuel Carrasco Durán (Seville), Gilbert Kujovich (VLS), Colleen Sheppard (McGill), Peter Teachout (VLS), and Roberto Toniatti (Trento) discussed some of the numerous facets of the law of diversity. The analyses were wide-ranging and included (1) the challenges faced today by the courts as they are asked to issue remedies to accommodate differences; (2) desegregation patterns in U.S. history; (3) theoretical issues of constitutional recognition of diverse groups; and (4) the multiplicity of constitutional meanings of diversity. Regarding the latter, the keynote speech by Joseph Marko, professor at the University of Graz and former international judge in the Constitutional Court of Bosnia and Herzegovina, deserves special mention. Professor Marko presented, from the perspective of both a scholar and a judge, the Bosnian legal framework, which was successful in stopping an ethnic war but which has proven far less workable in terms of reconciliation and integration of peoples.

The second panel focused on international law. Alessandro Fodella (Trento), Peter Leuprecht (University of Québec at Montréal), Pamela Stephens (VLS), and Burns Weston (VLS) showed how traditional international law has failed to provide workable solutions for diversity claims due to deep-rooted limitations, such as the principle of noninterference, and has consequently failed to provide for the limited impact of international norms on each country's choice regarding recognition or suppression of diversity claims. As the panelists noted,

however, due to recent developments that are profoundly changing the roles and functions of international law, recognition and protection are becoming extremely challenging.

The third panel focused on corporate and labor law. Scholars in these legal fields have long grappled with accommodating pluralism in everyday practice, particularly in labor relationships and company organization. Pascale Bloch (Paris 13), Matteo Borzaga (Trento), Richard Janda (McGill), Stefania Scarponi (Trento), and Linda Smiddy (VLS) presented a large variety of examples of the most recent developments in international, national, and European law, showing that corporate and labor law is in the forefront of diversity recognition. Going forward, this branch of law may offer fascinating opportunities if properly used for diversity purposes, as in the case of one aboriginal corporation in Canada.<sup>4</sup>

The fourth panel focused on private law. The topics included consumer law in the European and national models (Luisa Antonioli, Trento), family law and the rights of same-sex couples (Gregory Johnson, VLS, and Susan Apel, VLS), the role of private suppliers of law (Arianna Pretto-Sakmann, Columbia), and how the “storm of diversity” is affecting even the most unitary legal system ever conceived, the French legal system (Cyrille Duvert, Paris 13). The studies showed how much of the law designed to protect permanently established groups, such as national minorities or ethnic or religious groups, is applicable to less-defined and less-definable groups of people that can be seen as majorities or minorities regardless of their consistency and their permanent membership in these groups. The examples of consumers on the one hand and law-suppliers on the other are particularly telling in this respect.

The fifth panel focused on criminal law. Bruce Duthu (VLS), Emanuela Fronza (Trento), Patrick Healy (McGill), and Michael Mello (VLS) were asked to address some challenging issues of illegal repression of diversity claims. It emerged, for instance, that some groups are affected much more than others by criminal prosecution. It also emerged that criminal law might be designed in a flexible, granular way to address some diversity problems, such as in the case of Native American criminal law. Moreover, one of the most intriguing, “slippery,” and contradictory problems posed by the criminal repression of forms of diversity was presented: the issue of the criminal sanction against negationism, with particular regard to statutes in several European countries that prohibit the denial of Nazi crimes, sometimes cloaked as historical revisionism.

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4. Richard Janda, *Why Does Form Matter? The Hybrid Governance Structure of Makivic Corporation*, 30 VT. L. REV. 775 (2006).

Special guests and active participants in the panels included Patrick and Jane Glenn (McGill), Denise Johnson (Justice of the Vermont Supreme Court), Carlo Casonato (Trento), and Marc Jacques (Canadian Consulate of Boston, one of the sponsors of the conference).

### III. FINDINGS OF THE CONFERENCE

Some findings emerged from the conference. First, at a more superficial level, it may be noted that the structure and, to some extent, even the concept of diversity varies quite remarkably between the American and European legal traditions. Such a divergence, however, seems more rooted in the overall, theoretical approach than in the practical solutions provided in the respective legal traditions. Whereas in North America, particularly in the United States, no different treatment is permitted unless it passes judicial tests, in Europe (i.e., in the European Union and in its member states, to greater extent now even in France), different treatment is considered permissible unless it exceeds the limits imposed by judicial tests.

Second, it clearly emerged how important extralegal determinants, including cultural aspects, numbers, and costs, are in defining a society's approach to the law of diversity. Law is always a cultural phenomenon, and, as such, it tends to reflect the cultural attitude of the majority. For this reason, what is the rule for the minority is generally the exception for the majority. Moreover, within the realm of law, soft instruments<sup>5</sup> are becoming as important as hard, binding ones. This might not be new, but certainly this is now perceived much more profoundly than in the past, and the study of soft law poses additional challenges to the legal analysis of diversity issues.<sup>6</sup>

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5. Soft law, first recognized in the field of international law, has persuasive power only and is not strictly binding. Resolutions by the United Nations are one example of soft law.

6. The failure of the Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms and the compromise in the Framework Convention for the Protection of National Minorities can be seen as a confirmation of this. In light of these events, the differing approach chosen by the Organization for Security and Co-operation in Europe (OSCE) High Commissioner for National Minorities in the second half of the 1990s is very promising. He presented a set of recommendations, named after the places where they were elaborated: Oslo, The Hague, and Lund, on the most relevant issues for minorities, including linguistic rights, and rights to effective participation in public life. Rolf Ekéus, High Comm'r on Nat'l Minorities, Org. for Security and Co-operation in Eur., *Effective Participation of National Minorities in Public Life* (Sept. 28, 2005). See generally John Packer, *The Origin and Nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life*, HELSINKI MONITOR No. 4, 2000, at 29, 29, available at <http://digbig.com/4qrew> (providing "some explanation about the origin of the *Lund Recommendations* . . . , the process of their elaboration, and their nature as a tool with which to address inter-ethnic relations within the democratic State"). The aim of these soft-law recommendations

Third, it is worth noting how quickly legal instruments become antiquated in the modern law of diversity. Although legal instruments have traditionally been considered eternal, it turns out that, in the field of diversity, they are becoming outdated with increasing speed. The labor and corporate law papers in this symposium are very telling with regard to the destiny of affirmative action, which is today conceived in a way that profoundly differs from that of the past. Moreover, considering that within the modern law of diversity corporations might matter much more than political bodies, perhaps even the “sacred cows” of constitutionalism, such as electoral legitimacy, are put under stress. This difference in importance might also affect minority issues, as in the case of minority companies in northern Quebec.<sup>7</sup>

Fourth, and even more importantly, recent developments in all fields challenge the rooted idea that lawyers always know and ought to know both the rule of law and the exception. In this delicate area of law, however, it might be much more difficult to have this knowledge because to some extent, as Patrick Glenn pointed out, difference might be the rule and equality the exception. Whereas law has traditionally been the expression of the majority’s will (the *volonté générale*), it is often very difficult to distinguish the rule from its exception in a given case. Thus it is also difficult to distinguish the general right from a specific right or the overcoming of disadvantaged positions in a specific case from a privilege.

The questions posed in this symposium confirm these difficulties. Who are the people(s)? What group(s) deserve(s) legal recognition? Who are the members of a native nation? Are consumers a legally relevant group? Are private law suppliers? What are the remedies against possible abuses? What are the limits to the free establishment of groups? Not even the application of criminal law is always easy to ascertain, as the *Oliphant* case from the United States Supreme Court shows.<sup>8</sup> Finally, as Peter Leuprecht and Burns Weston pointed out, the very concept of a right is debatable.<sup>9</sup>

What are the legal resolutions to these profound uncertainties confronting lawyers? From all the presented perspectives, it seems that the challenge for lawyers dealing with this subject lies in an approach that

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elaborated by a group of independent experts is to show the wide range of possible solutions for different and frequent practical issues and to persuade actors (especially governments) rather than to impose uniform “standards.” However, political will for implementation is critical, and acceptance and willingness to cooperate are preconditions for satisfactory legal regulation of minority situations.

7. Janda, *supra* note 5.

8. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978) (“Petitioners argued that the Suquamish Indian Provisional Court does not have criminal jurisdiction over non-Indians.”).

9. Peter Leuprecht, *The Difficult Acceptance of Diversity*, 30 VT. L. REV. 551, 563–64 (2006).

could be labeled as “systemic pragmatism.” That is, one must necessarily be pragmatic in recognizing problems, but rigorous in understanding their legal rationale. This seems to be a lesson for both the common law and civil law traditions, which sometimes run the risk of being too pragmatic (the former) or too systemic and abstract (the latter).

Finally, two methodological achievements seem to emerge, more or less explicitly, from this symposium. On the one hand, it turns out that, despite all the possible differences, law is still a unitary phenomenon. On the other hand, the comparative method now proves to be the most effective tool for understanding how to grasp the essence of legal phenomena.

#### IV. LAW AND DIVERSITY: MULTIFACETED, COMPLEX, AND SOFT

It is hardly possible to summarize the constituent elements of a modern law of diversity. Moreover, the motivation for publishing this symposium is precisely to allow readers to elaborate their own personal reflections on problems and possible solutions emerging from the analyses presented herein. Therefore, it is not the duty of this contribution to elaborate *the* introduction to the volume but, more modestly, *an* introduction. The essays that follow have been written with particular regard to the value of diversity. It would be a betrayal not to adopt the same approach in presenting them. For this reason, it seems respectful to the contributors to begin this publication simply by proposing some critical remarks elaborated from the privileged standpoint of the introducer. At the same time, it is hardly this introduction’s intention to generalize about or present a common position of the contributors.

From such a subjective perspective, it seems that there are some elements common to the challenge diversity presents to the various fields of law. These elements might be summarized as follows: the modern law of diversity is *multifaceted* (i.e., it is characterized by a plurality of producers and suppliers), it is *complex* (i.e., the “sovereignty” over diversity issues is diffused), and it tends to become *soft* (i.e., determined to a large extent by factors that are not strictly binding).

The law of diversity is *multifaceted* because the state, in an era of increasing political and legal interdependence, is far from representing the only counterpart to diverse groups. Consequently, the state is no longer the sole and exclusive legislator authorized to regulate, or even recognize, majority and minority positions. Sovereignty over diversity, once vested exclusively with the state, has now definitively ceased to be concentrated in just one sphere of government. This sovereignty is rather part of the same phenomenon of polycentric diffusion that characterizes an increasingly

large share of public tasks and functions.

These phenomena of “subsidiarity” can have vertical or horizontal dimensions. Regarding “vertical subsidiarity”—subsidiarity between different levels of government—polycentric diffusion occurs through the increasing importance of the international, supranational, and subnational legal systems. These systems are assuming greater importance due to the processes of decentralization. Regarding “horizontal subsidiarity”—subsidiarity between the public and the private sectors—polycentric diffusion occurs through instruments like personal and cultural autonomy as well as through the various groups’ active role in determining their own right to be different. Thus, if this is true, it is necessary to gradually abandon the idea of accommodation of diversity as being linked to, and to some extent confused with, the concepts of uniformity or equality.

The law of diversity is therefore *complex*. Such a multiplicity of actors and of sources of law for diversity claims inevitably leads to a multilevel minority governance, where a constant and often confused interplay between potentially countless subjects takes place. This implies that the accommodation of differences ceases to be the task for only one level of government (in the United States, the state level) and becomes a transversal and shared objective sought after by distinct public and private actors and instruments in a combined approach.<sup>10</sup> While lowest common denominators are determined at international and supranational levels, the state acts as the engine for macropolicies in the law of diversity. The subnational and local authorities and private actors like groups, enterprises, and economic subjects are the main creators of micropolicies of diversity.

This complexity manifests itself with increasing clarity in the horizontal subsidiarity dimension. On the one hand, the multiplicity of levels of actors with lawmaking authority with which groups are confronted results in a constant change in group status as minority or majority, depending on the level of government and jurisdiction concerned. All of us are members of both majority and minority groups more and more each day, depending on the criteria used to define the members of the relevant group. This continual change in status facilitates understanding and respect for the positions and needs of others. On the other hand, the adequate instruments of the rich toolbox for the protection and promotion of diversity are increasingly chosen by the groups themselves, according to their needs.

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10. As an example, this tendency can be compared to protection of the environment, which is, by its very nature, an objective of collective interest and is thus shared by all governmental subjects and spheres of government. This accommodation must be reached through a variety of instruments. Like the clear general interest in a healthy environment and in biodiversity, a similar interest exists in a pluralistic and differentiated society.



The groups thus become the first (but certainly not the only) mechanics of the complex machinery assembled for their own protection. This role of mechanic has inevitable consequences in terms of both potential, not yet fully explored, and of responsibility—towards the groups themselves and towards the other actors in “diversity management.”<sup>11</sup>

Finally, the law of diversity tends to become *softer*. This field of analysis is particularly telling and paradigmatic of a larger evolutionary trend that seems to affect the entire system of law. Law has always been the expression of values, the majority’s values, at least implicitly. In a society characterized by differentiation and thus complexity, there are two fundamental options for the law. One option is to limit its use to an instrument of conflict resolution in order to settle controversies that inevitably arise within any society. This means decreasing the law’s ideological component in favor of increasing its technical character. Another option is to transform it into an inclusive law that expresses not only the values of the majority but also, more generally, those of pluralism. In this inclusive approach, minorities and groups are a fundamental expression of social pluralism. From a perspective of complexity, neither function mutually excludes the other.

Thus, the experiment of a law of diversity aiming at conflict prevention can coexist with increasingly sophisticated instruments for governing conflict. There is a proliferation of forms of “soft law,”<sup>12</sup> which are based on the presumption of broadly shared values, within which the differentiation of specific legal settings becomes the rule. This differentiation makes up a rich and varied panorama with an increasing number of single pieces of a mosaic that, if put together correctly and in a systematic way, are able to form a much more beautiful picture than the individual pieces did before.

Reflecting a pluralistic attitude, this soft law of diversity protects fundamental and individual rights while simultaneously providing procedures that lead to negotiated choices. This soft law does not predetermine or impose such choices, but rather guarantees that they can be made in full autonomy. Above all, such a soft-law approach seems to be inevitable from a long-term perspective. The more society becomes free and reluctant to tolerate strict impositions, the more law can be effective by means of persuasion, albeit obviously within a legal system characterized

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11. See Francesco Palermo & Jens Woelk, *No Representation Without Recognition: The Right to Political Participation of (National) Minorities*, 25 J. EUR. INTEGRATION 225, 226 (2003) (summarizing problems that minorities face in terms of political representation).

12. GUSTAVO ZAGREBELSKY, *LE DROIT EN DOUCEUR* (Michel Leroy trans., 2000) (coining this phrase).

by the rule of law. This basic common denominator shows that “pluralism in togetherness”<sup>13</sup> requires some basic common rules and probably also a minimum of shared values in order to guarantee the peaceful coexistence of different communities. In this regard, modern versions of older theories like personal federalism focus on the concept of multicultural citizenship, contrary to the exclusive traditional concept of citizenship understood as equivalent to “nationality.”<sup>14</sup>

#### V. FIVE HINTS FROM THE LAW OF DIVERSITY

A minority or diverse group has no independent existence, as diversity is the rule in human life. It becomes a minority or a diverse group only in relation to another, more numerous and/or dominant group and only with regard to certain distinguishing criteria.<sup>15</sup> This is why the law of diversity poses fascinating questions to legal scholars and represents a litmus test for legal analysis in general. What is a group? What is a right? What is the rule, and what is the exception? What are the limits, and who controls them? What are the origins of the law? From which level of government does the law emanate? Does the law emanate from public or private actors? Who is subject to the rule of difference?

By observing the dynamics of the law of diversity as illustrated in the conference and this symposium, one may discern general tendencies in relevant legal analysis.

*Law and methodology.* It appears on the one hand that, aside from all possible differences, law is still a unitary phenomenon. Therefore, a multidisciplinary legal approach merits application despite the concomitant difficulties. On the other hand, the comparative method has proven to be

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13. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, ¶¶ 194, 198–200, at 38–40, U.N. Doc. E/CN.4/Sub.2/1993/34 (Aug. 10, 1993) (submitted by Asbjørn Eide) (recognizing the need to protect “basic subsistence rights,” the right to “continued residence in the areas where members of the minority lawfully reside,” and the “right to exist in peace and security as distinct peoples”).

14. See, e.g., WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 191 (1995) (noting that, in order for a multination state to cohere, citizens must value minority groups and diversity); KARL RENNER, *DAS SELBSTBESTIMMUNGSRECHT DER NATIONEN IN BESONDERER ANWENDUNG AUF ÖSTERREICH* (1918); see also Uri Ra’anan, *Nation and State: Order out of Chaos*, in *STATE AND NATION IN MULTI-ETHNIC SOCIETIES* 3, 4–7 (Uri Ra’anan et al. eds., 1991) (noting that “nation-state” is an oxymoron—many “states” (countries) are composed of two or more ethnic “nations,” and some ethnic “nations” are spread among more than one “state”).

15. See Roberto Toniatti, *Minorities and Protected Minorities: Constitutional Models Compared*, in *CITIZENSHIP AND RIGHTS IN MULTICULTURAL SOCIETIES* 195, 200–01 (Tiziano Bonazzi & Michael Dunne eds., 1995) (discussing the concept of a minority and that concept’s relation to the concept of a majority).

the most effective tool to grasp the essence of legal phenomena. As a consequence, legal analysis, in order to comply with the requirements posed by the complex challenge of diversity, needs to be complex, broad, and not confined to a single legal discipline or a single legal system.

*Law and definitions.* As discussed above, the task of the scholar in dealing with diversity is made more difficult by the lack of certainties deriving from the absence of clear definitions of the relevant concepts. It follows that, instead of looking for standards and comprehensive definitions that in the long-term prove to be fallacious, the legal analysis should be more ready to deal with uncertainties, paying greater attention to the procedural side of possible diversity conflicts. A greater pragmatism in identifying problems (“I know it when I see it”)<sup>16</sup> can and should be balanced with a sound systematic analysis of possible legal solutions, based on the application of tests and procedures that might help reify the systemic nature of the law.

*Law and equality.* Equality in its purely formal sense is not sufficient for the management of the complex situation of a multiplicity of groups that find themselves—as a consequence of their diversity—in a structural minority position. The role of the law consists of applying the democratic criterion (majority rule) through corrective measures aimed at overcoming structural and permanent minority positions by highlighting the pluralistic dimension. Diversity rights that do not provide for antimajoritarian limits are inconceivable. For this reason, the equality principle cannot be viewed merely in its formal dimension, treating all citizens in the same way. Only when the substantial dimension of equality is considered can the specific structural, social, and factual disadvantages of a minority group be noticed and addressed by differentiating rules.

*Law and prescription.* In an increasing pluralistic context, society looks to the law to provide persuasive rather than merely prescriptive rules. Where a majority demands mindless obedience and submission from a minority, this subjugation results in the minority’s rights not being respected.<sup>17</sup> Thus, the more pluralistic a society, the higher the need for

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16. It is not by chance that the former OSCE High Commissioner on National Minorities, Max van der Stoep, when asked of a definition of a minority, replied: “I would dare to say that I know a minority when I see one.” Max von der Stoel, High Comm’r on Nat’l Minorities, Conference for the Security and Co-operation in Eur., Keynote address at the CSCE Human Dimensions Seminar (May 24, 1993), available at <http://digbig.com/4qrey>. Van der Stoel’s definition of a minority draws on Justice Stewart’s famous statement that when it came to hard-core pornography, “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

17. This demand is common to all phenomena of integration, as such phenomena are characteristic of a societal integration of groups or a legally driven process of integration in terms of supranational polity building. Regarding tolerance as opposed to obedience in the context of European

tolerance and persuasion instead of diktats and sanctions. This seems to explain why the modern law of diversity is so strongly determined by soft-law rules that are not strictly binding, making the task of the legal scholar more difficult but at the same time more fascinating than in the past.

*Law and complexity.* In such a context, law tends to become similar to technology, where even recent achievements quickly become outdated. In the increasingly integrated, transnational legal community, problems and solutions tend to converge, mutually fertilizing different legal systems and branches of law. The multiplicity of instruments, rules, actors, and responsibilities seems to oblige minority groups to accept their role as being part of a larger entity and to think—to their own advantage—in terms of integration and cooperation. It also seems to force majorities to accept that they are not the only masters of their house and to think—again, to their own advantage—in more complex terms. In such a context, law should provide for adequate normative instruments and procedural solutions to enable the accommodation of legitimate diversity requirements, thereby promoting societal evolution. These instruments will prevent the domination of one position over the other and guarantee the necessary balance—permanent but never stable—between equality and difference, protection and cohabitation, rights and obligations, and autonomy and integration. Due to the continuous need for readjustment, the positions as well as the instruments—including the balances that the latter represent—can never be regarded as permanently established. Legal categories are fundamental, but one should not forget, in the end, that law is anything but a stable artifact.

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integration, see J.H.H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg* (Jean Monnet Center for Int'l & Reg'l Econ. Law & Justice, Working Paper No. 10/00), available at <http://digbig.com/4qrfa>.