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## WINDS OF CHANGE: PERSPECTIVES ON THE WORLD'S SEARCH FOR STABLE DEMOCRACY

by Rodney A. Smolla\* and Darlene P. Bradberry\*\*

### I.

In November 1992, the German government summoned the citizens of Germany to stage a march through Berlin in a massive demonstration of the nation's commitment to tolerance and human rights. The march was scheduled to coincide with the anniversary of two events in German history, one monstrous and one triumphant: the commencement in 1938 of the Nazi Kristallnacht pogrom against Jews, and the 1989 fall of the Berlin Wall. The march should have been a celebration of peace and hope, a signal to the world that the reunited Germany was dedicated to equality, the rule of law, and protection of human dignity. Indeed the German government and the vast majority of the German people are so dedicated.

But the march ended in ruin. Radical reactionary youths pelted the marchers with racist chants, catcalls, tomatoes, eggs, and paint bombs. German Chancellor Helmut Kohl was forced to abandon his place at the head of the march as anarchist protesters — known as *autonomen* — began throwing eggs and stones at him. German President Richard von Weizsacher was hit by eggs thrown by the protestors, and was forced to cut short his speech — an eloquent plea for German citizens to condemn and take action against the rising tide of hate crimes and anti-foreigner violence sweeping the nation. Despite the show of solidarity among most of Germany's political, business, labor, and religious leaders, the peaceful demonstration in Berlin's Lustgarten Square ended in a debacle of hate. Ignatz Bubis, the leader of Germany's Jewish community, took the microphone and chastised the crowd: "I am ashamed of what has happened here. We are not in 1938, but in 1992."<sup>1</sup> The event in its way captured many of the currents of modern times.

There are, first, the currents of optimism. It must be remembered that the march itself would have been almost unimaginable five years earlier, for this was a march in a *unified* Germany, through a Berlin without a wall. The revolutions in Eastern and Central

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<sup>1</sup> Marc Fisher, *Pro-Foreigners March Disrupted in Germany; Anarchists' Eggs Spoil Kohl's Day of Unity*, THE WASHINGTON POST, November 9, 1992, at A1.

Europe and in the former Soviet Union ended communist statism. When these revolutions occurred, citizens in nations around the world seemed swept up in a mass euphoria. Winds of change appeared to be swirling across the globe, restless winds of democracy, self-determination, and openness, stirrings that crossed international borders and cultural traditions, as the peoples of the world began to assert entitlements to the enjoyment of fundamental human rights. In late 1989 the Earth seemed to be in the midst of an extraordinary renaissance of democracy, freedom of expression, cultural tolerance, open economic markets, and pluralism, experiencing movements toward democracy and openness unimagined only a year before, as what was once unthinkable has become commonplace.

Yet the November 1992 march through Berlin also captured currents of foreboding. Three years after the revolutions, the celebrations of 1989 had given way to a sense of collective hangover. A jittery world seemed unsure of its future.

The signals of misgiving are plentiful.

There appear to be two seismic earth-forces at work, pushing and pulling, like volcanoes and shifting continental plates. On the one hand, the world is witnessing a centrifugal force, a force that is pushing societies apart, breaking them up into smaller and smaller units of ethnic and racial identity and sovereignty. Within many of the newly emerging democracies, it is beginning to appear more difficult to make a nation than to make a revolution. Forces are threatening to pull Ethiopia apart, breaking it up into ethnic states for Eritreans, or Oromos, or Tigreans. The Soviet Union is gone, dissolving to republics and autonomous regions based on what Russians call nationalities, and Americans call ethnicity. Ethnic and religious differences have destroyed the artificial construct that was once Yugoslavia, ending in horrible acts of ethnic cleansing that ravage fundamental notions of humanity. Canadians voted to reject a constitutional reform, creating the distinct possibility that the nation Canada as the world has known it could dissolve.

These forces are at work in the United States. The people of Los Angeles have long felt ethnic tremors. After the Rodney King verdict they felt a quake. And they ask, like all Americans should ask, can the nation pull itself together and avoid the big one? Whether the visual images are taken from the films of Spike Lee, from the amateur video that caught the racist beating of Rodney King, or from the scenes broadcast from Los Angeles on the weekend after the King verdict was announced, it is clear that American society is nowhere near achieving any sense of racial or ethnic understanding, or peace.

These breaking-apart pressures being felt around the world are, in an ironic way, accelerated by a very different kind of pressure that is also at work. These are the pressures of the marketplace — indeed, of the global marketplace. In a *true* global marketplace, nations as we once knew them might not matter as much as they once did. For if people can market their goods and services in regional or world markets that cross national borders, many of the economic imperatives that fostered the existence of traditional nation-states begin to dissolve.

And so the traditional nation-state has experienced pressures in two directions. Its sovereignty is threatened from the inside, by demands for self-determination — indeed, often, for sovereignty itself, from smaller internal entities — often organized along lines of ethnic group identity. And the traditional nation-state is threatened by pressures from the outside — pressures toward the ceding of sovereignty to international confederations, such as the European Community or the United Nations.

These forces are destabilizing and frightening. They give rise to the impulse to retreat. Democracy may be made to appear too menacing. Open markets may be made to appear too volatile. Tolerance for foreigners, for immigrants, for refugees, may be made to appear too much a luxury in pressing times. And so it is not surprising that resentment against new ethnic migration would erupt into violence in both Los Angeles<sup>2</sup> and Berlin.<sup>3</sup> Nor is it any surprise that among the nations of the world, the momentum toward greater economic and political union has stalled, if not moved into outright retrograde.<sup>4</sup>

Against this ambiguous and convoluted backdrop, the Institute of Bill of Rights Law, with the generous support of the Henry Jackson Foundation, sponsored its "Winds of Change" task force, bringing together scholars from around the world to reflect on the nature of these evolving events, and to address them in light of the "great issues" of nation-building and constitution-making.

The Institute of Bill of Rights Law, and the *William and Mary Bill of Rights Journal*, are institutions bearing names implying a mission limited primarily to exploration of matters pertinent to the American Bill of Rights. From its inception, however, the Institute of Bill of Rights Law has taken a broad view of its mandate, treating all issues of "constitutionalism" as fair game for academic exploration. The reasons for this latitudinous vision of mission are worth articulating, both to explain why this collection of materials appears in *this* journal sponsored by *this* Institute, and to explain why the destiny of the American Bill of Rights is linked inextricably to the destiny of progress in the protection of human rights world-wide.

Viewed first from a domestic perspective, the Institute has adopted the position that it would not treat the American constitutional experience as something to be chopped up into artificially self-contained topical or disciplinary sub-components. The Bill of Rights does not travel in its own orbit, unaffected by other constitutional principles, such as those embodied in the Equal Protection Clause, or in our concepts of federalism and separation of powers. Thus the Institute has over the years conducted many programs that cut across all of these doctrinal boundaries.

If the Bill of Rights does not travel in its own doctrinal orbit, it is also true that the meaning of the American Constitution is not the exclusive domain of American constitutional law. Our constitutional experience is not merely the experience of law professors and law students, or lawyers and judges. The Institute's focus has thus been deliberately inter-disciplinary, serving as a forum and catalyst for research for scholars of religion, history, political science, economics, sociology, journalism, philosophy, arts, letters, and even sciences. Reinforcing this intentionally eclectic taste, the Institute has

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<sup>2</sup> The violence in Los Angeles following the Rodney King verdict was, at least in part, the result of tensions among different ethnic groups in Los Angeles. Jack Miles recently argued that the violence in Los Angeles was connected to United States immigration policies, and that it largely concerned conflicts between Blacks and Latinos. Jack Miles, *Blacks v. Browns*, ATLANTIC MONTHLY, Oct. 1992, at 41.

<sup>3</sup> In 1992, Germany has experienced more than 1,800 attacks against foreigners, 14 times as many assaults as in 1990. See Fischer, *supra* note 1, at A1.

<sup>4</sup> Among the symptoms of the retreat were renewed threats of serious trade wars between the United States and Europe, while the Maastricht Treaty, which would have created greater unity in the European Community foundered on political and economic disagreement among the states of Europe. These historical forces never move in perfect unison, however, and the counter-tensions toward greater economic unity were also visible — as in the successful negotiation by Mexico, Canada, and the United States of the North American Free Trade Agreement. However, in light of the rejection of the constitutional referendum in Canada, and the election of Bill Clinton as President of the United States, it is not fully clear what the future fate of this agreement will be.

placed an emphasis on involving not merely *scholarly* voices from these disciplines, but the actual *practitioners* of the various arts and sciences that give them life. And so we have welcomed not merely journalism scholars, but journalists, not merely political scientists, but politicians, not merely religious studies professors, but religious leaders, and so on. This is done out of an abiding sense that in contemporary life, these various perspectives actually constitute the core substance of the American constitutional experience. How is one to talk about freedom of speech in modern times, for example, without talking of artistic freedom? And how is one to talk about artistic freedom without talking about art? And how is one to talk about art without talking to artists?<sup>5</sup> This example is merely emblematic of the larger lesson, that one cannot talk with full richness of constitutional developments concerning the issues of the day (whatever they may be — abortion, affirmative action, the right to die with dignity, the war power — it makes no difference) without a spacious sense of the intellects and ideas that comprise American constitutional discourse.

This philosophy naturally led the Institute to an even wider supposition: The American constitutional experience should be interpreted as part of the larger march of constitutional theory and practice around the world.

American constitutional history is certainly, at minimum, a dialogue of one generation of Americans to the next. This point was made recently with great eloquence by Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*:<sup>6</sup>

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one.<sup>7</sup>

In the final analysis, however, the American Constitution is also a dialogue with the rest of the world. And it *is* a dialogue. Our constitutional history can instruct the world, for good and for evil. American mythology, from the Puritans to the presidency of Ronald Reagan, has invoked the image of America as a shining "city on a hill," a beacon illuminating the world.<sup>8</sup> And to be sure, there is much in our constitutional life that has weathered time well, can truly be accounted a success, and offers itself for possible adoption by other societies.

But there was always a certain self-absorption to this image of city on a hill, and what is worse, a certain disconnection with reality. Our "living Constitution" has not been the story of utopia. Americans have purchased civil rights and civil liberties at great cost, and only through that struggle have those rights ultimately gained purchase in our democracy. In that struggle Americans have learned much from the parallel struggles of other nations. The currents of philosophy and policy that circulate in other cultures filter through our own, and are absorbed, in part, in our constitutional bloodstream. Indeed, for

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<sup>5</sup> See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 172-78 (1992).

<sup>6</sup> 112 S.Ct. 2791 (1992).

<sup>7</sup> *Id.* at 2833 (O'Connor, Kennedy, and Souter, JJ., announcing the judgment of the Court and delivering the opinion of the Court in part).

<sup>8</sup> See generally, FRANCES FITZGERALD, *CITIES ON A HILL: A JOURNEY THROUGH CONTEMPORARY AMERICAN CULTURES*. (1987).

many Americans, it was specially invigorating that on the 200th anniversary of the American Bill of Rights, constitutional ferment should be so prominent in other societies. The revolutions in Eastern Europe were particularly exhilarating for the American psyche: here were people whom we could observe with the immediacy of modern television *for whom rights mattered, and for whom ideas mattered*. Here were people taking to the streets, blocking the paths of tanks, locking arms, waving flags, writing manifestos, all in the name of democracy and human rights. Here were people invoking our Bill of Rights for their own liberation.

And when these events were over, and that nation-building began, here were people anxious to talk with us. They did not want us to talk *at* them, but *with* them. They wanted to talk about the fundamental questions of governmental and societal organization. These discussions were often scholarly but not “academic.” The solutions sought were practical, immediate, and necessary. In the process of that dialogue, conducted in many forums by many institutions over the course of the last several years, societies have learned more about each other, and about themselves. It was in the spirit of that tradition that this Winds of Change task force was commenced.

The actual dynamics of the task force meetings underscored the difficulty of international dialogue and the great need for more such efforts. The barriers to thoughtful debate were often formidable. Not barriers of *language* translation — they were the easiest to overcome — but barriers of *value* and *idea* translation. Throughout the conference there were moments of collegial consensus and moments of fierce division. There was always a dynamic, however, of diplomatic skirmish at work — a sort of uneasy testiness and defensiveness — which had to be worked through and resolved, area-by-area, before genuine progress toward quality discourse could be achieved. At times breakthroughs were made, at other times debate ended in stalemate. There was always the sense, however, that this type of dialogue does not take place enough, that it ought not be this difficult, that the world would benefit if it were more commonplace.

## II.

Why are democratic movements successful in some nations and not in others? Why are elemental notions of human rights — free expression, security from political prosecution, observance of religious tolerance, respect for racial and ethnic equality, freedom from torture, safety against arbitrary criminal search, seizure, and arrest — able to take root and flourish in some nations but not in others? Is the experience of every culture unique, or are there lessons that the peoples of the world can learn from one another? Do nations with long traditions of democracy and respect for human rights have something to contribute to the evolution of those values world-wide, or will efforts to “export” those established traditions be viewed with contempt by nations in flux, as paternalistic or condescending attempts to impose legal and social norms irrelevant to the indigenous patterns of life of other nations? Are there any necessary cultural or economic preconditions to democracy and respect for civil liberties? Are the successes of those values in any given nation largely random and accidental, so much wrapped up in the unique history of that nation as to not be “suitable for export?”

The papers presented by the scholars brought together for this conference present a rich mixture of responses to these issues. Several of the scholars in this task force observe that when a country begins its democratic tradition, the spirit of compromise

between political parties is paramount. Democracy cannot be established by force. The main political parties of a country must instead learn to work together to establish a government which best reflects the needs of the people. Spain and Hungary both experienced unprecedented compromises between diverse and numerous political parties after their revolutions. In Hungary, following the fall of the socialist government, the political parties worked with the former State Party to form a new government while maintaining the peace. Professor Antal Visegrády states that:

The Hungarian transformation was also unprecedented because revolutionary changes were accomplished in a peaceful and orderly manner and were reached by negotiations that preserved the governing ability of the central power. Unlike East Germany and Romania, in Hungary, no one destroyed the state machinery or the institutional political power. Furthermore, the state machinery did not become paralyzed, as had occurred in Poland and Czechoslovakia. Instead, the central state and party power machinery were dismantled following the agreements between the opposition and the governing political forces, safeguarding the economic and social reproductive capacity of the country.<sup>9</sup>

Was this spirit of compromise facilitated by the countries' previous experience with a communist government? Can such peaceful compromise be duplicated elsewhere? Professor Santiago Sanchez Gonzalez writes that in Spain:

In order to ensure that the program of economic reform would not be opposed by the representative of the working class parties, [Adolfo] Suárez decided to invite the leaders of practically all major political forces to his official residence at the Moncloa palace to discuss his economic proposal. . . .

The Moncloa Pacts were signed on October 24, 1977 by the representatives of all the main political parties. They amounted to a cooperation agreement between right and left in order to improve the economic situation and thereby avoid a political backslide. Although the reforms, particularly in the social field, promised by the government in exchange for the opposition's peaceful acceptance of the austere measures were not completely fulfilled, the Moncloa Pacts were temporarily successful in the economic sphere and prevented a regression in the transitional process.<sup>10</sup>

Although the scholars in the task force agree that democracy is the most stable form of government, they do not agree on what form of democracy is the most viable for their own countries. In their papers several of the scholars relate how alien American democratic principles appear to the people of their countries.

Russians have a long experience of being servants to a powerful state. Professor Svetlana A. Chervonnaya describes Russian history as the repeated rejection of

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<sup>9</sup> Antal Visegrády, *Transition to Democracy in Central and Eastern Europe: Experiences of a Model Country — Hungary*, 1 WM. & MARY BILL OF RTS. J. 245, 250 (1992).

<sup>10</sup> Santiago Sanchez Gonzalez, *Emergent New Democracies: The Case of Spain*, 1 WM. & MARY BILL OF RTS. J. 267, 281-82 (1992).

democracy. Again and again, Russians have chosen to be subjects instead of citizens. She describes the entrenched mentality:

A subject is responsible to the state, serves it, and obeys its orders. A citizen is responsible to himself and to the nation, not to whatever administration happens to be in power. To a subject, the state is an irrational, external force. To a citizen, the state is an understandable mechanism used to administer the country, established with the citizen's active participation and operating under the citizen's control. A subject depends upon the state for the satisfaction of basic needs and is expected to feel grateful for the very right of existence. A citizen provides for personal needs and, in exchange for benefits from the state, relinquishes some rights.

Throughout history, Russians have been deprived of any real sense of citizenship, and thus an understanding of the inalienable nature of their rights.

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Memorizing a list of one's inalienable rights does not guarantee an understanding of those rights. In the United States, this understanding took two centuries to formulate, even with a background of democratic tradition dating to the Magna Carta. For Russians, an understanding of the citizen with a simple, clear-cut, and rational relationship with his country is still incomprehensible. Real-life problems and opportunities are changing this, however. Will Russians realize the historic chance of finally becoming full and equal citizens of their country and not the subjects of their state?<sup>11</sup>

For Russians, then, establishing a democracy is as much a struggle of the soul as a struggle over structure.

Much the same psychology is described in the powerful essay on Puerto Rico by Professor Antonio Fernos.<sup>12</sup> Although Puerto Rico has a "democratic government," it is not *Puerto Rico's* government, but the government of the United States. Instead of evolving into a democracy itself, Puerto Rico was given a democratic government of U.S. design. The result is that:

Regarding public law institutions, Puerto Ricans simply do not live by a Republican form of government having separation of powers. It exists only in theory, not in "official" government action. Political behavior and discourse in Puerto Rico is still patterned after a monarchical, parliamentary system, of government subordinate to considerations of party, friendship, family, group or regional relationships, humanity and charity.

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This customary system is the real one, because the great institutions of the democratic, constitutional system of government were: (1) imposed, but not

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<sup>11</sup> Svetlana A. Chervonnaya, *Critical Choices of Russia's Democracy* 1 WM. & MARY BILL OF RTS. J. 227, 233-34 (1992).

<sup>12</sup> Antonio Fernos, *Trading Winds in Puerto Rico: The Dawn of Self-Determination Shines on a Legal System*, 1 WM. & MARY BILL OF RTS. J. 285 (1992).



taught, consulted, or developed by the people themselves, for themselves; and (2) because those who brought it and proclaimed it did not practice it, and then later only pretended to observe it. That is why the old system still exists, yet that is also why this state of affairs cannot last longer, and the winds must change.<sup>13</sup>

Why would a country with a democratic government tolerate that government yet choose not to participate in it? How can Puerto Ricans prepare themselves for their own kind of democracy?

Even Hungary, a country that is functioning democratically, feels the need for democratic instincts in its people. Antal Visegrády writes:

We must build democracy not only in institutions, organizations, and laws, but inside ourselves as well. Without respect for moral and political values, no moral politics exist, and there is no political nation which is built from below. Democracy must be built in the souls, in the emotions, in the everyday life. Only a democracy that is based on morals and everyday practice can be strong.<sup>14</sup>

Apparently, for a democracy to work, its citizens need to be engendered with the democratic spirit. But which comes first? How can people learn the spirit of democracy without first experiencing it? Can the spirit of democracy be taught, or must it be self-taught?

Japan presents an interesting example for analysis. Although it established its own democratic government, it did so partially at the behest of its people, but mostly in response to international pressure. Professor Yasutomo Morigiwa recognizes in Japan the lingering of a mind-set he calls tribalism:

In the typical tribal society, the code of the clan or tribe must be upheld without questioning the purpose of the rules; changing the rules through mutual discussion and resolve is impossible. If there is a conflict, the elders intervene and mediate. Resorting to the judicial system and arguing the case in a court of law is similarly not an option; neither the concept of law nor the judicial system necessary for implementing law exists in this society. A society based on and embodying the rule of law must exist for such a legal system to function therein. The tribal society as we perceive it is anything but such a society.<sup>15</sup>

Several of the scholars address the concept of government according to "the rule of law." What is this concept? Is it a necessary component of a democratic government?

The role of ethnic identity, and the problems of resolving ethnic conflicts, are prominent themes in the papers. Professor Alemante Selassie argues forcefully that in some emerging democracies, such as Ethiopia, the formulas of traditional liberal democratic thought may not be adequate to address the task.<sup>16</sup>

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<sup>13</sup> *Id.* at 294 (citation omitted).

<sup>14</sup> Visegrády, *supra* note 9, at 256-57 (citation omitted).

<sup>15</sup> Yasutomo Morigiwa, *The Laws of a Nation: The Essential Formula for a Liberal and Democratic State*, 1 WM. & MARY BILL OF RTS. J. 187, 195-96 (1992).

<sup>16</sup> Alemante G. Selassie, *Ethiopia: Problems and Prospects for Democracy*, 1 WM. & MARY BILL OF RTS. J. 205 (1992).

A major hurdle for many emerging democratic governments is the existence of friction among multiple ethnic groups within a country. Many countries grapple with the problem of preserving national unity while at the same time recognizing ethnic identity. Perhaps because Western European countries were relatively homogenous ethnically, liberal democratic thought did not tend to treat ethnicity as requiring recognition from the state. However, in countries that are divided by language and culture, the recognition of ethnic identity may be an important prerequisite to national peace. The African nations and Russia both face the issue of how to balance the relationship between state, individual, and ethnic community. Can national, individual and ethnic rights be balanced, or must one prevail over the others? Svetlana Chervonnaya writes that:

A fundamental principle of the system Russia inherited was Stalin's definition of a nation as an ethnically homogenous community with exclusive rights to a territory with fixed borders. This definition resulted in a rigid hierarchy of ethnic communities with a corresponding hierarchy of administrative-territorial divisions. . . .

. . . .

What is the future of ethnonationalism in "nation-states" where the "native" population constitutes less than a majority? Can the sovereignty of the Tatar Republic be interpreted as the result of self-determination of the Tatars when eighty percent of its members reside outside this republic? What will be the price of social peace in the Baltic republics with the rights of their sizable "non-native" populations, almost forty percent of Estonia and fifty percent in Latvia, severely abridged? What will happen if the most alarming Russian ethnonationalism becomes realized so that a "Russian republic" is created on the territory of the current Russia despite the existence of more than one hundred ethnic groups? Can a civil society evolve within the limits of ethnic nationhood when the state becomes a vehicle for just one ethnic group?<sup>17</sup>

Professor Chervonnaya suggests that Russia should use the United States as an example and place individual rights in a position of priority over group rights. Professor Selassie, on the other hand, observes that in Africa, the Western assimilation strategy has not succeeded. He advocates a new approach for African Ethiopia and other African nations — one that recognizes both individual and the collective rights of ethnic groups:

. . . Ethiopia should consider alternative constitutional models that accommodate ethnic diversity without impairing national unity. If the federal idea is to be effective, it requires fostering an awareness that each region, by itself, is relatively insignificant vis-a-vis the whole. One way to achieve this is to split the large regions into several smaller units, taking ethnicity into consideration, but also considering history, economic viability, and other criteria calculated to encourage a feeling of interdependence and mutual cooperation. . . .

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<sup>17</sup> Chervonnaya, *supra* note 11, at 239-41.

Little, if at all, in the way of democratic progress can be expected amid ethnic conflict and competition.<sup>18</sup>

In the end, what strikes one most about the collection of scholarly works in this volume is the complex interplay of “things we have in common” with “things that make us unique.” The collection reveals that there are indeed many issues common to all constitutional democracies, and that societies have much to learn from the traditions and strategies of others. Yet in the final analysis, stable democracies respectful of the basic human rights of others must emerge from the unique history, culture, and traditions of each society, and most importantly, the values of democracy and human rights must be absorbed into the ethos of the people.

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<sup>18</sup> Selassie, *supra* note 16, at 225-26.