

Reconsidering “Community”: A Normative Model to Address Communities in the Law

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Article abstract

This article proposes a normative infrastructure concerning the legal treatment of communities in the law. This normative infrastructure, based on the state's pluralistic obligation to protect the existence of multiple, diverse conceptions of good within a society, first requires the state to distinguish between different communities according to their characteristics to determine how each should be treated. This article suggests three key elements for distinguishing communities in this way: the social compatibility of the community with other communities and with society as a whole, the role that cooperation plays in the realization of the community's conception of the good life, and the community's political and economic strength.

We then demonstrate how the proposed normative infrastructure should apply to various legal branches including private law (focusing on proprietary arrangements of residential communities and relational contracts); public law (aiming to provide a comprehensive policy to regulate the relationship between the liberal state and illiberal communities) and labor law (proposing a novel framework for rights and duties in workplaces).

Reconsidering “Community”: a Normative Model to Address Communities in the Law

by Shai STERN*

Dans le présent article, l’auteur propose une infrastructure normative concernant le traitement juridique des communautés dans la loi. Fondée sur l’obligation pluraliste de l’État de protéger l’existence de conceptions multiples et diverses du bien au sein d’une société, cette infrastructure oblige d’abord l’État à distinguer les différentes communautés en fonction de leurs caractéristiques afin de déterminer la façon dont chacune doit être traitée. L’auteur suggère d’abord trois éléments clés pour distinguer les communautés à cet égard : la compatibilité sociale de la communauté avec les autres communautés et avec la société dans son ensemble; le rôle que joue la coopération dans la réalisation de la conception communautaire du bien-vivre; la force économique et politique de la communauté.

L’auteur montre ensuite la manière dont l’infrastructure normative en question devrait s’appliquer à diverses branches juridiques, notamment le droit privé (focalisation sur les arrangements propriétaires des communautés résidentielles et les contrats relationnels), le droit public (élaboration d’une politique globale en vue de réglementer les relations entre l’État libéral et les communautés non libérales) et le droit du travail (mise au point d’un nouveau cadre pour les droits et les devoirs sur les lieux de travail).

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I. The Law and the Community: Continuous Struggle for Independence and Interdependence

Community is one of the oldest social institutions. People have joined communities to meet their social and human needs. The community served as a source of support, faith, cooperation and fulfillment of common aspirations¹. They have existed for centuries, forming the most common social framework in the world². The establishment of nation-states in the 17th century undermined the stability of this social institution. New states have begun to take on the traditional roles of the community, leaving communities weaker and their members less relevant. The Industrial Revolution, along with significant changes in mobility and communications, also affected the stability of the social institution of community. As Tönnies described it, the traditional communities, which were based on solidarity, traditional division of roles and personal acquaintance have ceded their central social role to the cities in which modern society has developed³. While some sociologists have mourned this eclipse of communities⁴, others have suggested that while communities may have changed in nature, their social role has survived⁵. The tensions that characterize the relationship between states and communities in the 20th century indicate that communities still have a significant role for many in society.

Western law has long struggled to accommodate communities. In many and varied branches of law, the law is required to define and clarify this institution. In private law, communities pose challenges for both

¹ Anthony P. COHEN, *The Symbolic Construction of Community*, Milton Keynes, Ellis Horwood Ltd, 1985.

² See, e.g., Colin BELL & Howard NEWBY, *Community studies: An Introduction to the Sociology of the Local Community*, New York, Praeger Publishers, 1971; Anthony P. COHEN, *Belonging: Identity and Social Organisation in British Rural Cultures*, Manchester, Manchester University Press, 1982, p. 1-4.

³ Ferdinand TÖNNIES, *Community and Society*, Oxfordshire, Taylor & Francis Group, 1887.

⁴ See, e.g., Maurice ROBERT STEIN, *The Eclipse of Community: An Interpretation of American Studies*, Princeton, Princeton University Press, 1964; Robert E. PARK, Ernest W. BURGESS & Roderick D. MCKENZIE, *The City*, Chicago, Chicago University Press, 1984.

⁵ Peter H. MANN, "The Concept of Neighborliness", (1954) 60 *American Journal of Sociology* 163, 168; Herbert J. GANS, *The Urban Villagers: Group and Class in the Life of Italian-Americans*, New York, The Free Press (Macmillan), 1982.

property and contract law. Regarding the right to property, communities challenge the libertarian conception of property, according to which owners should be entitled to absolute freedom with regard to the management of their property⁶. Realistic conceptions of private law, on the other hand, suggest that owners have obligations toward their communities, which in several instances may limit their liberty and autonomy in their property⁷. For example, residential communities may impose restrictions on their members, as well as using exclusion mechanisms to screen candidates who wish to live in the community⁸. In contract law, the discussion that revolves around “relational contracts” requires the law to re-think the role of communities⁹. Giving meaning to the relationship between the parties to the contract, and especially to the communal norms that developed between them during the period of the contract, requires the law to define what the community is, and what its characteristics are.

However, the law’s examination of the institution of community is not limited to private law. In fact, in most branches of law, the legislature, as well as the courts, are required to define the social institution of “community”. In public law, religious, cultural and economic communities challenge the ability of law to maintain equality and protect individual rights. Most Western countries deal with the tension between the liberal

⁶ See, e.g., Robert NOZICK, *Anarchy, State, and Utopia*, New York, Basic Books, 1974; Richard A. EPSTEIN, *Takings: Private Property and the Power of Eminent Domain*, Cambridge, Harvard University Press, 1985, p. 250.

⁷ See, e.g., Joseph W. SINGER, *The Edges of the Field: Lessons on the Obligations of Ownership*, Beacon Press, 2001; Gregory S. ALEXANDER, “The Social-Obligation Norm in American Property Law”, (2008) 94 *Cornell Law Review* 745; Gregory S. ALEXANDER & Eduardo M. PEÑALVER, “Properties of Community”, (2008) 10 *Theoretical Inquiries in Law* 127; Hanoach DAGAN, “Takings and Distributive Justice”, (1999) 85 *Virginia Law Review* 741.

⁸ See, e.g., Erez TZFADIA, “Abusing multiculturalism: the politics of recognition and land allocation in Israel”, (2008) 26 *Environment and Planning D: Society and Space* 1115; Michal TAMIR, “The freedom to exclude: The case of Israeli society”, (2016) 49 *Israel Law Review* 237.

⁹ See, e.g., Charles J. GOETZ & Robert E. SCOTT, “Principles of relational contracts”, (1981) 67 *Virginia Law Review* 1089; William C. WHITFORD, “Relational Contracts and the New Formalism”, (2004) *Wisconsin Law Review* 631; Lisa BERNSTEIN, “Beyond relational contracts: Social capital and network governance in procurement contracts”, (2005) 7 *Journal of Legal Analysis* 561.

state and illiberal communities¹⁰. Questions such as restricting the use of religious symbols in the public sphere¹¹, maintaining equality in the internal community space¹², and compulsory core curriculum in all educational institutions challenge the law and require an examination of the role and characteristics of the communities¹³. In criminal law, communities raise questions such as the obligation of the state to take into account the cultural background and the community norms as a justification for prohibited action, or alternatively an exemption from the criminal law¹⁴. Communities also play significant role in family law, both in terms of marriage and divorce (especially as regards the encounter between civil law and religious law), with regard to the children's way of life after divorce, and inheritance¹⁵.

The above examples illustrate the significant place that communities occupy in legal discourse, and the meaning that they may have in legal decisions. At the same time, it seems that the law finds it difficult to assign a concrete meaning to the social institution of "community". The reason for this, according to Anthony P. Cohen, is the fact that today we use the term "community" so frequently that it has almost completely lost its meaning¹⁶. In social discourse, therefore, the term "community" can simultaneously be used to describe "thick" communities that provide a common framework of action that has a significant impact on the lives of its members, and "thin"

¹⁰ Shai STERN, "Takings, Community, and Value: Reforming Takings Law to Fairly Compensate Common Interest Communities", (2014) 23 *Journal of Law and Policy* 141, 172-173; Shai STERN, "When One's Right to Marry Makes Others Unmerry", (2015) 79 *Albany Law Review* 627.

¹¹ See, e.g., *S.A.S. v. France*, no. 43835/11, ECHR 2014.

¹² See, e.g., *Osmanoğlu and Kocabaş v. Switzerland*, no. 29086/12, ECHR 2017.

¹³ See, e.g., *Appel-Irrgang and others v. Germany*, no. 45216/07, ECHR 2009; *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, nos. 5095/71, 5920/72, 5926/72, ECHR 1976.

¹⁴ See, e.g., Alice J. GALLIN, "The Cultural Defense: Undermining the Policies against Domestic Violence", (1994) 35 *Boston College Law Review* 723; Nilda RIMONTE, "A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense", (1991) 43 *Stanford Law Review* 1311.

¹⁵ Carolyn J. FRANTZ & Hanoach DAGAN, "Properties of marriage", (2004) 104 *Columbia Law Review* 75.

¹⁶ Anthony P. COHEN, *The Symbolic Construction of Community*, *supra*, note 1.

communities that are ad hoc for specific activities. For example, we can define as a “community” both our family, our religious community, the social network to which we belong, and our residential building. It is clear that not all communities are alike, or even hold the same meaning for us. Yet, when we use the term “community” in each of the contexts, the meaning is usually clear. Things are different, however, when we think about the law.

The ambiguity and the multiplicity of meanings of the term “community” in our times – even if allow a contextual social discourse – does not allow the law to function properly. The law unlike social discourse has coercive power¹⁷. A legal decision may significantly restrict the liberty of individuals, sometimes to the point of revocation of their life. The law has the power to allocate resources, or alternatively to deny them. This power directly affects the perception of justice and equality in society, as well as the promotion of certain values over others. In other words, to preserve the rule of law, we cannot rely on vague terminology¹⁸. Stability and certainty are an integral part of the rule of law that require clear definitions of the terms used by the law¹⁹. The law, therefore, is at a crossroads. On the one hand, it must recognize that the term “community” enjoys a wide range of interpretations and meanings in society, but on the other hand – and in order to preserve the rule of law – it must strive to give this term as clear a meaning as possible. For this purpose, the law must adopt a clear normative framework that will provide meaning to the institution of the community, on the one hand, but will allow differentiation between different communities, on the other hand. This framework will be the focus of the next section.

¹⁷ See, e.g., William A. EDMUNDSON, “Is Law Coercive?”, *Legal Theory*, vol. 1, Cambridge University Press, 1995, p. 81.

¹⁸ See, Timothy ENDICOTT, *Vagueness in Law*, New York, Oxford University Press, 2000.

¹⁹ *Id.*, p. 185. See also, Lon LUVUOIS FULLER, *The Morality of Law*, London, Yale University Press, 1969.

II. A Normative Framework to Accommodate Communities in Law

A) From Liberalism...

The law's struggle to accommodate communities should begin by adopting a comprehensive and coherent normative framework that would allow a distinctive legal treatment of communities. In liberal countries, it is only reasonable to begin with the possibility of basing such infrastructure on a liberal conception. All liberal conceptions, however, may have difficulty accommodating "thick" communities in which individuals, members of the community, are required to make concessions and commit themselves to the common good²⁰. To illustrate this argument, we can think of the treatment of illiberal communities in the majority of Western states. Western liberal states have struggled to establish a policy to treat illiberal communities over the last centuries. At the heart of this struggle stands the tension between the liberal empowering of the individual and the limitations imposed by communities on individuals, as part of – and sometimes as a condition to – their communal affiliation. This tension provoked a philosophical-political debate about whether and how to build the relationship between the state and the community²¹. Most liberal states embraced a policy that consists of forcing communities to realize minimal liberal requirements (MLR). In such policies, the state interferes with the running of the community, to verify that the community complies with MLR such as equality and autonomy. One prominent demonstration of this policy is the imposition of a mandatory core curriculum in all educational institutions, including private educational institutions of illiberal communities²². Other examples include restrictions and prohibitions on

²⁰ See, e.g., Jeremy WALDRON, "The Rule of Law in Contemporary Liberal Theory", (1989) 2 *Ratio Juris* 79.

²¹ See, e.g., Alasdair MACINTYRE, *After Virtue: a Study in Moral Theory*, Notre Dame, University of Notre Dame Press, 1981, p. 190; Michael J. SANDEL, *Liberalism and the Limits of Justice*, Cambridge, Cambridge University Press, 1998, p. 188.

²² For the application of core curriculum in the European Union, see, European Commission/EACEA/Eurydice, 2018. The Structure of the European Education Systems 2018/19: Schematic Diagrams. Eurydice Facts and Figures. Luxembourg: Publications Office of the European Union.

illiberal communities' practices, such as gender-based discrimination²³. While most of the tension revolves around illiberal religious and cultural norms embraced by illiberal communities, the MLR policy applies also in non-religious communities that discriminate against those who are not members. One prominent example is the practice, well established in the United States and Israel, of admission committees in residential communities²⁴. Residential communities often use mechanisms to exclude potential buyers that do not share the characteristics of most of the community's residents. A MLR policy aims to deal with this discrimination, while imposing restrictions on the ability of residential communities to exclude potential tenants²⁵.

The MLR, however, entails several difficulties; some of which go to the root of its liberal commitment. First, a MLR policy blatantly interferes with the norms and practices of different communities. Such interference contradicts the liberal commitment to allow individuals to become the authors of their life stories, or in other words, it interferes with the autonomous decision making of individuals who decided to be a part of the community. Second, such a policy, by its nature, is only partial, so that on the one hand it impairs the ability of the community to operate in accordance with the norms it deems appropriate, but on the other hand it does not guarantee full autonomy and equality for members of the community. Third, a policy that seeks to apply liberal norms to illiberal communities is difficult

²³ In Israel, the Supreme Court rejected attempts by the ultra-Orthodox community to gender segregate buses and public events. See, *Rachel Azaria v. Israeli police*, HCJ 7521/1, 2011; *Neomi Regan v. Ministry of transportation*, HCJ 746/07, 2007. In the United States, a lawsuit was filed against an ultra-Orthodox community in Kiryat Joel, which sought to establish separate playgrounds for boys and girls. See the NYCLU statement: <<https://www.nyclu.org/en/press-releases/victory-park-hasidic-enclave-kiryas-joel-will-not-segregate-based-sex>>.

²⁴ Homeowners associations in the United States may establish in their bylaw (CC&Rs) the power of the community board to approve and screen individuals seeking to purchase or rent homes within their communities. In Israel, this power is established by law. See the Israeli Cooperative Societies Ordinance (1993).

²⁵ See, e.g., article 6(c) of the Israeli Cooperative Societies Ordinance (1993) that states, that "admission committee will not refuse to approve anyone on the grounds of race, religion, gender, nationality, disability, personal status, age, parenthood, sexual orientation, country of origin, perspective or political affiliation".

to implement and monitor. Finally, and no less important, such a policy fails, in general, to achieve its goals. Past data indicate that the implementation of a policy that imposes liberal norms on non-liberal communities leads to the entrenchment of communities and the exacerbation of internal norms²⁶.

The failure of the minimal liberal requirement policy to settle the tension between the liberal state and illiberal communities, therefore, requires us to re-examine that relationship and the challenges it poses.

B) ... To Pluralism

The normative and practical failure of the MLR policy is not a valid reason to abandon the regulation of communities under the law. The quest for a normative framework that will enable recognition of both the social and legal role of communities, and the differences between them, should be sensitive to the different way people want to live their lives. Since different citizens are interested in promoting different conceptions of good, the state should adopt a pluralistic conception as its the normative framework. Elizabeth Anderson's foundational pluralistic conception is a good starting point for this discussion.

Anderson's starting point is that "people experience the world as infused with many different values²⁷". Goods, according to Anderson, "differ not only in *how much* we should value them, but in *how* we should value them²⁸". Given this diversity of goods, as well as the variety of modes of evaluation, Anderson argues that "our evaluative experiences, and the judgments based on them, are *deeply pluralistic*²⁹". I find Anderson's pluralistic theory attractive for four reasons: *first*, her theory recognizes the diversity among people's approaches to valuing goods. According to Anderson, we, as human beings, are able to attribute different values to

²⁶ Ayelet SHACHAR, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, Cambridge, Cambridge University Press, 2001, p. 35.

²⁷ Elizabeth ANDERSON, *Value in Ethics and Economics*, Cambridge, Harvard University Press, 1995.

²⁸ *Id.*, p. xiii.

²⁹ *Id.*, p. 1.

different goods, based on different modes of evaluation³⁰. *Second*, Anderson marries theory and practice. She demonstrates how we value goods in different modes³¹, in accordance with our social and internal construction³², and how this diversity of approaches constantly influences our perception of goods, people, and transactions³³. The *third* reason is Anderson's demand for institutional change as a prerequisite for the establishment of value pluralistic society³⁴. *Finally*, she identifies the state's obligation to maintain a pluralistic society. As Anderson argues:

[i]ts [the state] proper aim in funding projects is not to serve the political interests of the state, the self-interest of its officials, or even the tastes of the majority, *but to expand the range of significant opportunities open to its citizens by supporting institutions that enable them to govern themselves by the norms internal to the modes of valuation appropriate to different kinds of good*³⁵.

The state, therefore, is not only obligated to *allow* people to live in accordance with their values and beliefs, but also to provide them with the *practical possibility* to do so. Pluralism, according to Anderson, should not remain an empty, popular slogan. Rather, accepting pluralism means that states are obligated to facilitate it. This obligation requires the state and the law to accommodate communities, with minimal interference in their internal conduct. However, the state's pluralistic obligation cannot be considered as a total renunciation of liberal values or an exemption from the rule of law. In the next Section I propose a practical policy to accommodate the state pluralistic obligation toward its citizens.

³⁰ *Id.*, p. 1-16.

³¹ *Id.*, p. 8-10.

³² *Id.*, p. 11-15.

³³ *Id.*, p. 1-15, 55-58.

³⁴ *Id.*, p. 12. (“[G]oods differ in kind if people properly enter into different sorts of social relations governed by distinct norms in relation to these goods”.)

³⁵ *Id.*, p. 149.

III. Guideline for Implementing the State's Pluralistic Obligation

The state's pluralistic obligation requires the law to accommodate communities, with minimal interference in their conduct. In fulfilling its pluralistic obligation, the state should enable its citizens to realize their own conceptions of the good by offering them a sufficiently wide range of legal institutions and instruments. Insofar as we believe that either individualism or community "fulfills an important human need and facilitates the pursuit of worthy civic virtues, we need to incorporate this vision into our legal rules³⁶". It is important to recognize, however, that incorporating the various values in the legal rules should not be considered as a call for vagueness, or alternatively for unlimited or unconditional recognition. On the contrary. The understanding that the social values held by members of society should be incorporated into the legal rules requires a careful examination of these values and their characteristics³⁷. As far as community value is concerned, incorporating the community into our legal rules requires examination of which communities should be legally protected so that the state fulfills its pluralistic obligation. The aim of this Section, therefore, is to offer guidelines for implementing reform in the law's treatment of communities.

A state's pluralistic obligation to a given community should depend on that community's characteristics. It is argued therefore in this Section that the state should take into account three factors in determining the treatment of communities in the law: (1) the community's social legitimacy; (2) the role of community members' cooperation in the realization of a shared conception of the good; and (3) the community's need for state support to stay intact. In assessing these factors, the state should ensure that the benefits of the reform are limited to socially legitimate communities that engage in sufficiently meaningful cooperation.

³⁶ Hanoch DAGAN, *Property: Values and Institutions*, New York, Oxford University Press, 2011, p. 106.

³⁷ *Id.*

A) Social Legitimacy

Embracing a foundational pluralistic conception as the normative infrastructure for addressing communities in the law, runs the risk of enabling – or signaling state endorsement of – communities that abide by norms that explicitly or implicitly enforce racial, socio-economic or religious discrimination³⁸. The main question that lies at the center of this examination is whether it is possible to allow the liberal state to intervene in the conduct of illiberal communities, without violating the state’s pluralistic obligation.

A liberal state may have three possible answers to these questions. First, it may deny illiberal communities any state support. Second, it may condition its support on the community’s compliance with a state’s defined minimal liberal requirements (“MLRs”)³⁹. I believe, however, that our recent social developments provide for a new, more attractive model for a liberal state to distinguish between socially legitimate and illegitimate communities. The current social reality, in which a person may belong simultaneously to more than one community, significantly reduces the concern that any one of the communities will oppress them⁴⁰. This is true for three primary reasons. *First*, membership in multiple communities (MCB – Multiple Community Belonging) exposes a person to different norms of behavior, thereby promoting their ability to be self-reflective about norms in all of their other communities⁴¹. *Second*, membership in multiple communities increases a person’s likelihood of having a voice in some of their communities⁴². *Finally*, MCB increases a person’s ability to become the author of a multi-fragmented life story, in which some of the chapters are simultaneously written, thereby reinforcing a more

³⁸ Hanoch DAGAN, “Pluralism and Perfectionism in Private Law”, (2012) 112 *Columbia Law Review* 1409.

³⁹ See, Stephen MACEDO, *Diversity and Distrust: Civic Education in a Multicultural Democracy*, Cambridge, Harvard University Press, 2009.

⁴⁰ Georg SIMMEL, *Conflict & The Web of Group-Affiliations*, New York, Free Press, 1955, p. 128-129.

⁴¹ Shai STERN, “Takings, Community, and Value: Reforming Takings Law to Fairly Compensate Common Interest Communities”, *supra*, note 10, 175; Shai STERN, “When One’s Right to Marry Makes Others Unmerry”, *supra*, note 10, 648.

⁴² *Id.*

foundational and meaningful form of pluralism⁴³. This social reality, therefore, should not only be acknowledged, it should permeate the legal arrangements that govern society. Embracing the MCB model as a means of determining whether, and how, the law should treat a given community is in keeping with the foundational pluralistic conception of property as a social instrument. In other words, the state, if it takes its pluralistic obligation seriously, should examine communities' social legitimacy not based on their subordination to liberal values but rather based on their willingness to allow their members to belong to other communities simultaneously.

Illiberal communities' readiness to allow multiple community belonging is a necessary condition for determining the social legitimacy of the community but it is not sufficient in of itself. In order for the State to fulfill its pluralistic obligation, it must examine not only what is happening within the community, but also to act against the possibility that communal illiberal norms will be applied to society. Therefore, just as the State is required to preserve the ability of illiberal communities' members to realize their perception of good, it is required to preserve the possibility of those who are not members of the community – and do not wish to be subjected to community's illiberal norms – to live in accordance with their liberal conception of the good. This limitation is consistent with the harm principle enunciated by John Stuart Mill⁴⁴. According to this principle, a person who enjoys the ability to exercise his values and beliefs should not prevent others from doing so. To conclude, to fulfil its pluralistic obligation in a manner that ensures that both community members and those who do not belong to the community will have the ability to realize their conception of the good, the liberal state should prevent the externalization of illiberal communal norms beyond community borders and to verify that illiberal communities allow multiple community belonging.

⁴³ Brian BARRY, "Liberalism and Want-Satisfaction: A Critique of John Rawls", (1973) 1 *Political Theory* 134, 152; Joseph RAZ, *The Morality of Freedom*, New York, Oxford University Press, 1986, p. 155; Isaiah BERLIN, *The Power Of Ideas*, Henry Hardy, 2011, p. 13.

⁴⁴ John Stuart MILL, *On Liberty*, Hackett Publishing Company, 1978, p. 9.

B) What Cooperation Turns a Community into a Meaningful One?

What exactly constitutes a sufficiently meaningful community? Strictly speaking, community represents cooperation of two or more persons who are jointly involved in an activity. Yet, for a community's cooperation to be sufficiently meaningful, it must be founded upon a conception of the good that promotes norms of cooperation rather than separation, exclusion, or individualism. Recognition of cooperation in the law should not be dependent on the cooperators' motivations, but rather on the *role* such cooperation plays in ensuring pluralism. Accordingly, the law should accommodate the value of cooperation both in cases where cooperation is inherent to the cooperators' shared conception of the good⁴⁵ and in cases where cooperation is but a means for its realization. This Part offers a two-stage analysis in order to determine whether a specific form of cooperation should be recognized as expressing the value of community in the law, and to what extent this should affect the legal treatment it receives.

1. Stage One: Verifying a Shared Conception of the Good

After establishing that cooperation exists, the law must determine if and how meaningful that cooperation is to the cooperators' ability to realize their conception of the good. The first step in that determination is to ascertain whether the cooperation is indeed intended to allow the cooperators' realization of a shared conception of the good. The examination should then turn to confirming that the conception of the good is not founded on individualistic and exclusionary norms or values that fail to contribute to a sense of community. For the purposes of this first-stage examination, a conception of the good need only have the ultimate goal of fulfilling the conditions deemed necessary for a valuable and worthwhile life⁴⁶. Such conceptions are many and diverse⁴⁷. They may have different characteristics: economic, social, cultural, religious, and may differ in their

⁴⁵ Consider, for example, the Israeli kibbutz, in which the shared conception of the good calls for ongoing cooperation.

⁴⁶ Jonathan QUONG, *Liberalism Without Perfection*, New York, Oxford University Press, 2011, p. 2.

⁴⁷ John RAWLS, *Political Liberalism: Expanded Edition*, New York, Columbia University Press, 2011, p. 19-20.

comprehensiveness. While some might infuse every aspect of life, others may be less all-embracing⁴⁸. At this stage, no normative judgments regarding conceptions of good are required.

But if we accept any conception of the good as a legitimate end, which types of cooperation would *not* be recognized as meaningful? The answer is twofold: first, cooperation that does not promote a conception of the good, and second, cooperation that promotes a conception of the good but does not express or promote the value of community. To illustrate this, consider gated communities. Gated communities are a form of residential community often characterized by a closed perimeter of walls and fences. They usually consist of small residential streets and include various shared amenities. Given that gated communities are spatially a type of enclave, some argue that they have a negative effect on society⁴⁹. Should such cooperation be entitled to legal treatment that differs from that applied to fee simple ownership? The answer is no, for two reasons. First, such gated communities do not promote any distinct conception of the good given that security and property values are commonplace ideals. Second, even if we are to assume that such gated communities do cooperate in the pursuit of a conception of the good, that conception should not be entitled to different legal treatment because it fails to express the values of “community”. Gated communities are primarily a locus of seclusion and segregation for the wealthy⁵⁰. Membership in such communities does not depend on a commitment to a shared notion of the good, but rather on members’ ability to pay for the services provided to them, services that are generally supposed to be of higher quality than those local governments

⁴⁸ *Id.*, p. 13-14, 19-20. See also, Jonathan QUONG, *supra*, note 46, p. 13-14.

⁴⁹ Setha M. LOW, “The Edge and the Center: Gated Communities and the Discourse of Urban Fear”, (2001) 103 *American Anthropologist* 45.

⁵⁰ Edward James BLAKELEY & Mary Gail SNYDER, *Fortress America: Gated Communities in the United States*, Washington, Brookings Institution Press, 1997, p. 8; see also, Amnon LEHAVI, “How Property Can Create, Maintain, or Destroy Community”, (2009) 10 *Theoretical Inquiries in Law* 43, 58-59; Evan MCKENZIE, “Constructing the Pomerium in Las Vegas: A Case Study of Emerging Trends in American Gated Communities”, (2005) 20 *Housing Studies* 187, 187-192; Sarah BLANDY, Diane LISTER, Sheffield HALLAM, Rowland ATKINSON & John FLINT, *Gated Communities: A Systematic Review of the Research Evidence*, ESRC Centre for Neighborhood Research, 2003, p. 2.

provide to the general population⁵¹. It should come as no surprise then that “[c]ontrary to popular claims, studies show that [gated communities] are associated with low community participation and cohesion⁵²”.

In other words, gated communities’ shared conception of the good is centered on isolation and low social cohesion. Such a conception of the good – even if it can be established as a genuine conception of the good – should not be entitled to unique treatment by the law.

2. Stage Two: Classifying the Role of a Community’s Cooperation

Assuming a legitimate conception of the good is identified, the next step is to determine the role of cooperation in the community’s ability to realize that good. Simply put, the more significant the role cooperation plays in community members’ ability to realize their shared conception of the good, the greater the justification for providing it a unique legal treatment. When cooperation plays only a marginal or secondary role, the law should only be sensitive to the existence of such cooperation or moderately support it. On the other hand, if the cooperation is crucial to a community’s realization of its conception of the good, the law should provide a unique treatment for the preservation of the community’s activities.

In order to identify the role of cooperation in a community’s realization of its conception of the good, this Part proposes three distinct categories: (1) constitutive cooperation; (2) value-adding cooperation; and (3) facilitative cooperation. Cooperation is constitutive if it is an inherent and vital feature of the conception of the good: not only an instrument for the realization of the conception of the good, but an end unto itself. An example of constitutive cooperation can be found in the historic Israeli kibbutz. Israeli law defines a kibbutz as “a free association of people for the purposes of settlement, absorption of new immigrants, maintenance of a cooperative society based on community ownership of property, self-sufficiency in labor, equality and *cooperation* in all areas of production,

⁵¹ Elena VESSELINOV, Matthew CAZESSUS & William FALK, “Gated Communities and Spatial Inequality”, (2007) 29 *Journal of Urban Affairs* 109, 118-119.

⁵² *Id.*

consumption and education.” [Emphasis added – S.S.]⁵³ Avital Margalit explains, “The kibbutz is an exemplary and equitable way of communal living for people who believe in the ideals of equality, brotherhood and mutual assistance⁵⁴”. Cooperation, then, not only enables the community to function properly, but is one of the essential elements of the good itself.

Other instances of cooperation may simply facilitate a group’s ability to realize its shared conception of the good. Consider the “House of Commons” community in Austin, Texas. The “House of Commons” is a residential cooperative and part of the University of Texas Intercooperative Council, a non-profit student housing organization, which focuses on vegan and vegetarian lifestyles⁵⁵. The community only serves meals that are vegan or vegetarian. The house purchases almost nothing except organic food, and meat is not allowed on the property⁵⁶. Although veganism has become a common way of life for many people who live outside a defined geographic communal setting⁵⁷. Vegans may still encounter difficulties as they seek to live according to their beliefs. For instance, they may discover that local grocery stores do not sell many products they can eat. They may find themselves forced to work in businesses that do not respect their way of life, and they may have to ask restaurant staff to accommodate their dietary restrictions. If a group of vegans unite in order to form a vegan community, a significant portion of these difficulties are likely to be resolved. It would be easier for vegans to live in a community where the shops and businesses cater to their lifestyles, relieving them of the burden of finding acceptable foods and of the need to ask about the ingredients in the food they consume. Accordingly, though it may be *possible* for the members of the House of Commons to live as vegans while living next to non-vegans, the supportive

⁵³ Cooperative Societies Ordinance (Types of Societies) (1995) (Isr.).

⁵⁴ Avital MARGALIT, “Commons and Legality”, in Gregory S. ALEXANDER & Eduardo M. PEÑALVER (dir.), *Property and Community*, New York, Oxford University Press, 2010, p. 141, at p. 141-145.

⁵⁵ [Http://www.iccaustin.coop/hoc/](http://www.iccaustin.coop/hoc/).

⁵⁶ *Id.*

⁵⁷ A 2012 Gallup poll discovered that five percent of American adults consider themselves to be vegetarians and two percent consider themselves to be vegans. Frank NEWPORT, “In U.S., 5% Consider Themselves Vegetarians”, *Gallup* (July 26, 2012), <<http://www.gallup.com/poll/156215/consider-themselves-vegetarians.aspx>>.

surroundings they gain within the community facilitate each individual's ability to practice veganism.

Finally, cooperation need not be constitutive or facilitative, but can be “value-adding”. This type of cooperation, although it is not an essential element of the good itself, is nevertheless much more than an instrument to assist in its realization. Such “value-adding” cooperation may bring about a qualitative change in a community's realization of its shared conception of the good. Cooperation should be regarded as a value-adding if, considering the group's values, joint activity has more value than individual activity. Consider for example the Lammas community in Wales. The Lammas Ecovillage has been created to allow its members – who all share an ecological conception of the good – to realize it together with others. An ecological worldview calls for recognition of the importance of sustainable behavior, a deeper connection between humans and nature and the land, and an attempt to maintain infrastructures that do not harm nature. The Lammas community consists of “a collective of eco-smallholdings working together to create and sustain a culture of land-based self-reliance⁵⁸”. While each member of the community could realize his own ecological conception of the good on his own, collaboration with others – and the establishment of the community – added significant value to the realization of the shared conception of the good. Instead of purifying water in a home appliance, or purchasing ecological products for their own use, community members can now build more significant ecological infrastructures that help them promote their shared conception of the good. Moreover, the joint action enables the members of the community to expand the realization of their ecological conception of the good from the private sphere to the public sphere. For example, members of the community can realize the perception of good in the community's public space, and avoid harm caused by those who do not share this perception of good. In cases such as the Lammas community the cooperation among community members is not constitutive – as they can realize their conception of the good without cooperating with others, but at the same time it is not only facilitative, as cooperating with others not only facilitates the realization of the shared conception of the good, but intensifies its realization.

⁵⁸ See, <http://lammas.org.uk/en/ecovillage/>.

This classification of the potential roles of cooperation in a community's members' realization of their shared conception of the good provides the law with an instrument for distinguishing among communities based upon their actual characteristics. Therefore, it can be used as a basis for determining the type of legal treatment that a community should receive in the law.

C) Community Strength

This section further limits the scope of the state's pluralistic obligation by arguing that it should also be contingent on a community's political or economic strength. In a nutshell, I argue that stronger communities should be treated differently than weaker, but similarly situated, communities.

All kinds of people operate within community frameworks and socioeconomic diversity can be found in all forms of human cooperation. The question then arises: should the law distinguish among communities based on their economic or political strength? In theory, the law is blind to economic or political differences among individuals and communities. It is generally acknowledged, however, that such considerations often affect decision-making regarding communities. Minority communities often encounter difficulties precisely because of their economic or political weakness⁵⁹. Nevertheless, the contention that the law should recognize community strength is based on properly limiting the scope of the state's pluralistic obligation. As discussed, foundational pluralism does not require the state to actively support or promote *any* conception of the good. The state's obligation is limited to establishing conditions that *allow* the existence of diverse conceptions of the good. Such an obligation may require distinguishing among communities, but the state should only seek to ensure pluralism by rectifying inadequacies in the law that make it extremely difficult or impossible for certain communities to continue flourishing.

⁵⁹ See, e.g., Lester C. THURLOW, *Poverty and Discrimination*, Washington, Brookings Institution Press, 1969, p. 117.

To ensure that the law fulfills the state's pluralistic obligation account should be taken of the political or economic strength of communities both at the decision-making stage and at the allocation of remedies stage. In general, stronger communities are more likely to have the resources and influence to avoid the damaging effects of undesirable actions, whether they be legislative or judicial⁶⁰. Politically strong communities may use their political ties and influence to fend off undesired legislation, and economically strong communities may deal relatively easily with the results of legislation or rulings that harm their economic interests. Members of politically or economically strong communities are also less likely to lose their ability to achieve their shared notion of the good – whether jointly or separately, because they usually share the majority's sense of the good. Therefore, even if the law effects such a community's functioning, community members are expected to be able to continue realizing their shared conception of good by cooperating with others. In addition, even if a politically strong community does not share the majority's conception of the good, it may still use its political influence to bypass bureaucratic barriers. Members of economically strong communities also are more likely to preserve their conception of the good than those in weaker communities since they are more likely to have the resources to independently re-establish the community.

Therefore, belonging to politically or economically strong communities reduces the concern that community members will lose their ability to realize their conception of the good, even when the community's ability to function is affected by the law. Accordingly, the need for the state to actively intervene to help these communities is reduced and such intervention might in fact be a waste of government resources.

⁶⁰ See, e.g., Daniel A. FARBER, "Economic Analysis and Just Compensation", (1992) 12 *International Review of Law and Economics* 125, 130. ("[I]f public choice theory has any one key finding, it is that small groups with high stakes have a disproportionately great influence on the political process").

IV. From Theory to Practice: Communities in Private Law, Public Law and Labor Law

In this section, several applications for the theory presented in this article are explored, in particular how the theory may affect the law's treatment of communities. It is important to note at the outset that the examples presented in this part are not exhaustive, so that the application of the theory in the law may have broader implications in other branches of law. My focus here is on three examples, which will enable us to understand the effect of the proposed theory: private law (with emphasis on expropriation laws), public law, and labor law.

A) Private Law

Communities play a central role in private law, and they pose challenges for the law mainly in the field of property law and contracts law. In contract law, cooperation and communal norms are essential factors in the increased recourse to relational contracts. In property law, communities pose challenges for the law as they often subject individual owners to the judgment of others. This occurs at three main stages: the stage of creation and entering the community, the stage in which the community operates, and the stage of leaving the community. In other words, the law and the community meet at three intersections: entrance, governance, and exit. At the entrance stage, the law deals mainly with questions of land allocation to different communities, as well as the ability of members of communities to choose their neighbors by using legal exclusion mechanisms, such as admissions committees⁶¹. At the stage of the governance, the law deals with decisions made within the framework of the community (such as decisions made in a condominium regarding tenants' rights, or the ability of the individual to do as he pleases with his or her property) and with community actions that run counter to general legislation (for example, violation of antidiscrimination laws). Finally, at the exit stage, the law deals with three main situations: (1) the ability of the community to place barriers to the individual's right to exit (for example, by subjecting the sale of a real estate

⁶¹ Eduardo M. PEÑALVER, "Property as Entrance", (2005) 91 *Virginia Law Review* 1889.

to the approval of the community or imposing high economic sanctions on exit); (2) the ability of the community to exclude members from the community against their will and (3) expropriation of land that harms the functioning of the community. Although the decisions at each stage present different challenges, in all cases, the law is required to deal with the significance of cooperation between property owners, both in terms of the scope of the right to property and in relation to the question of remedies.

According to the theory presented in this article, where a community is socially legitimate (because it accepts the imposition of the MLR's or the MCB) then in accordance with the extent that the role of cooperation in that community is essential, and with the political and economic fragility of the community, the law should provide it with unique legal treatment. At the entrance stage, this treatment might include legitimization of exclusion mechanisms; at the governance stage it may call for an expansion of community autonomy in decision-making, and at the exit stage, it may require the state to compensate community members whose property is being expropriated for the loss of communality. The application of the theory, therefore, may have a profound significance in the design of property law and legal protection afforded to property owners.

B) Public Law

The institution of the community also poses challenges for constitutional, administrative, criminal and tax law. Thus, for example, in criminal law the question arises whether it is right to take into consideration the affiliation of the offenders to a particular cultural community in order to exempt them from criminal liability or, alternatively, to reduce their punishment⁶². Another aspect of this challenge was recently introduced by the United Nation Human Right committee (OHCHR), that ruled that the criminal ban imposed in France and other European countries on wearing the Burqa is disproportional and violates the rights of Muslim women to

⁶² See, e.g., Kent GREENWALT, "Cultural Defense: Reflections in Light of the Model Penal Code and the Religious Freedom Restoration Act", (2008) 6 *Ohio State Journal of Criminal Law* 299.

dress according to their community's norms⁶³. In tax law, the question arises as to how it is appropriate to tax communities or cooperation⁶⁴. An even more interesting issue is the way constitutional law deals with communities and their effects on individual and collective rights. The Burqa ban is one such example. Another example is the growing trend of ultra-conservative communities demanding spatial segregation. In the United States, for example, a group of ultra-orthodox Jews, affiliated to the Satmar sect has recently gained complete municipal separation, and has established a new town whose entire population belongs to that community⁶⁵. The establishment of the town of Palm Tree, NY raises serious constitutional questions regarding the conduct of the new town, and the willingness of its residents to subject themselves to the rule of law, in particular in the context of anti-discrimination laws⁶⁶.

The theory proposed in this article provides a comprehensive and applicable infrastructure to accommodate communities in public law. The idea that not all communities are alike, and that therefore the treatment they receive under the law should differ suggests that in some cases, legal accommodation should be made for community norms and practices, in others no such accommodation should be made. Communities should be treated in public law based on their role in preserving their members' ability to fulfil their conception of the good, their compliance with the social legitimacy mechanisms and their political and economic status. The greater the role of the community in preserving its members' ability to achieve good as they perceive it the greater the law's duty to that community. In addition to these two public law axes, the axis that seeks to verify the social

⁶³ The United Nations' Human Right Committee decision regarding the niqab ban in France, 23.10.2018, available at: <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23750&LangID=E>>.

⁶⁴ Tsilly DAGAN & Avital MARGALIT, "Tax, State, and Utopia", (2013) 33 *Virginia Tax Review* 549.

⁶⁵ Lisa W. FODERARO, "Call It Splitsville, N.Y.: Hasidic Enclave to Get Its Own Town", *The New York Times* (Nov. 19, 2017), <<https://www.nytimes.com/2017/11/19/nyregion/hasidic-kiryas-joel-upstate.html>>.

⁶⁶ Debra NUSSBAUM COHEN, "New York Hasidim Challenge Constitution in Bid to Forge the First ultra-Orthodox Town in America", *Haaretz* (Nov. 23, 2017), <<https://www.haaretz.com/us-news/.premium-ny-hasidim-challenge-constitution-in-bid-to-get-own-town-1.5626673>>.

legitimacy of the community is of particular importance. Indeed, a significant part of the conflicts created in public law stem from the normative gap between the liberal state and law and the illiberal community. The mechanism proposed in this article, namely, changing the form of examination to determine the social legitimacy of the community from the current ethical one to a structural one, allows the liberal state to provide a balanced treatment to communities in public law. The proposed MCB mechanism allows the law to achieve an equilibrium between illiberal communities' norms and practices on the one hand, and the needs of both the liberal society and the individual members of the community, on the other.

In order to illustrate this, I will focus on the example of the ban by the French legislature on the wearing of the burqa. The Burqa ban was justified by the French legislator on several grounds, the most interesting of which is the one that the ban is required to allow all society members to live together⁶⁷. The ECHR accepted the French argument about the importance of socialization and the need to impose MLR (minimal liberal requirements) on illiberal communities⁶⁸. The ruling embraced the MLR examination for the community social legitimacy, an examination that interfere with the norms and practices of illiberal communities. The court's approval of the ban was criticized by the OHCHR, who suggests that the general criminal ban on the wearing of the Burqa in public introduced by the French law disproportionately harmed the petitioners' right to manifest their religious beliefs⁶⁹. I suggest that the controversy between the ECHR and the OHCHR stems from their different points of views regarding the social legitimacy of illiberal communities and the treatment that such communities should be given by the liberal states. The ECHR embraced the ethical examination for determining the social legitimacy of illiberal communities. as the court states, "[t]he systematic concealment of the face in public places, contrary to the ideal of fraternity, ... falls short of the minimum requirement of civility that is necessary for social interaction⁷⁰". The OHCHR, on the other

⁶⁷ *S.A.S. v. France, supra*, note 11, p. 5, 8.

⁶⁸ *Id.*

⁶⁹ United Nations' Human Right Committee decision regarding the niqab ban in France, *supra*, note 63.

⁷⁰ *S.A.S. v. France, supra*, note 11, p. 55.

hand, embraced a structural examination, one that resembles the social legitimacy examination proposed in this article. The OHCHR decision suggests, “rather than protecting fully veiled women, could have the opposite effect of confining them to their homes, impeding their access to public services and marginalizing them⁷¹”. The OHCHR therefore gives greater weight to the ability of members of the community to go out and participate simultaneously in other communities – even if this exodus into the public sphere is carried out by wearing religious symbols. The theory proposed in this article share the OHCHR’s decision’s logic. Public law, according to the proposed theory, should not prevent illiberal communities’ members from participating in the public sphere only because of their adherence to their community norms and practices. Inasmuch as there is no attempt by the illiberal community to externalize its internal norms to the public sphere – in the sense of obliging others who do not share the community conception of the good to act in accordance with community norms – there is no justification for preventing the participation of members of illiberal communities in the public sphere.

C) Labor Law

Labor law’s primary focus is on ensuring that the power gap between employers and employees does not disproportionately harm employees’ rights⁷². This definition, at the heart of labor law, does not encompass all the aspects of the reality of the contemporary workplace. Workplaces have long been much more than just a place where workers earn their living. In fact, over the years workplaces have become a “second home” – where employees spend a significant part of their time and energy. Workplaces have become a significant arena for socialization for many; they provide identity and a sense of belonging, and offer a supportive and

⁷¹ United Nations’ Human Right Committee decision regarding the niqab ban in France, *supra*, note 63.

⁷² See, *e.g.*, Kenneth G. DAU-SCHMIDT, Matthew W. FINKIN & Robert N. COVINGTON, *Legal Protection for the Individual Employee*, Saint Paul, West Academic Publishing, 2016; Ann C. HODGES, *Principles of Employment Law*, Saint Paul, West Academic Publishing, 2018; John D. ARAM & Paul F. SALIPANTE JR., “An Evaluation of Organizational Due Process in the Resolution of Employee/Employer Conflict”, (1981) 6 *Academy of Management Review* 197.

inclusive social framework⁷³. The employers themselves – either because of a marketing strategy or a desire to recruit quality employees – define themselves as “family” or “community”. In addition to the instrumental considerations involved in these processes, they also appear to reflect a significant change that has occurred in relation to workplaces in recent years.

In this article changes in our workplaces are viewed as an opportunity to examine the communal component of labor law. The starting point for this examination should be the pluralistic understanding that not all places of work are identical, and that the law must be able to give meaning to these distinctions. Therefore, the state must offer various institutions for employment, such as private companies, governmental companies, non-profit organizations, partnerships and more. These institutions should differ not only in their employment characteristics, but also in the legal treatment to which they are entitled. Specifically, it is possible to point to a possible impact of the theory proposed in this paper on labor law in various respects: first, the impact or potential impact of the employer’s or employee’s communal affiliation on the status of employment. These questions have recently been discussed both in Europe and in the United States. For example, the European Court of Justice ruled that an employer could prohibit his employees from coming to work with religious symbols, as long as this prohibition applies to all workers⁷⁴. On the other hand, in two decisions made by the United States Supreme Court and the Supreme Court in England, a business owner may refuse to make a cake for a same-sex wedding, to the extent it violates his beliefs and community norms⁷⁵.

⁷³ See, e.g., Etienne WENGER, *Communities of Practice: Learning Meaning and Identity*, Cambridge, Cambridge University Press, 1998; Gunnhild BLÅKA & Cathrine FILSTAD, “How Does a Newcomer Construct Identity? A Socio-Cultural Approach to Workplace Learning”, (2007) 26 *International Journal of Lifelong Education* 59.

⁷⁴ *Eweida and others v. United Kingdom*, nos. 48420/10, 59842/10, 51671/10, 36516/10, ECHR 2013.

⁷⁵ For the United States Supreme Court decision, see *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). For the United Kingdom supreme court decision see, *Lee v. Ashers Baking Company Ltd and others*, [2018] UKSC 49.

Another dimension in which the proposed theory may have an impact on labor law concerns the relationship between employees. Until now labor laws focused on the relationship between the employee and the employer. The fear of the power gap led labor laws to provide some protection to workers against the power of employers. However, as the workplace becomes more than just a source of income; as our workplace becomes part of our socialization process as well as our identity definition, we need to focus the spotlight on equally significant relationships for employees: those with other employees. Sima Kramer considered the relationships between employees and called for the formulation of a unique system of laws, enabling employees to enforce their rights where they are harmed by other employees⁷⁶. The deepening of the law's involvement in employee-employee relations also stems from the understanding that the workplace is not only a source of income, but also a place of socialization, in which employees construct their identity as well as their sense of belonging. The harm to the worker, therefore, has many ramifications not only with respect to his earning capacity, but also with regard to his social affinity and identity. The theory proposed in this article demonstrates how labor laws should be adapted to take account of the prevailing reality, while giving adequate and distinct legal treatment to different places of work.

V. Conclusion

This article proposes a normative infrastructure concerning the legal treatment of communities in the law. This normative infrastructure, based on the state's pluralistic obligation to protect the existence of multiple, diverse conceptions of good within a society, requires the state to distinguish between different communities according to their characteristics to determine how each should be treated.

This theory carries with it many and significant implications in the attitude of law to communities. These implications may find expression in a wide range of legal branches, and they should be at the center of a follow-

⁷⁶ Sima KRAMER, "The Curious Case of Employee-Employee Relations: An Ethical Perspective", *Hebrew University of Jerusalem Legal Research Paper Series No. 17-2*, June 1, 2016, available at SSRN: <<https://ssrn.com/abstract=2788727> or <http://dx.doi.org/10.2139/ssrn.2788727>>.

up study that will specifically examine the application of the theory in certain branches of law. In this article, I have examined only briefly the implications of the recognition of the community, as well as those the proposed theory, on three branches of law: private law, public law and labor law. There is no doubt that the assimilation of the social institution “community” within the boundaries of law, and the attempt to give legal form to this concept, constitute a challenge that merits future research. At the same time, I believe that the guidelines of the theory proposed in this article, as well as the pluralist viewpoint underlying it, are a good starting point for such a study.