THE HOW MANY QUESTION: AN INSTITUTIONALIST’S GUIDE TO PLURALISM

ORI ARONSON*

INTRODUCTION

A policy decision to involve the state in either the accommodation or the provision of institutional pluralism entails a crucial design question that is often undertreated in the political morality literature on pluralism. The fact that a pluralist agenda has won the policy debate – that political agency has been mobilized in support of public institutions that would tolerate or express multiple alternatives and respect individual and community choice – does not in itself tell us a lot about the quantity and nature of the alternatives that ought to be included in the pluralist regime. Most of the normative inquiry in this area has focused on the external boundaries of the field of options to be devised; that is – whom it might be justified to exclude from the sphere of public respect and accommodation. The typical discussion in this context concerns the variety of illiberal practices exercised by communities that present an otherwise morally sustainable demand for pluralist recognition; and positions vary familiarly.

But assume that the external boundaries of the field have been relatively settled: that we have a reasonably articulated theory of what qualifies as a non-legitimate cultural practice, such that we know what is not going to be part of the recognized field of alternatives in our pluralist regime. We are still left with the issue of how to design the field itself, and here the discussion is still lacking. Specifically, two interrelated questions arise: (1) what is the “pluralistically optimal” amount of alternatives a state is required to (strive to) provide in order to fulfil its political ideal (the N question); and (2) what is the “optimal” degree of variance the state should (seek to) maintain among the given alternatives (the Δ question). How many parties should we put on a national ballot? How large or distinct should a cultural group be in order to warrant political recognition and differentiation? What kinds of courts should a judicial system include and what variety of schooling should an education system uphold? Should legally recognized familial structures, contractual associations, or property relationships be limited in kind or open-ended?

Obviously there is no available method to answer these questions in the abstract, as different pluralistic contexts lead to different institutional demands, and even in particular cases we are not likely to reach something like an exact figure – a “42” à la Douglas Adams. But we should be able to make an effort to theorize the institutional implications of normative pluralism, and to identify workable, useful benchmarks, considerations, or heuristics for pluralist institutional design. This work is essential for constructive as well as intellectually rigorous critical engagement with current practices from a pluralist perspective.

* Bar-Ilan University Faculty of Law. ori.aronson@biu.ac.il.
In this essay I suggest an analytical framework for working through these questions. Rather than try to deduce institutional prescriptions from abstract normative claims, the suggested framework – one of several possible entry points into this field – identifies two fundamental paradigms of pluralist institutionalism: mimetic pluralism, in which the pluralist field is meant to accommodate an existing diversity of practices within the state apparatus; and poietic pluralism, in which the state engages in the design of new institutional alternatives. Each presents an ideal type of institutional design, deriving from a different moral conception of pluralism as a political imperative, and therefore also suggesting a different approach to the “how many” question. Through their elucidation and juxtaposition, the essay hopes to open up useful avenues for treating questions of pluralist institutional design in context, and not only in the abstract.

To keep the discussion grounded, the essay draws on the near history of Israel’s politics of law, religion, and identity and some of the institutional variations they have brought about, as examples and illustrations. The essay begins therefore (in Part I) with the tale of two Israeli stories of institutional innovation, each representing a different model of pluralist design. From the context-specific stories, I turn in Part II to present and discuss the two paradigms of pluralist institutional design, which are to anchor the discussion throughout. Parts III and IV are dedicated to analyses of two central complications or challenges faced by pluralist institutional designers of either paradigm, but shows how they play out differently in each of the two approaches. One challenge is the ever-changing nature of the social fields that are subject to pluralist treatment (the dynamism of institutional design); the other has to do with the effects of a constituency failing to avail itself of a pluralist structure (the problem of convergence). Finally, in Part V, I return to the question at the title, and try to map some of the practical issues pluralist institutional designers would have to tackle.

I. DESIGNING PLURALIST INSTITUTIONS: TWO ISRAELI STORIES

(1) Marriage registration

In October, 2013, Israel’s parliament, the Knesset, enacted an amendment to the Marriage and Divorce Registration Ordinance, a piece of legislation with origins in the British mandate, which had until then provided that Jewish couples are to register for marriage with the local rabbinate of their place(s) of residence or that of their wedding. The 2013 legislation provided instead that the couple may register for marriage with any rabbi authorized to register marriages in Israel, “regardless of [the couple’s] place of residence or the location of their wedding.” The formal justification for the legislation, presented in the explanatory notes to the bill, focused on the fact of young persons’ geographic mobility in contemporary Israel, which renders the requirement of local registration needlessly burdensome.

A highly visible subtext however had to do with the matter of variety: not so much a measure of administrative streamlining, the legislation was above all another act in a decades-old culture war around the still Jewish-orthodox-dominated system of marriage and divorce in Israel. Unable to muster the political force to enact a comprehensive civil marriage
reform, representatives of secular constituents instead recurrently opt for second-best solutions that seek to circumvent or to mitigate the costs the orthodox monopoly incurs on couples and individuals who have no other option but to marry the religious way. In this case, the legislation was meant to enable couples to register for marriage with a local rabbinate that is not as strict as the one they might have been bound to under the previous place-of-residence-based regime.

Because it is part of a religious system, marriage registration in Israel is not a mere clerical function: the registrar – a male orthodox rabbi appointed by the chief rabbinate – is expected to employ his knowledge of Jewish law to ascertain that both parties are Jewish and that there are no other Halachic obstacles to consummating the marriage, including ones that may seem petty in character, such as whether the bride performed a ritual Mikveh immersion or whether the wedding venue had a kosher certificate. The degrees of diligence in insisting on these requirements can vary however, not (only) due to divergence in bureaucratic culture. A modern-orthodox registrar might treat couples differently than his ultra-orthodox counterpart, and a rabbi in an urban setting might have different understandings of family and community than a rabbi in a small-town or rural context. And due to the diffuse and non-hierarchical nature of Jewish law and of rabbinical authority, there is no practical way to ensure the application of uniform Halachic standards throughout the local rabbinites.1 This meant that by the virtue of chance – where you or your future spouse happened to live – your marriage registration experience could vary significantly, albeit only within the boundaries of the orthodox, chief-rabbinate vetted spectrum. The new law therefore allows couples to ‘shop’ for a more hospitable rabbi-registrar from among those available in the existing distribution of local rabbinites throughout Israel.2

(2) Civil adjudication

Devising a choice mechanism among several providers of public service along the secular-religious fault line has been suggested in Israel not only in the context of marriage registration. Like in many other countries over the past few decades, adjudication of civil disputes in Israel has undergone a process of institutional diffusion and pluralization, with diverse adjudicatory units and forums springing up both within the state apparatus (specialized courts, administrative tribunals) and in the so-called private sphere (the ADR

---

1 In the Knesset debate, the ultra-orthodox opposition asked how come this reform is applied to marriage registration, but not to the myriad other governmental functions that require citizen attendance at a local office. The difference however lies in the institutional context: street-level bureaucratic variance notwithstanding, regulatory state bureaucracies are normally susceptible to the unifying forces of organizational hierarchy and of administrative law. Both of these elements have a much diminished force in the context of state-backed rabbinical authority.

2 It should be noted – as it was by proponents of the legislation during the parliamentary debate – that Ultra-orthodox communities had long enjoyed this kind of choice in marriage registration: a combination of cultural and political forces led the chief rabbinate to recognize marriage registrations conducted by several non-state ultra-ultra-orthodox rabbinites, whose constituents viewed the religious stature of the state-backed local rabbinites as insufficient; in effect privatizing a segment of the marriage registration power.
variety). One of these developments has taken the form of a burgeoning industry of Jewish religious tribunals, Battei Din, which pursuant to parties’ authorization hold court in diverse civil disputes according to Halachic principles and procedures and at the same time can enjoy the backing of state enforcement under Israel’s arbitration laws.

The development of a competitive, client-oriented market for Jewish-religious arbitration, out of what was once an intra-community service premised mostly on cultural commitments and charismatic leadings, is a multifaceted story. It involved multiple agents and points of institutional innovation, including a 2006 landmark Supreme Court opinion which turned out to reinforce the privately-run forums’ claim of religious attractiveness.\(^3\) I will not go into the intricacies of this fascinating episode; Amihai Radzyner’s essay for this conference touches upon it in detail. For my purposes suffice it to note that the Court’s decision had clarified that state-run Battei Din – Jewish-religious tribunals with exclusive jurisdiction in marriage and divorce – lack jurisdiction over civil or commercial disputes. This result in turn led to still-ongoing political efforts to draft and enact a novel jurisdiction-conferring statute, one that would formally establish state-sponsored Jewish-religious jurisdiction in civil matters, alongside the secular courts which normally adjudicate such disputes.

These attempts to formally introduce a “public option” in the market for religious adjudication of civil disputes are yet to bear legislative fruit. However, as a matter of institutional vision they present a similar design strategy to the one employed in the marriage registration reform: creating a field of multiple choice-alternatives for the consumption of a religious service (here, Halachic civil adjudication), this time one that includes provision by both state and market/community actors.

(3) Commonalities

Both episodes, I suggest, can be appropriately understood as political exercises in a pluralist normative agenda: They employ state institutions in order to enlarge and diversify the set of alternatives available for individuals acting socially, and they do so in a social context that is deeply sensitive to demands for difference and distinction – religious attachment and belief.

But the two episodes are also interestingly distinguishable from each other in their institutional strategies. The marriage registration reform was conducted through a minor tinkering with the choice mechanism: It took the field of existing alternatives (the already-established local rabbinites) as given, and merely reworked the process through which couples are paired with registrars. The proposed religious adjudication reform, on the other hand, would change – enlarge – the very field of available choices, by introducing a new alternative for parties to choose from.\(^4\) So while the two episodes tell comparable stories of

\(^3\) HCJ 8638/03 Amir v. Grand Rabbinical Court, 61(1) P.D. 259 (2006).

\(^4\) The current proposals seem to treat the new forum as holding non-exclusive jurisdiction, meaning that the same civil cases could end up either with the new religious state tribunal, with civilian courts, or with private religious arbitration panels. This is not a necessary arrangement – they could have
pluralist normative agendas in the design of state-backed religious institutions, they also present two competing theories of *how to do pluralism*. It is the aim of this essay to conceptualize these two theories as paradigmatic versions of pluralist institutional design, and to unpack some of their moral, political, and practical foundations and implications.

In what follows I term the two paradigms *mimetic pluralism* and *poietic pluralism*. Each presents an ideal type of institutional design, deriving from a different moral conception of pluralism as a political imperative. I define these two concepts in the following paragraphs with an aim to distinguish between them, but note already that, as we’ll see, in reality both necessarily overlap and feed into each other. Still, through their elucidation and juxtaposition we may come up with some generalizable insights about the pluralist method of institutional design.

### II. PLURALIST INSTITUTIONALISM: MIMESIS AND POIESIS

1. *Mimetic pluralism*

   A pluralist agenda is mimetic when it calls for designing public institutions that respect and reflect existing variations in belief systems, in social norms and understandings, and in demands from the public sphere. In such cases, the public intervention is characterized by imitation – mimesis – of already-existing practices, through their representation in state institutions. Mimetic pluralists rely on the multiplicity of alternatives developed by members of the constituency as the principal determinants of both **N** (amount) and **Δ** (variance). They ask the state to take the field of alternatives as given and ensure that it retains its pluralistic character, by creating institutions that recognize these practices and sustain their multiplicity. The “how many” question for mimetic pluralists is concerned primarily with determining which groups, practices, or institutional units qualify as viable for recognition as distinct alternatives under the pluralist regime: what are the foundational elements of a “religion,” how many members constitute an “association,” what procedures are required to establish a “party.”

   The marriage registration reform in Israel is an example of an exercise in mimetic pluralism. As we saw, what the reform involved was a mere tweak in the assignment mechanism of couples to registrars – in place of a bounded geographical criterion, it opted for a national choice-based market structure. It used the known diversity in registrars’ Halachic rigidity as the basis for institutional reform that would inject pluralism into a system often perceived as arbitrary, coercive, and discriminatory. The state overlays the existing map of alternatives with its system of marriage registration, and adopts the existent pluralistic field as its solution to local religious disparities.

Mimetic pluralism can thus be thought of as a bottom-up project of institutional design. In its ideal type, it is a passive-responsive political strategy, which identifies diversity in morally opted for exclusivity or preemption of one kind or another, and that would make them less pluralistic under this essay’s understanding of the term.
consequential social spheres, and then makes room for that diversity in the design of public institutions. It does so ostensibly without engaging in a critical evaluation of the nature or content of the existing alternatives (except for the purpose of defining the external limits of the regulated field and excluding illegitimate options).

Of course these spheres of plurality, to which the state attaches its public superstructure when it goes pluralist, do not develop organically out of some state-less zone of pre-political communal life. The state (through law) has a background role in the processes of creation or evolution of most social arrangements, and so it is hardly ever a purely mimetic agent. The marriage registration story is a case in point: the Jewish-religious alternatives endorsed by the state in that case were themselves state institutions – local rabbinates, which are funded, managed, and regulated by law as part of the government apparatus, and which were allowed to diverge in their levels of stringency, whether or not that was an intended consequence of the initial choice to involve Halachic discretion (known for its decentralized nature) in the registration of marriages in Israel. Other instances of mimetic pluralism however apply to institutions that evolve with a lesser statist background role; consider the millet system, in which the Ottoman Empire recognized acts of the religious tribunals of certain ethno-religious minorities that have come under its control – an arrangement the central features of which are still in force in Israel today. Still, as theories of representation have long recognized, any mimetic act by definition alters that which is being represented, and in that sense as well there is no such thing as pure mimesis. Existing religious courts which are granted state imprimatur are no longer the same tribunals they were without their position within a political apparatus.

As the realization of a liberal political ideal, mimetic pluralism is best understood as a mechanism for coping with the (sociological) “fact of pluralism” and the demands and constraints this fact imposes on the state. Framed in terms of autonomy, dignity, or equality, as an expression of neutrality or of toleration, or indeed as a signification of the diversity of human experience as an intrinsic good – mimetic pluralism seeks to express, accommodate, and facilitate through public institutions the multiple visions of social welfare that exist in a community, or in a certain social structure, at a given time. Mimetic pluralism can also be justified in terms of efficient or expedient policymaking: it relies on existing sources institutional design, in a sense privatizing design while capitalizing on the public goods plurality produces – competitive incentives to improve and innovate (where choice is involved), and greater efficacy of governance through a more nuanced fidelity of public institutions to individuals’ diverse understandings and expectations.

(2) Poietic pluralism

A pluralist agenda is poietic when it engages the state in the creation – poiesis – of multiple institutional alternatives that would sustain, overall, a sufficiently pluralistic field. Poietic pluralists face the “how many” question in a more direct and challenging sense than mimetic pluralists, because they are required to introduce new institutions into an existing field, or indeed to produce a whole new institutional scheme where the state was not formerly involved at all. The determinants of $N$ and $\Delta$ under poietic pluralism are not
necessarily existing practices or expectations, rather a conception of what ought to be the set of alternatives that constitute the pluralist institutional structure. And because the limits of reason preclude the possibility of an accurate ex ante prediction as to the optimal set of alternatives, poietic pluralism should often take the form of an experimentalist institutional agenda, leaving open ends for the introduction of new institutional possibilities down the road.

The proposal to confer state religious courts with concurrent jurisdiction over civil disputes is an example of an exercise in poietic pluralism. Although a field of diverse forums for civil dispute resolution already exists in Israel (both in religious ADR tribunals and in secular state courts), the new proposed legislation expresses a view that this field is not diverse enough to fulfil a sufficiently pluralist vision of adjudication; namely it lacks the option of a state-backed religious process – a mode of dispute resolution that turns out to be of special significance to a considerable constituency in Israel. The state therefore enters the field and produces the missing alternative. In this process it engages the “how many” question: while it does not provide a finite number, it does take the position that in the civil adjudication field, two is not enough – the choice between private-religious and public-secular is a pluralist state of affairs, but it is not sufficiently so. At the same time it reflects on the degree of variance question: the normative gap between the private-religious and public-secular alternatives is too wide, compelling parties to litigate in forums that are either too private or too secular.

Notably, there are other ways of construing the poietic project expressed in the proposed legislation. Applying a more nuanced lens, the story can also be told not as a binary setting (private-religious/public-secular) into which a third option (public-religious) is introduced, rather as a broad field in which multiple judicial forums operate, located on various points along a private-public/religious-secular spectrum. Thus, not all ADR-based battei-din are the same, and not all state civilian courts are the same. Religious tribunals vary from extreme ultra-orthodox forums with no attachment to the state or to other communities, to modern-orthodox systems that willingly endorse the legitimating shadow of arbitration law and seek to serve diverse litigants, from an informal ad-hoc gathering of three rabbis asked to resolve a given dispute, to formalized organizations of case management and disposition, all with offices, clerks, fixed panels, reasoned opinions, and appellate review. The civilian judicial system is also made of diverse units, from two levels of general jurisdiction courts to specialized courts for labor, family, and financial disputes, each with its different levels of formality, capture by interest groups, and distance from statist control. In this portrayal, the addition of a state rabbinical court with jurisdiction over civil disputes seems a more nuanced institutional move, and one that can therefore raise more particular questions along the N and ∆ lines: why only one kind of state religious court? Why orthodox and not conservative or reform? (Indeed why not one of each?) The challenges of institutional design therefore vary according to context as well, not only by moral theory.

---

5 I do not tend here to the bigger question of the non-Jewish communities in Israel and their needs and expectations with regard to state-based religious adjudication. A full account of the Israeli pluralist agenda in this respect would necessarily include those communities as well, but is excluded
Compared to mimetic pluralism, poietic pluralism is thus conceived as a top-down creative exercise in political agency: having decided to “go pluralist,” designers of public institutions are asked to employ their prescriptive imagination to come up with what could be, rather than their descriptive skills of tracking and identifying what already is. In doing so, (conscientious) poietic pluralists cannot avoid issues of content and quality, which at least some mimetic projects can treat as given. In that sense poietic pluralism can prove a more demanding effort in institutional design, although it comes with the unique potential of introducing people to novel and unfamiliar paths.

Poietic pluralism as a liberal project would most sensibly be grounded in a moral understanding of autonomy as self-authorship, requiring meaningful choice in important life junctures as the core of autonomous fulfillment. In terms of political obligation, this version of autonomy requires the liberal state to ensure that in significant spheres of human development and interaction, multiple and diverse institutions would be made available to choose from and thus made one’s own. Capabilities-based approaches to distributive justice, as well as pluralist accounts of legal constructs such as property or marriage could fit this category. Such pluralists must face the quantitative nature of poietic challenge, because even where multiple institutions already exist, the available alternatives may fail to provide genuine or meaningful choice. Thus for example, on the $N$ axis, the availability of too many alternatives can lead to little real choice, as reasoned comparisons become costly and complex, and the status quo gains a distorting force. On the $\Delta$ axis, available alternatives may be too similar, turning choice into a sham, or indeed too far apart, again exacerbating the effects of increasing returns and path dependence in favor of the familiar status quo.

Of course, in the mirror image of the constitutive element that inheres in all mimesis, poietic pluralism as well cannot really escape the boundaries of that which is already in existence, and so, at least to us humans there is no pure poiesis – what we can imagine is bound by what we already know. This point takes two forms in our context. First, the poietic act itself can sometime involve the use of already-existing institutions. The proposed rabbinical court authorization legislation is an obvious example: state rabbinical courts already operate in Israel, adjudicating divorce and related disputes for many years. Indeed, they have already engaged as arbitral forums in the adjudication of civil disputes until the Supreme Court deemed the practice *ultra vires*. The poietic nature of the proposed legislation is therefore jurisdictional rather than structural – it confers new authority on an existing institution rather than creating a wholly new judicial unit. This kind of poiesis clearly takes the path of least intellectual resistance, as it finds the materials for institutional innovation in up-and-running institutions.

Second, even the myriad examples of more genuinely creative acts of institutional pluralism all face a boundedness of human experience. The histories of most administrative states (and of judicial systems therein) are stories of creation and experimentation in institutional novelties like various governmental agencies, specialized courts, and privatized endeavors. But few, likely none, come “from nowhere.” In another recent innovation in the field of

from the present essay for the purpose of theoretical focus and clarity. Michael Karayanni’s essay for this conference sheds important light on the non-Jewish elements of Israel’s *millet* system.
commerce-related adjudication, Israel created a few years ago a new specialized economic division in its Tel Aviv district court. The jurisdictional legislation brought into being a forum that never existed before in Israel. Even that innovation, however, was mimetically denoted by its proponents as “Israel’s Delaware” – indicating its source of inspiration in the famed chancery court of the American state. And projects of therapeutic and restorative justice, now gaining traction in rule-of-law democracies and certainly charting new pluralist courses alongside the liberal orthodoxies of criminal justice, often draw on practices of indigenous and traditional communities, perhaps seeking legitimation in the knowledge that these methods have been tested elsewhere.

* * *

In the subsequent sections I turn in more detail to several central challenges of pluralist institutional design of the “how many” variety, and explore the disparate ways each of the two models treats them. While it may seem that poietic pluralism requires much more work in figuring out design questions, we will see that mimesis as well is a process of ongoing value-laden choice-making.

III. DYNAMIC INSTITUTIONAL DESIGN

Both mimetic and poietic pluralists must face the dynamic nature of the fields they are regulating. In both models, sufficient (“optimal”) degrees of plurality of alternatives are contingent upon the practices, beliefs, expectations, and choices of individuals and groups, and all these can change as societal and cultural connections and commitments develop or alter. We can already sense that the “how many” question presents a moving target, which can at best produce a workable algorithm rather than a finite number. In this part I unpack the different sorts of dynamism each pluralist model has to tackle.

In some contexts mimetic pluralism can be a static exercise, requiring a one-time choice and relying on a given institutional background as the determinant of the field of alternatives. In the Israeli marriage registration example, the choice-based pluralist framework was superimposed on an existing institutional structure – the already set-up system of local rabbinates, which is not expected to fluctuate without further deliberate design choices. Thus even if some of the local rabbinates would turn out to share similar levels of halachic rigidity, or if an existing rabbinate would shift in one direction or another, the attachment of the pluralist scheme to the existing jurisdictional structure is not likely to change; people’s choices might shift, but not the institutional design. A similarly static pluralist account can be seen in familiar functional explanations of the jurisdictional redundancy characterizing the U.S. judicial apparatus – fifty-one systems with often overlapping jurisdiction over same or similar cases. Classic accounts of this arrangement as a

---

Interestingly, the initial bill proposing legislation along the lines of the marriage registration reform included a specified list naming only certain city rabbinates across Israel as available for forum shopping. This reflected a deliberate intention to accommodate only a set amount and degree of alternatives, and had this option been legislated, it might have required a more dynamic tracking system of the actual pluralism achieved.
“judicial laboratory” or as a mechanism for bringing out “interest, ideology, and innovation.”\(^7\) rely on the external fact of the American federal structure, with its given number of states that is not likely to change regardless of the actual pluralist pay-off it produces.

But other mimetic projects are dynamic, requiring an ongoing engagement with a fluctuating social and political field. This occurs when the pluralist project involves the creation of public institutions which are to accommodate existing social practices (hence their mimetic quality). Here the state needs to continually track the fluctuations in the field that is subject to pluralist accommodation, in order to ascertain whether new groups, communities, or practices have emerged (or withered) so as to require a remodeling of the mimic structure. The continued evolution of the Ottoman/mandatory millet system even after the establishment of the state of Israel is a case in point: since 1948, two “new” religious groups were formally recognized by the Israeli government and entrusted with public institutions and/or jurisdiction over their members’ personal status matters. Thus in 1957 theIsraeli Druze community was recognized as a separate religious group, leading in 1962 to the establishment of state-backed Druze courts, and in 1970 the Evangelical Episcopal Church in Israel became the tenth Christian denomination to be awarded jurisdictional autonomy (the other nine having been recognized already by the British mandate in 1939).

An institutional project of mimetic pluralism, if it is to serve more than the political moment that led to its adoption, must therefore involve a mechanism for tracking and evaluating the development of new practices that would require institutional accommodation: have new possibilities evolved, and do they qualify under the pluralist criterion to enjoy institutional accommodation? This mechanism can take different forms – it can rely on private party petitioning (think of the federal process for recognizing Indian tribes), or on public outreach through surveys and censuses (think of demography-contingent multi-lingual ballots).\(^8\) The dynamism of the mimetic process lies in the dynamism of the reality it seeks to respect and imitate, and so a genuine mimetic pluralism has to answer the “how many” question by accepting the potential of a constantly shifting number of institutional variations.

At the same time, such episodes of mimetic dynamism of course do not merely reflect a passive process of tracking and observation, in which the state would grant institutional accommodation to any qualifying group under some predetermined objective threshold (e.g., number of members, recognition by authoritative foreign actor). Although claims of discrimination and arbitrariness could be raised with respect to these processes,\(^9\) they still represent above all a politics of recognition, which in Israel include the special complexities of a state whose constitutional identity is defined along exclusionary ethno-religious lines. Thus for example while the Druze, who have shown a strong allegiance – as minority outsiders – to the Jewish national project (most notably by encouraging young men to serve in the IDF), won recognition, requests for recognition by Jehovah’s Witnesses, who challenge the deep anti-missionary sentiment in Israel, are recurrently declined.

---

7 Robert Cover, The Uses of Jurisdictional Redundancy.

8 Endorsed in the Voting Rights Act for “language minorities” that comprise more than 5% of the relevant constituency’s citizens of voting age. 52 USCS § 10303(f)(3).

9 And in some contexts succeed: see the policy regarding special schooling.
Indeed in some contexts a practice that may seem a straightforward exercise in mimetic distinction can turn into a hot-button pluralist challenge when confronted with identity politics and inter-group anxieties. Consider for example the registry of nationalities administered by the Israeli Ministry of the Interior: once a security-related profiling tool distinguishing primarily between two categories – “Jewish” and “Arab” – the registry has taken on two additional public roles: a statistical means of tracking population diversity, which now numbers some 130 other categories, mostly noting the origin countries of non-Jewish immigrants, including such curious groups as “American,” “Hong Kongian,” and “Tatar,” and an active turf for the Israeli culture wars of group definition, recognition, and belonging. In this last context the dynamics of mimetic pluralism have been evident, both in the registration over time of such “nationalities” as “Druze,” “Circassian,” and lately “Aramaic,” in public expressions of these groups’ differentiation from the (Muslim) Arab collective, as well as in the denial of a petition to put “Israeli” on the list, in what was a failed attempt to formally entrench a post-pluralist version of citizenship in Israel. By employing the nationalities registry to imagine new communities and block the access of others, Israel has in a sense switched from a mostly symbolic exercise in mimetic pluralism, into a poietic project of redesigning the very field of alternatives. I turn now to the dynamic aspects of poietic pluralism.

As we have seen in the religious adjudication episode depicted in the beginning of this essay, poietic pluralism as well can sometimes seem a relatively static act of institutional design. This is the case when the institutional imagination employed to create the field of new alternatives is bound either by an attachment to familiar and existing institutions which serve as inspiration or source of borrowing for the new field, or by an ideological or political capture that – while supporting pluralism – limits the effectively available resources of innovation and diversity. The proposal to entrust existing state battei-din with jurisdiction over civil matters arguably suffers from both pathologies of poiesis. The existing tribunals are all Jewish-orthodox, presided over by only-male judges (dayyanim), most of whom were educated in Ashkenazi ultra-orthodox institutions. Thus while the new forum would add a distinct judicial alternative to the existing field (making it a pluralist move), it would be one that represents only a segment of Jewish religious legality – one that already enjoys accommodation in state institutions as well as a strong base in Israeli interest group politics. None of the current bills proposed, for example, adding judicial forums that would apply conservative or reform halachic innovations; that would have been a truly poietic measure.

The choice to limit the proposed pluralist legislation to an orthodox option could be explained in terms of variance – there simply aren’t enough potential customers in Israel for a Jewish-reform court to justify the creation of two systems of state religious adjudication. In other words, the primary demand for state religious adjudication can be satisfied by an

---

10 Admin.App. Ornan. The nationalities registry does include however a category titled “Hebrew,” as well as one that allows you to register as “without nationality,” the question whether one can have one’s nationality registry left unfilled remained undecided by the Court.

11 I reiterate that the discussion of religious adjudication in this essay focuses on the Jewish community is Israel. Clearly a comprehensive act of pluralist poiesis would have to account for the varieties of non-Jewish religiosity in Israel as well.
orthodox court; another tribunal would just not be distinct enough to justify the investment. But note that this explanation reflects a mimetic reasoning, rather than a poietic one: it derives an institutional agenda from existing practices and preferences, and in that way entrenches the status quo rather than challenge it. A poietic perspective does not ask how many people are likely to choose a new institution, rather whether the new institution is needed in order to make their choice meaningful, whatever that choice turns out to be.

The dynamic nature of poietic pluralism lies therefore in its goal of stimulating the capacity of individuals to keep engaging in the lifelong project of self-authorship. This dynamism has two related implications. First, social norms and expectations change over time, and thus the set of available choices that might be sufficient to fulfil the autonomy ideal at one point in time, may fall short at another. Consider for example the liberalization of family-name registration in Israel over the past few decades: from a system that once conceived of choice as the option of a married woman to either assume her husband’s name or to hyphenate it after her own, Israel today places practically no limitations on the possibility of either spouse to register whatever last name he or she sees fit. Of course this has a lot to do with mimesis – the process followed evolving familial practices – but it also reflected updated notions of autonomy and the public-private divide, creating a space for (and not merely a mold of) diverse naming choices.

Second, we suffer from an inherent epistemic deficit when we try to design an ex ante optimal array of institutions for individuals to choose from. Because the needs and beliefs of people vary and change, and because social conditions keep evolving, the poietic project necessarily entails some measure of chasing a moving target. This does not mean that poietic exercises in pluralist institutional design are futile or destined to fail their sufficiency threshold. It does mean however that we can only measure the success of poietic acts of institutional pluralism in retrospect: did we manage to develop a valuable field of choices through which people could exercise their autonomy?

The open-ended nature of autonomy-enhancing poiesis leads to institutional experimentalism as a central feature of the pluralist enterprise. This poses a special challenge for designers, who have to construct systems that are robust enough to serve institutions’ purpose of providing order, structure, and direction to social life, but at the same time are also flexible and malleable enough to be able to incorporate new information and new interests (and to forgo defunct elements) in their own design.

This can be attempted in different ways. One is to institutionalize ‘poietic moments’ – predetermined points along the projected life of an institution, in which its pluralist ideal comes under examination and its resistance to reform is relaxed (e.g. by a temporary change in amendment procedures, or a reversal of a default norm). Another is to create modes of learning and critical reflection in the ongoing functions of the institution, in order to mitigate the risks of entrenchment and ossification. Thus a pluralist design can institutionalize meaningful interaction between agents of different units, such that the discourse of each is

---

12 I use “experimentalism” here following Roberto Unger (rather than Sabel et al).

13 Eg Goodin
infused by the knowledge and experience of the other. Consider for example rotating judges among units or jurisdictions within a court system: randomly placing a sample of civilian court judges on religious court panels, and vice versa. Such a scheme would, first, help in maintaining a tolerant and deliberative quality to a diverse judiciary, and second, turn it into a learning body in which communication can lead to innovation.14

While always dynamic, the universe of pluralist institutions – mimetic or poietic – does not always expand. In different contexts institutional designers can face the predicament of a contracting field of choices or alternatives. This is a special challenge of pluralist dynamism, to which I turn now.

IV. THE PROBLEM OF CONVERGENCE

What happens if the field subject to pluralist regulation does not “play along?” That is, what if pluralist theory prescribed institutional reform in a given context, but the people supposed to benefit from the pluralist design fail to do so? This is not merely a problem of poor design – giving the incorrect answer to the “how many” questions; it can also arise due to the very nature of choice-based systems. I proceed again in bifurcated fashion, discussing how this challenge plays out in each of the two paradigms of pluralist institutionalism.

Mimetic pluralism can reach a “dead end” when the amount or the variety of the social practices that were the basis for the pluralist project dwindles – when people abandon certain associations or practices, and converge around fewer options, or even a single one. Language usage sometimes raises these kinds of concerns. This is a familiar issue in indigenous communities overrun by colonial forces of cultural assimilation, but other paths can also lead to the death of a language, as in the decline of Yiddish and Ladino, the combined result of Jewish secularization, the Holocaust, and a resurgence of modern Hebrew. When state institutions are mimetically designed to accommodate lingual pluralism – in formal correspondence, in the modes of petitioning the government, in public education – what is the pluralist to do when a language is dying? The simple answer would seem to be that if the pluralist project is about dignifying the actual preferences of people, recognizing existing practices, and accommodating them in public institutions, then the state should simply eliminate alternatives that have gone out of favor with the relevant constituency.

But this result can be problematic to the mimetic pluralist in several respects: First, the more likely scenario is not a complete abandonment of a certain practice, rather its gradual decline until it is shared by only a small group of people. Then the question implicates the allocation of public resources and raises the question of a pluralist threshold: which groups

14 Israeli formally includes an institution titled the “special tribunal” (Beit-Din Meyuchad), in which two Supreme Court justices and the chief judicial officer in one of the state religious court systems convene to determine contested questions of jurisdiction. This institutional anomaly – a British mandate design – could have become an inspiring source of innovation through communication between the multiple versions of adjudication and legality that comprise the Israeli system. However in the past three decades the “special tribunal” has become practically extinct, as the conditions for its convening where interpreted by the Supreme Court to be highly demanding.
or practices are sufficiently substantial to justify their accommodation in the state apparatus. This is an essential aspect of the “how many” question, to which I return below. Second, mimetic pluralism need not necessarily be conceived of as a synchronic overlay of present conditions. It can also justify taking account of past practices worth preserving or reviving. This could be done in order to respect a cultural memory shared by members of living communities, for example if it is constitutive to their ongoing association. It can also be required as a measure of corrective justice, when the state had a causal role in the decline of the cultural practice.

The underlying question here has to do with the kind of obligation a state is subject to when it opts for mimetic pluralism: should it merely provide the opportunity for the different groups to make use of pluralized public institutions – and then it is up to individuals and communities to determine whether the pluralist design will endure or wither – or is the state also expected to ensure that the different alternatives in fact thrive and are expressed in the products of its institutions? Going back to the mimetic example used in the beginning of the essay, assume that following Israel’s marriage registration reform, most couples choose to register at a limited number of rabbinates known to be Halachically lax. Should the state keep maintaining the full field of alternatives, even if some of them draw little or no interest? Or take the case of public support for non-orthodox Jewish rabbis in Israel. In 2012, following Supreme Court brokering, the state took on an obligation to fund a fixed number of posts for non-orthodox rabbis in local councils across Israel. 15 Membership in non-orthodox communities in Israel is relatively low;16 assume it drops to meager and that the consumption of non-orthodox rabbinical services becomes irregular. Should the state continue funding these positions? Should it make a positive effort to get people to know and appreciate them and keep its mimetic vision alive?

It is at these questions that mimetic pluralism and poietic pluralism seem closest to each other. A decision to use state institutions not only to accommodate and enable existing practices, but also to create a space for ones that once did, or ones that sometime could, exist, necessarily involves a position on how the field of alternatives ought to look – that is, an essentially poietic perspective.

Poietic pluralism faces the problem of convergence in a similar but distinct way. Recall that the plausible moral foundation for poietic pluralism lies in the value of autonomy and the need to ensure meaningful choice. Suppose that a poietic project takes place, and multiple institutions are created by the state in order to provide the needed choice. But it turns out that people simply do not choose the options presented to them through the pluralized institutional scheme, rather coalesce around only a few or a single alternative. This can be the result of one of three failures: (1) Designers’ failure in identifying the field warranting pluralist treatment. Autonomous people do not exercise self-authorship through all of their social interactions, and sometimes make choices according to one-dimensional metrics like price or time. As airline and cellphone markets opened up for competition in Israel and elsewhere, it was reported that companies that until then commanded large

---

15 HCJ 8944/05 (May 29, 2012).
market shares were surprised by how quickly clients abandoned them to cheaper providers – long-established brands turned out to have little traction. (2) Designers’ failure in creating the appropriate institutions, for instance in terms of $N$ and $\Delta$. Incorporating an open-ended experimentalist element to the pluralist structure ought to help in correcting this kind of failure over time. (3) Constituents’ “failure” in utilizing the full array of the pluralist structure, due to communal pressures, prejudice, lack of information, or behavioral inhibitions. Here the problem of convergence lies with the client, rather than with the product, and so institutional designers may consider means of overcoming the forces that work against the pluralist ideal. In other words, should people be “nudged” toward a pluralist life of choice and meaningful self-authorship, in hope of making them more autonomous? And if so, how does one do this?

Take the civil adjudication case discussed at the top of the essay. Assume that institutional designers properly perceive the new state religious tribunal as the “missing link” in the field of available judicial forums, such that its provision would allow individuals sufficient choice (between sufficiently diverse alternatives) to fulfil the autonomy-based pluralist ideal. But once constituted, people don’t use it. This could be because they are not aware of its existence or nature, because they are wary of approaching Jewish-religious institutions regardless of merits, or because they share an ideological bias against state institutions. Can the state nonetheless lead some litigants into that forum, to ensure that it thrives and furthers the autonomy-enhancing function it was designed to serve? From a normative perspective, this question involves familiar concerns with the ironies of paternalism, in which coercion is used as a means of promoting autonomy. Different coercive measures of course invoke different levels of objection – subsidizing court fees in the new forum is not the same as compelling randomly selected parties to litigate their cases in that forum; although even the latter method can be defended in certain contexts.\footnote{I survey justifications for randomized case allocation in Aronson, Forum by Coin Flip.}

V. THE HOW MANY QUESTION

Having drawn a conceptual map for pluralist institutional design, described its moral underpinnings, and identified some of its central practical challenges, I return to the question at the title of the essay. By now it should be even clearer than at the outset that we are not likely to reach a conclusive answer to the “how many” question. But we can perhaps identify several considerations, or benchmarks, to help us approach questions of pluralist institutional design; specific answers are of course contingent on circumstance and context.

(1) \textit{Two is company, three is a crowd?}

Even if we cannot answer the N question up front, could we identify conditions in which the alternatives provided are “too few” or “too many” to accomplish the pluralist

\footnote{Cf Thaler & Sunstein.}
project? This sounds mostly like a question for poietic pluralists, since they are engaged in the creation and alteration of the institutional field, and therefore have to decide on the contours of their design. Mimetic pluralists on the other hand are supposed to track existing conditions, and so should be ostensibly indifferent to numbers, once the sphere of pluralist accommodation has been chosen. But this is of course not the case in reality. While poietic projects confront the “how many” question as a matter of logical necessity, mimetic projects do so as a matter of pragmatic means-end calculation, given limited resources of governmental accommodation.

In poietic projects centered on choice and diversity, institutional designers will have to take account of our knowledge of how people choose and how choice mechanisms can be tweaked and biased through strategic design of the supply side. Thus for example we know that in some contexts the availability of many alternatives may numb the skills of deliberate choice: the resources required to understand, compare, and rate the multiple alternatives may become prohibitive, leading to a reinforcement of the status quo and in fact inhibiting exit, experimentation, and effective choice. At the same time, allowing choice between just two options can lead to a flattening of the choice experience, framing it as a binary juxtaposition with stakes seeming higher than what they actually are. An illuminating analogy can be drawn from party-system politics, with the extensively studied tradeoffs between two- and multi-party systems, including in their effects on voter choice.

In mimetic projects centered on recognition and accommodation, institutional designers will have to engage in setting thresholds and determining variables. How large, old, or prevalent should a group or a practice be in order to qualify for pluralist accommodation in state institutions? Subjective claims of distinctness will not do: although such a criterion simplifies the screening process, it could lead to an overflow of claims for inclusion in the institutional scheme. So an objective, non-discriminatory method has to be devised, and it has to be one that does not end up entrenching an existing distribution of cultural or political capital. Such a system could, for example, begin from accommodating a set number of prominent groups, but include a guaranteed mechanism for adding more members down the road (say once every few years), which is not controlled by the original inductees (selected randomly from those who apply?).

(2) The Field of Reference

The discussion thus far has implied that the designer of pluralist institutions is a state actor concerned with the just governance of the state’s own constituency. It did not take into account the diversity exhibited in the institutions of other states and jurisdictions, some of which might become available for at least some individuals and groups to exploit in

---

19 E.g. Schwartz, The Paradox of Choice: why more is less.
20 E.g. Lijphart, Sartori.
21 Compare for example with the process of ascension into the EU, or with membership in the UN Security Council.
a globalized economy characterized by cross-border reach of people, products, ideas, and associations. This globalized reality invokes the question whether at least some of the challenges of pluralist institutional design could be justifiably met through external provision of accommodation or choice. In other words, are there conditions under which we could “send” a person to acquire somewhere else an option we think he is morally entitled to enjoy? Given globalization, does the fact of inter-jurisdictional diversity affect the obligations of the pluralist state toward its constituencies?

It would seem that at least in some contexts that answer may be yes. One of the justifications for strengthening federalism in the US or for allowing EU members to retain certain spheres of autonomous policymaking, is the fact that respect for local variations is accompanied by a the relative accessibility of migration possibilities between the various states. Thus pluralism is maintained on a supra-jurisdictional level, while local units can still pursue monist projects (consider the same-sex marriage debate in the US). This kind of rationalization can sometimes help the mimetic pluralist, who lacks the resources to accommodate the needs of a certain group, but can instead ensure simple access to the required institutions in a neighboring jurisdiction. In a partial sense this captures the story of Israel’s “export” of civil marriage to nearby countries like Cyprus or to marriage-by-mail jurisdictions like Paraguay: lacking the political capital to break up the religious monopoly over marriage inside Israel, its laws do recognize such marriages and treats them practically as equal Israeli marriages.

Of course, this kind of pluralism is not tenable in all contexts. First of all, sometimes it would just be perceived, if not be as a matter of fact, a cover for discrimination and exclusion of weak groups from local resources. In addition, there are distributive concerns. Even given the relative accessibility today of migration and cross-border movement, these are still costly endeavors which can be prohibitive for both financial and cultural reasons. Thus although Israel recognizes civil marriages conducted in Cyprus, it does not compensate couples for the cost of going there or help in facilitating the process in any other way, essentially limiting its availability to people of a certain social-economic class. It is therefore questionable whether Israel can be said to fulfil a pluralist ideal through its implied reliance on the promises of globalization. Still, assuming the optimal pluralist structure is genuinely unattainable, the cross-border solution can sometimes provide a second-best arrangement. To reach it we must be able to reframe our field of reference when confronting the “how many” question, so as to include options that may not be visible in an internal look.

(3) Making Pluralist Institutions or Making Institutions Pluralist?

Pluralist institutionalism in this essay has been conceived mainly as a process of creating (or harnessing) multiple institutions in a single field of social activity, each one accommodating, representing, and producing a distinct vision of that practice, such that overall the system generates a diverse output. While this is a familiar conceptualization of the process, there is another common understanding of how an institutional designer would go about a pluralist reform. The alternative view would not create separate and distinct institutions, rather it would guarantee multiple voices, views, and practices in the work of a
given institutions, to ensure that the products of that institution are themselves reflective of the assemblage of agents and backgrounds involved in its making. Classic examples of this kind of pluralist discourse are identity-based assessments of judicial appointment and behavior\(^{22}\) (mimetic), or the development of decisionmaking bodies that incorporate lay participation and input (poietic).

As a matter of institutional fact, both kinds of pluralist projects are often employed side by side. Most countries today have multiple systems of specialized courts, each with its jurisdictional idiosyncrasies and unique versions of process and legality (compare, for example in Israel, family courts, labor courts, courts martial, and indeed religious courts), but many also have a collegial high court whose makeup is often called to reflect the diverse qualities of the constituency it governs. In different contexts, then, one of the two alternatives may be more salient or attractive.

Take the marriage registration case. Here the state opted for a multiple-institution structure. While all of the registrars are employees of a single agency, they act individually and are institutionally independent from each other. When a couple registers for marriage with a given registrar, it inevitably forgoes the input of all other registrars in the system, diverse as these may be. Following the reform couples can now choose where to register, and this is often lauded as a liberal success, although the distributive point made above regarding cross-jurisdictional pluralism applies here as well, as the need to travel to a desired registrar could price out low-income couples (even in as small a country as Israel). However even the fact of choice does not let the couple enjoy a “pluralist treatment,” in the sense of being treated by an institution that has imbued the diverse beliefs and expectations of the constituency. From a consequentialist point of view, the couples shopping for registrars act as means toward a greater social end of sustaining diversity in the marriage industry overall. Hence the problem of convergence discussed above, which appears when choice no longer follows the diversity of options.

The multiple-institution approach therefore faces the risk of turning into either a system of separate “islands,” each doing its own thing with no interest in the comparative input of parallel agents; or a dwindling set of alternatives subject to forces of competition and monopolization. Still, it can also provide unique social benefits that collegial-if-diverse institutions cannot: their attractiveness lies precisely in their capacity to allow different units to speak with decidedly different voices, and thus ensure that the communicative commons is infused with the distinct visions each espouses. A multiple-institution system can therefore be seen as a high-risk-high-return approach. The added challenges it presents to institutional designers are, first, the problem of convergence discussed above; and second, getting the different units to communicate with each other in a way that would turn the pluralist structure into a deliberative, learning process, and not merely an exercise in institutional multiplicity.

\(^{22}\) E.g. Joy Milligan, Pluralism in America; amendments ensuring female membership in judicial appointment commissions in Israel – including a commission to appoint only-male rabbinical court judges!
CONCLUSION

The current essay is all about difference and the public ways of accommodating, expressing, and effectuating it. It takes the pluralist impetus as granted, and assumes an institutionalist mode of reasoning about application and design. But as we have seen, a pluralist normative agenda does not lend itself to a single institutionalist program, and so normative inquiry is required in the secondary level of application as well. This means that the choice of mimetic or poietic strategies, and the design of institutions accordingly, should also account for the moral implications of pluralism as a political project. Specifically, designing institutions that are so perfectly disparate and set apart so as to allow difference to coexist peacefully, can also raise concerns as to the effects on notions of political community, civic engagement, and democratic deliberation – all concepts that assume some degree of shared public space. Clearly these are not anti-pluralist concepts, as they all rely on difference to enrich and inform the social dynamics they allude to. But they do require exposing this project to additional levels of institutional complexity. There is still, then, a lot of work to be done in the avenue of pluralist institutional design; the essay was an attempt to identify some initial paths along that avenue.