Constitutionalism and the Challenge of Ethnic Diversity[1]

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Preliminary Draft, Subject to Revision[2]

Prepared for World Justice Forum,

Vienna, July 2-5, 2008

Abstract

This paper examines how traditional notions of constitutionalism are challenged by the rise of ethnic identity in numerous parts of the globe. In their origin, the rule of law and constitutionalism, closely connected, paid little attention to diversities among the people of the state. They were based on the homogeneity of the people, in part by the exclusion of specific communities, religious or ethnic, from rights and participation in public life. After the Westphalian settlement, political and legal concepts, developed under the sovereignty of the state, reflected the essential principles of the modern state. Gradually the concept of citizenship, based on the rights and duties of the individual, became central to membership in the political community constituted by the state. With growth of the notion of human rights and democracy, members of excluded communities were given the right to citizenship. This

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did not imply the political incorporation of these communities; instead citizenship became a means towards their assimilation in the wider political community.

From the eighteen century onwards, as the political map of Europe came to be re-drawn, the homogeneity of the people (defined by their cultural, particularly linguistic affiliation) became the basis of the creation of new states. Congruence between a cultural community and the boundaries of the state became the major principle of the re-organisation of states ("nation-state"), justified in considerable part by the preservation of both culture and democracy, and subsequently social welfare (possible only if there was social solidarity which comes from a common culture). The rise of ethnic consciousness and its political mobilization (for which phenomenon I use the term "ethnicity") has challenged many of these assumptions, including the concept of a homogenous people. The paper examines the reason for the rise of ethnicity, the form its challenge has taken, and the implications for the future of the rule of law and constitutionalism. Increasingly ethnicity presents its claims as imperatives of identity. Under its impact, some key principles and components of the liberal state (which came to personify the rule of law and constitutionalism in its 'highest' form) have been critically examined and are increasing re-defined: sovereignty as vested in the entire people as a collectivity and manifested in the centralization of the state; common citizenship with equal rights and obligations; equality; uniformity of law and legal institutions; majoritarian democracy; the nature of rights; and the distinction between the public and the private.

I.   Constitutionalism

There is a close connection between constitutionalism and the rule of law. Both are premised on the importance of limits on the power of the state and its institutions, with law as the principal means of defining and ensuring the limits. Charles Howard McIwain said that 'in all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government; it is the anti-thesis of arbitrary rule; its opposite is despotic government, the government of will instead of law'[3]. The rise of the notion of limits on power can be traced to disputes about the prerogatives of the monarch; in England at least the limitations were introduced through decisions of courts. The democratic element of constitutionalism came later, with the end of royal rule, and the supremacy of parliament. Parliamentary sovereignty itself came to be seen as a threat to the rule of law. Courts, which were in the forefront of the struggle for the limitation of state power, were now subordinated to parliament (in terms of jurisdiction and the degree of the scrutiny of the executive)—justified by the democratic imperative. For a while the courts tried to introduce limitations by invoking the common law[4], but could not long resist the superiority of legislation.

However, in most countries, which adopted formal constitutions, led by the US and France, the powers of the legislature were also limited; the constitution, not parliament, was

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[3] C H McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, NY: Great Seal Books, 1947) p. 21-22.

[4] McIlwain says that for some early 'liberal conservatives, the safeguarding of necessary liberties seems to have implied the preservation in tact of the customary law in its entirety. Sir Edward Coke appeared to have thought nothing less than the whole body of English common law must be kept inviolate if the liberty of the subject was to be protected against arbitrary rule; he saw the common law as 'fundamental law' (p. 12, op.cit).

supreme, establishing close connections between constitutionalism and the rule of law. Both were concerned about the limits on state power, but unlike the origins of the rule of law, constitutionalism also emphasized the political mandate and accountability of the government, which placed a greater importance on the legislature. In fact increasingly the constitution became the foundations of the state, the social contract among the people—even though the constitution often did little more than reflect the balance of social and economic forces in society[5]. The constitution became an act of deliberation, not necessarily organic growth—a notion which marked earlier understandings of a constitution—'that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed'[6]. As I shall argue later, the role of the constitution, and the process of making it, in contemporary multi-ethnic states is fundamentally different; nation building is as important, if not more, than state building[7].

Frequently commentators have seen contradiction between the rule of law and democracy[8]. Democracy as the will of the people and their rulers, tended towards the expansion of state power, and was seen to threaten the rule of law, which rested on the limitations of state power. The notion of people's power implied restrictions on the jurisdiction of judges, so as not to subvert its sovereignty. The rule of law began to be seen as a conservative ideology, to put a brake on social and economic reform.

Various attempts have been made to bridge the gap between democracy and the rule of law, particularly by the common acceptance of the centrality of human rights. The concept of the rule of law has been broadened, from absolute fidelity to any law, to the notion of just law made through the democratic process. The rule of law now also focuses on institutional arrangements of the state, including the separation of powers, and the franchise. This broader concern first appeared in the Delhi Declaration on the Rule of Law in the 1950s (and is now extensively elaborated in the ABA Index on the Rule of Law). On the other hand, the notion of democracy became more substantive than procedural, emphasizing the rights of citizens and the protection of minorities.

It is not my intention to explore the tensions between the rule of law and democracy in traditional liberal societies where they have been most intensely debated. Instead I examine a more fundamental tension. The framework of constitutionalism, rooted in legal and political theories, derived from the notion of the 'nation state', is now under threat from the rise of identity politics. Traditionally neither the rule of law nor constitutionalism paid much heed to ethnic differences; they were deemed not to exist. The states in which constitutionalism arose did not acknowledge this kind of diversity. The Virginia Declaration of the Rights of Man ignored not only women, but also slaves and aboriginal people; as did the Philadelphia Convention (where slaves were acknowledged only in determining the size of representation

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[5] Soon after the Philadelphia Constitution, Thomas Paine said that a constitution 'is to liberty, what a grammar is to language' and a government without a constitution is 'power without right' (quoted in McIlwain, op. cit, p. 2.

[6] This is a major theme of McIlwain's book, and informs much of the criticism of modern constitutional approaches by James Tully, *Strange Multiplicity: Constitutionalism in An age of Diversity* (Cambridge: Cambridge University Press, 1995).

[7] For the changing functions of constitutions, see Yash Ghai, 'A Journey Around Constitutions: Reflections on Contemporary Constitutions' 122:4 (2005) *South African Law Journal,* pp. 804-31.

[8] For recent perspectives, see Jose Maria Maravall and Adam Prezeworski (eds), *Democracy and the Rule of Law* (Cambridge: Cambridge University Press, 2003).

of states in the Senate, for which they did not themselves vote). The French revolution was explicitly about developing a common national identity; and Shakespeare played his role in the formation of English nationalism. The political reorganization of Europe after each major war increasingly took the form of the "nation state", determined primarily by linguistic homogeneity. Elsewhere "national" languages displaced "local dialectics". The King's religion became the religion of the region (until after the scourge of centuries of religious wars, secularism was discovered as the remedy to peace). The process of assimilation and exclusion led to the "nation state" which was deemed hospitable to rights and democracy.

There were many advocates of the 'nation state' (like John Stuart Mills), but the high priest was undoubtedly the German philosopher, Herder. He invoked the authority of God in his revelation that 'best political arrangements obtain when each nation forms a state of its own'. He also described as 'unnatural' states in which there is more than one nation; 'they become oppressive and doomed to decay'. An other of his memorable statements is that 'Only one language is implanted in an individual, only to one does he belong entirely, no matter how many learns subsequently', and strongly disapproved of German diplomats who spoke French. Consequently he drew the conclusion that 'A group which is a nation will cease to be one if it is not constituted into a state'. [9]

Today, some of the most fundamental concepts and principles of the liberal state, the home of constitutionalism, are being questioned: the definition and constitution of a political community and its sovereignty, common and equal citizenship, majoritarian democracy, a uniform regime of laws and legal institutions, the centrality of human rights, the place of religion in the affairs of the state, and the distinction between the public and private spheres—all going to the basis of social solidarity. The rise of ethnic sentiments and claims in politics, that is, of 'ethnicity' as I use that expression, forces us to re-examine the foundations of constitutionalism as we have understood the term, including the relationship between territory and political power, and to explore its relevance in an increasingly multi-ethnic and multi-cultural world.

II.   Foundations of constitutionalism

Constitutionalism is based on the notion of a supreme law which governs the jurisdiction and powers of state institutions and determines the limits and mode of their exercise. In England this supreme law was effectively created and enforced by the courts, defining the restrictions on kingly powers, in the face of countervailing authority and doctrines of the royal prerogative (and confirmed by the Glorious Revolution). In many other places it is the constitution which established the supreme law (the US and France). An understanding of certain principles, rules and procedures developed around the concept of the rule of law associated with the supremacy of the law: the importance of law (written or otherwise) and its non-retrospectivity especially as regards criminal liability, the independence of the judiciary, certain presumptions (like that of the innocence of the accused), open trials, and access to lawyers and courts. Courts became central to the making

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[9] I have taken Herder's quotes from Elie Kedourie, *Nationalism* (New York: Frederick A. Praeger, 1960).

law and maintaining its supremacy[10]: some the most distinguished names and heroes of the movement, at least in its home, England, were lawyers and judges (Glanvill, Bracton, Coke, Mansfield).

The focus of much legal activity was the powers and privileges of the executive in the form of the monarchy Subsequently attention shifted to the law making process, particularly the powers of the legislature which began to monopolise law making. Limits on the powers of the legislature were most clearly enunciated in the form of the protection of fundamental right. In England itself the supremacy of Parliament prevented the notion of the supremacy of the law (even to this day there are doctrinal, although no serious practical, problems with parliamentary supremacy as the UK joined the EU, granted autonomy to Scotland and adopted the European Convention on Human Rights). Much of this took place without full attention to democracy; there were wide restrictions on the right to vote and to stand for elections.

The introduction of democracy introduced new understandings of the responsibilities of the executive and the legislature, and diminished the importance of the judiciary, raising key theoretical dilemmas about the relative importance of legality and democracy. The recognition of the sovereignty of the people to replace the sovereignty of the monarch (which was used in England to overcome precedents tending towards supreme monarchical powers) marks the turning point in the rule of law and constitutionalism. From the more technical aspects of jurisdiction in which the debate about the rule of law was conducted, fundamental questions of political representation, franchise, political processes, including accountability became more central concerns. Much thought was given to how people's sovereignty should be reflected in the state and limited (e.g., the Madison representative government and fundamental human rights), the constitutionalisation of the emerging principles of democracy, checks and balances, and in time political relations between classes came to the fore (the notion of "people" being more complex than "monarchy"). Questions of political theory superseded those of legality. In the fullness of time constitutionalism or the rule of law came to encompass a number of components, values, institutions and procedures, including what criteria of procedure and substance determined whether a rule purported to be law would in fact enjoy the status of binding rule. States in which these principles were central came to be known as liberal states.

Another dominant influence on the structures of state and the importance of law was the emerging market principles of organization of the economy. The case in which the courts questioned the authority of the monarch to grant monopolies of commerce and trade in restraint of the ability of others to engage in these areas was one of the first decisions to limit the power of the monarch—and in the typical English way, the monarch, without conceding the restriction, promised not to grant monopolies by prerogative. The market requires much more than the restriction on monopolies—it requires clear rules defining nature and uses of and transactions in property, the framework for and the sanctity of contracts, guarantees of state enforcement of agreements made by private parties (and yet limiting the direct role of the state in the economy). Underlying the development of the infrastructure of

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[10] To quote McIlwain again, speaking of the Roman and English record, 'The expansion of both the Roman and the English legal system called for great and fundamental changes at a time in the history of each case when the law was still plastic but the process of law making was yet undeveloped. Thus the legal changes in twelfth and thirteen century England and in the later centuries of the Roman Republic, far reaching as both were, came to be the work of jurists rather than of legislators, and the mode of their expansion of the law came to be extension by way of juristic interpretation rather than addition through legislative action' (p. 54, op.cit).

constitutionalism has been the imperative of the market, not seriously challenged until the rise of the welfare state, which infused new values in our understanding of the rule of law.

The liberal vision of a multi-ethnic society is that of a tolerant and pluralistic society, in which all cultures may flourish and members of minorities may freely pursue their goals. An extensive bill of rights, concentrating on civil and political rights, is central to this protective framework, guaranteeing various rights, such as the right to association, the freedom of expression, the use of languages, the freedom of conscience, protections of due process, freedom from discrimination and torture, etc. The liberal state achieves these goals by relegating a large sector of life and society to the private domain, the scope of which itself is expansively defined, in part by the protections of rights and the definition of the polity (and its ultimate goal of individual freedom). In the civil or private domain, communities may organise their own social, religious, educational and economic life. They may converse with others in their own language, and may cultivate cultural and social links with members of their own ethnic or kin communities in other lands, such as through vernacular newspapers, visits and other exchanges. At the same time they are protected from the imposition of the norms, culture, institutions, and symbols of the majority communities. Thus a sharp distinction between the public and private, which underlies the liberal state, is essential to the protection of minorities.

II.   1. Critique of the liberal state

Bhikhu Parekh describes various institutional and structural features of the modern state which in his view impose uniformity and ignore diversity. The organizing principle is state sovereignty, which justifies the centralization of power and displaces local and group sites of power. This sovereignty operates on a territorial basis, with hard boundaries. Rules for the exercise of this sovereignty are biased towards majoritarianism, stifling the voices of minorities. Much of his criticism is encapsulated in his view of sovereignty as 'a rationalised *system of authority*, is *unitary* and *impersonal* in nature, is the *source* of all legal authority exercised within the state, is not *legally* bound by the traditions, customs and principles of morality, and is not subject to a higher internal or external authority'[11]. People relate to the state through the concept of citizenship, based rigidly on equal rights and obligations of all persons, premised on loyalty to the state, and acknowledging no distinctions of culture or tradition. Citizens have rights but these are rights of individuals, based on an abstract and uniform view of the human person. The state operates through the medium of the law, but it is the law created by the state, rather than pre-existing bodies of customs or local law. The state favours the uniformity of structures and seeks to achieve the homogenization of culture and ideology, propagating them as universal values. The domain of the state is the public space, with an ever-shrinking area of private space, which alone allows some expression of cultural diversity.

Parekh argues that the theory of the modern liberal state presupposes a culturally homogenous society and becomes a source of disorder, injustice, and violence when applied to culturally heterogeneous societies. It is said that the modern liberal state, with its lineage of the market oriented and homogenising regime, built on the principle of individualism and

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[11] Bhikhu Parekh , "Cultural Diversity and the Modern State" in Martin Doornbos and Sudipta Kaviraj (eds), *Dynamics of State Formation* (New Delhi: Sage Publications, 1997)..

equal citizenship, is inherently incapable of dealing with ethnic and social diversity that characterizes most countries. Constitutionalism associated with the modern state was concerned at first with limits on power and the rule of law, to which were later added democracy and human rights. Noting different communities or groups who are seeking constitutional recognition of their cultural or social specificity—immigrants, women, indigenous peoples, religious or linguistic minorities—James Tully concludes that what they seek is participation in existing institutions of the dominant society, but in ways that recognise and affirm, rather than exclude, assimilate, and denigrate, their culturally diverse ways of thinking, speaking, and acting. He says that what they share is a longing for self-rule: to rule themselves in accordance with their customs and ways[12]. The modern constitution is based on the assumption of a homogenous culture, but in practice it was designed to exclude or assimilate other cultures and thus deny diversity[13]. One might add that the distinctions between the public and the private are difficult to maintain, especially in multi-ethnic societies, where consciously or unconsciously there is the desire for the political recognition of the fundamental values or symbols of the community, as well as dominance of even the private domain by the politically and economically powerful.

Tully argues that a constitutional order, which should seek to provide a framework for the resolution of issues that touch on the concerns of the state and its various communities, cannot be just if it thwarts diverse cultural aspirations for self-government[14]. Symmetries of power, institutions, and laws which define the modern state are inconsistent with the diversity of forms of self-government that Tully considers necessary for a just order in multi-ethnic states. The necessity of a constitution which is based on mutual recognition of diversity is reinforced by the consideration that there is no escape from multi-ethnic states as the alternative of over 1,500 'nation states' is not feasible. Such a constitution should be 'a form of accommodation' of cultural diversity, of inter-cultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time[15].

The resilience of the liberal state is evident from the way it fought off challenges from military dictatorship and communist regimes. It is now faced with the challenge from ethnicity.

IV.   The nature of ethnicity

As already hinted, I use the term ethnicity to refer to a situation when a community goes beyond a mere consciousness of what binds the community together (such as language, religion, race) and what distinguishes it from other communities, to claims that these differences are politically significant, constitute the community as a 'people' or 'nation' which is entitled to special recognition as such (e.g., by special forms of representation in

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[12] James Tully, *Strange Multiplicity: Constitutionalism n an Age of Diversity* (Cambridge: Cambridge University Press, 1995) p.4

[13] Tully, op.cit., p.58.

[14] Tully, op.cit., p. 6.

[15] Tully, op.cit., p.30

state institutions or the official support for the promotion of its religion or language). There is an intermediate stage when the members of the community become aware of their distinctiveness but their claims are more modest, not challenging the basis of the state.

The process of the rise of political consciousness is not dissimilar to that of the stimulation and promotion of 'nationalism', which in earlier periods formed the basis of the 'nation state'. It generally begins with intellectuals or persons with political ambitions, who begin to give symbolic, emotional and material significance to their differences from other communities in the state (cementing internal cohesion and distancing from others communities). This therefore involves the presence of some objective factors like language or religion, but which increasingly take on a symbolic or political meaning. This subjective factor can rise from a consciousness of discrimination against or social or economic exclusion of the community, a re-discovery of history when the community existed as a political entity, and increasingly of demands and insurgencies happening in other places. The political claims that it makes vary from a constitutional or legal recognition of some aspects of its culture (such as relations within the family or dispute settlement mechanisms), special measures to improve its social and economic situation, inclusion through representation, to secession. Sometimes (especially when their claims are denied) there is progression from the more modest to the more substantial demands, including a fundamental re-design of the state or secession (since, it would argue, that only through this radical reform can its legitimate demands be met)[16]. Increasingly these claims are justified by reference to international norms of human rights (a topic I revert to later).

There are a number of reasons why in recent decades there has been such a resurgence of ethnicity, such a ready response to those who would mobilize on the basis of ethnic differences. For one, there are a lot more multi-states than before (if we overlook the great empires of the nineteen and early twentieth centuries—the logic and organization of empires being different from states'). States which have accustomed to think of their populations as distinctively singular, have become multi-ethnic; this is particularly the case in the west. Globalisation has intensified inter-state transfers of peoples, as has the suppression of some communities in their homelands. In many states which emerged out of the dissolution of states after the second world war, the political conflicts   arising from the diversity of their populations came to the boil. (Unlike the policy of 'self-determination' which led to the establishment of 'nation states' in empires vanguished in wars in Europe in 19th and 20th centuries, in Asia and Africa the territorial principle took priority over the cultural, except in the prominent case of India—a partition which led to terrible carnage and massive transfers of people, which event may have dissuaded the international community from the cultural/linguistic basis of the de-colonised state).

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[16] The claim by a section of Muslims in colonial India that they should be allowed to secede from India was put in this way by their leading ideologue, the poet Muhammed Iqbal. Denying the proposition that religion is a private matter, he said that it is 'not surprising on the lips of a European', because Christianity is a 'monastic order, renouncing the world of matter and fixing its gaze entirely on the world of spirit'. In his view the experience of the Prophet as revealed in the Quran is of a wholly different nature, 'creative of a social order'. 'The religious ideal of Islam is, therefore, organically related to the social order it has created. The rejection of one will eventually involve the rejection of the other. Therefore the construction of a polity on national lines, if it means the displacement of the Islamic principle of solidarity, is simply unthinkable to a Muslim". He rejected Renan's view that nation is not tied to race or religion or geography: a great aggregation of men, sane of mind and warm of heart, creates a moral consciousness which is called a nation', due to the persistence in India of caste divisions and rivalries (Presidential address to the All India Muslim League, December 1930, reprinted in Sir Maurice Gwyer and A Appadorai (eds) *Speeches and Documents on the Indian Constitution 1921-47*, Vol. II (London; Oxford University Press, 1957).

The presence of diverse people need not have led to ethnicity. A distinguished Indian political scientist, Rajni Kothari, has argued that rise of ethnicity is due to the consequences of the centralization and monopolisation of the state (comparing the modern state to pre-colonial polities in Asia which did not aim at centralization of all authority, recognized diverse communities with their religion and customary practices, and whose borders were porous)[17]. The growth of market relations and globalization led to the marginalisation of communities, causing insecurities produced by economic changes over which these communities have no control. In his analysis ethnicity is very much a response to other, larger forces. This also affects the nature of ethnicity, turning it from a positive and inclusive form to negativity, exclusion and violence. He considers that ethnicity is a response to the universalizing tendencies of the state and the market, subjugating and eliminating other other 'social and ethical cohesions'. Others, in a similar vein, have pointed to the structures of the state, based on majoritarian principles, which leads the effect marginalization of minorities.

In the west, it is more fashionable to talk of the resurgence of ethnicity in terms of the imperatives of identity, based on Kant's emphasis on the autonomy of the individual (particularly the work of Charles Taylor[18] and Will Kymlicka[19]). The antecedents of this approach can be traced to the influential work of the anthropologist, Clifford Geertz, who is associated with the 'primordial' school of explanation for the phenomenon of ethnicity[20], who tied it to the nature and dynamics of 'primordlism' in the new states. Primordial links for him were based on what he called 'givens', the accidents of birth in a community, to which one may be linked by ties of religion, language, descent, history. 'These congruities of blood, speech, custom and so on, are seen to have an ineffable, and at times overpowering coerciveness in and of themselves. One is bound to one's kinsman, one's neighbour, one's fellow believer, ipso facto; as the result not merely of personal affection, practical necessity, common interest, or incurred obligation, but at least in great part by virtue of some unaccountable absolute import attributed to the very tie itself…For virtually every person, in every society, at almost all times, some attachments seem to flow more from a sense of natural—some might say, spiritual—affinity than from social interaction'.

He argues that in the new states, these primordial attachments are particularly strong and are in frequent tension with the affiliation with and expectation from the state. The discontent based on primordial factor is deeply destabilising for the state. 'Economic or class or intellectual disaffection threatens revolution, but disaffection based on race, language, or culture threatens partition, irredentism, or merger, a redrawing of the very limits of the state, a new definition of its domain'.

Charles Taylor defines identity as 'a person's understanding of who they are, of their fundamental characteristics as a human being'. Identity is achieved through a person's search for their inner soul, 'within inner depths'. The ideal is being true to one self and his or her own particular way of being, of authenticity, as revealed in this way. "Being true to myself means being true to my own originality, which is something only I can articulate and

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[17] In an article now re-printed in Rajni Kothari, *Rethinking Development: In Search of Humane Alternatives* (Delhi: Ajanta Publications, 1988) as "Ethnicity".

[18] This paper relies largely on his contribution, "The Politics of Recognition" in the anthology edited by Amy Gutman, *Multiculturalism* (Princeton: Princeton University, 1994)

[19] This paper relies principally on his first, important book, *Liberalism, Community and Culture* (Oxford: Oxford University Press, 1989) and several subsequent articles.

[20] Clifford Geertz, "The Integrative revolution" in C. Geertz (ed.), *Old Societies and New States* (New York: Free Press, 1963).

discover. In articulating it, I am also defining myself. I am realising a potential that is properly my own'. At another point, he says, 'There is a certain way of being that is *my* way. I am called upon to live my life in this way…If am not true [to myself], I miss the point of my life' (p. 30).

According to Taylor, this consciousness of the uniqueness of one's identity is the result of the breakdown of social hierarchies. Previously this hierarchy, based on forms of privilege and inequality, gave us the understanding of our place in society and defined our roles, and in this way defined our identity. But with the dawn of democracy and the re-ordering of society, our identity comes from self-reflection and contemplation. Identity has become essential to the sense of our own dignity, dignity which is inherent in each of us, as an attribute of our being human. Thus dignity is closely related to equality. And equality in turn depends on recognition by others. Taylor says, 'Democracy has ushered in a politics of equal recognition, which has taken various forms over the years, and has now returned in the form of demands for the equal status of cultures and gender'.

Although identity understood in this sense is an intensely personal affair, achieving a satisfactory understanding of one self and one's potential, and of orienting oneself, depends on our contacts with others. It is dialogic, to use Taylor's expression. It is in interaction with others that we discover our true self; we define ourselves by reference or comparison to others. Kymlicka says that our orientation, the way we negotiate values and makes choices, comes from our membership of a cultural community. Thus in their different ways, Taylor and Kymlicka place the individual securely within a cultural context, and interactions within a community. In an earlier period, Herder and other German philosophers had claimed a uniqueness for these communities, a unique, historically, even ethnically derived identity for each community, the nation. Thus Kant's emphasis on individual autonomy, was given firm roots in the community.

For Taylor and Kymlicka, identity is liberating. The potential of identity and of dignity come from recognition by others. The lack of recognition by others denies or at least distorts our identity. The politics of recognition, in public and private spheres, has thus become central to our quest for just political and social orders. Although there is now wide acceptance of the recognition of identity, and its corollary of social and cultural diversity, there are acute controversies about the nature of identity and the forms of its recognition[21].

If in the west identity is a matter of psychic satisfaction; in Asia, identity politics are important as a means to resources, although just as in the west material benefits are not irrelevant, in Asia pride in one's community is also an important factor (so an important factor in Taylor's explanation of the importance of individual identity—the disappearance of social hierarchy, does not fully apply in Asia). Identity is more a matter of political mobilization than a precise delineation of a community's characteristics or beliefs. Thus whatever the causes of dissatisfaction or dissent, it is *now* frequently presented in the language of identity (no doubt under the influence of trends in the west). Ethnicity is a way of dealing and bargaining with the state when the state itself has created insecurities and vulnerabilities; each individual and group interprets its loss as gain of another; and thus makes ethnicity exclusive. Because electoral politics and government interventions respond to ethnic groups, economic issues are transformed into issues of cultural survival. For example, in most cases, ethnic fighting is not about religion, but about jobs; religion is used

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[21] See the critiques of Amartya Sen (*Identity and Violence: The Illusion of Destiny* (London: Allen Lane, 2006)) and Anthony Appiah, "Identity, Authencity, Survival: Multicultural Societies and Social Reproduction' in Amy Gutman (ed.), *Multiculturalism* (Princeton: Princeton University Press, 1994))

as a pretext, emptying religion of its sacred and ritual aspects. Consequently in identity talk in both the west and the east, important issues are perceived as ethnic issues, impoverishing public discourse or policy options. Such an approach tends towards the singularity of our identity—the many other sources of the self and the community are ignored, and failing to recognize the fluidity of identity. And so in an ironic way, identity reduces political pluralism.

However, the way in which communities perceive the situation is important for the way in which it advances its claims. The character of an ethnic group can be gleaned from the entitlements it seeks: whether its concerns are solely cultural, economic, political—each of these in turn can be different –political can be the demand for inclusion, claiming equal rights of citizenship, or they can be separatist, in the form of autonomy, even secession. A community which sees itself as a nation may be satisfied with nothing less than a separate statehood, but may be willing to negotiate substantial autonomy. Others may be content with some form of special representation and affirmative action for access to education and public services. A minority language group may want the recognition of its language as an official language and the major language in its homeland. Increasingly demands are being brought under the rubric of the international regime of rights.

A self-conscious ethnic group can place itself in different categories, deriving from political science or legal discourse—it can be a cultural, religious or linguistic group, or it can be a minority, or a nation, or a 'people' or 'indigenous peoples'. Each of these categories is associated with a specific set of claims—participation, representation, recognition of language, religion, education, land, autonomy, etc.

How one establishes a claim to one or the other category? They are in part derived from political theory or practice, such as a 'nation', with a clear notion of the right to self-determination, including separatism/secession, or a minority or indigenous people, which derives more from legal norms or rules (e.g., article 27 of the ICCPR, or the Declaration on the Rights of Minorities, or the ILO Conventions on Indigenous Peoples). Perhaps the most significant of these are the concept of 'nation' and 'indigenous peoples' as they carry a large or high set of entitlements. To this extent a community's self-definition is determined or at least influenced by international political or legal norms, and sometimes the characterisation or classification under national law (at one time for example many groups in China claimed to be a 'national minority' to benefit for Chinese constitution provisions for ethnic autonomy)[22].

So we see that ethnicity is closely tied up with the state: some times supporting it and getting sustenance from it, some times subverting it. The interplay/interaction between the state and ethnicity is critical to the forms and demands that ethnicity takes; and eventually to the forms and fortunes of the state. The state may respond to the demands of ethnic groups in different ways; some may make concessions to them, including forms of cultural autonomy or forms of corporate rights, desist from total domination or assimilation. Or it may seek domination, which results in resistance and conflict. I now turn to some of the responses

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[22] In 1953 groups were invited to submit claims to be a minority—400 did so; this number was whittled down to 55 by the State Council 'after scientific investigations' carried out by a large number of anthropologists and linguistics. The lobbying to be recognized as a minority has waxed and waned depending on the changes in government policies towards minorities, Yash Ghai, 'Autonomy Regimes in China: Coping with Ethnic and Economic Diversity' in Yash Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (Cambridge: Cambridge University Press, 2000).

which try to resolve the issue within a reasonable and acceptable framework of constitutionalism.

IV.   Constitutionalism for Diversity

The critical claims of ethnic groups concern the structure and orientation of the state. We have already noted critiques of the liberal state (embedded in the philosophy of the rule of law) as failing to meet these claims. The liberal form of equal citizenship inevitably results in the dominance of the majority community. Under the fundamental principle of a culturally neutral and secular state, there are subtle and some times not so subtle, discriminations. The values and culture of the dominant community are taken for granted. Minorities have to a considerable extent to conform to them as many symbols and practices of the majority dominant the public sphere. In particular it becomes very hard for minorities to fully profess their religion or develop their language and culture in such a context. They may have problems in accessing state services because of problems of communication, or employment in public and private sectors because their command of the official language may be limited. They may not be able to rely effectively on security forces that are likely to be controlled by the majority community. There may be (and often are) pressures to not only acknowledge the primacy of the values, culture and language of the majority, but also to assimilate to them. For these reasons they may not be able to fully identify with the state or the 'nation', and may incur the displeasure of the majority and be accused of disloyalty.

There is now a wide variety of principles and institutions that seek to accommodate ethnicity. The recognition of ethnicity as a politically relevant category yields different results, paradoxically a 'neutral', 'liberal', secular state (in an attempt to be fair to all groups), a federal type solution where each group has significant autonomy (a true diversity model), a corporate autonomy based state (Belgium), a state which privileges one ethnicity over others (Israel, apartheid South Africa, and Fiji). 'Schizophrenia' is also possible: torn between the liberal and the cultural or ethnic; a state with the formal features of a liberal state but the practices of ethnic hegemony.

For the purposes of this paper two distinct approaches are identified. Some of them seek to respond to the concerns of minorities within a broadly traditional liberal framework (in accordance with 'minority rights'), avoiding the political recognition of communities, but providing electoral and other incentives for different communities to work together. Such approaches, relying on rights of individual citizenship, and seeking political integration, can be accommodated within traditional understandings of constitutionalism and the rule of law. The other major approach proceeds from the political recognition of communities, and their participation in the affairs of the state as communities. Individual citizenship is combined with recognition of rights of communities, producing a complex set of relationships as regards entitlements. There is a particular emphasis on power sharing as well as autonomy of communities, and proportionate share in state institutions. This paper focuses on principles and structures of this approach and the impact on the received notions of constitutionalism and the rule of law[23].

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[23] There is now a vast and growing literature on the subject. A great deal of it is inspired by Arend Lijphart who developed the concept of consociation under which ethnic communities are recognised as political communities

There are clear implications for the design of the state for diversity following from this last approach. The traditional notion of state sovereignty that tends towards also its centralization needs to be revised, perhaps through a notion of sovereignty shared by communities and regions (for which some types of federalism provide a model). The 'nation state' theory with its exclusive cultural underpinning must give way to the concept of a multi-cultural or multi-national state in which all cultures will be equally respected (and diversity of regimes of personal and family laws will be applied in place of a unified code). The excessive emphasis on human rights as (a) individual rights and (b) civil and political rights has to be balanced by group rights and economic and social rights (the latter being especially important to minorities who tend to be socially and economically disadvantaged). Democracy has to be re-conceptualised, moving away from the majoritarian model, as compact not so much between citizens as between communities. New forms of representation and electoral systems have to be devised. More participatory and collaborative forms of the exercise of power must be devised. Citizenship itself has to be re-conceptualised, establishing legal links not only to the state but to its various communities.

Some of these developments may require the re-consideration of the distinction between private and public spheres—ethnicity pushes into the public domain what has largely been seen, at least in modern state forms, as belonging to the private domain because of the emergence of human rights which give public recognition to private rights, and because of the demands for public recognition of communities and their relationships and practices. Yet at another level, communities (which may not have a distinction between the public and private such as Hinduism and Islam) get more control over community affairs, what might otherwise be state functions or responsibilities, creating different spheres of the public. It is possible in this paper to consider only a few of these directions. I start with the role of constitutions in multi-ethnic societies.

<u>IV.   1. Constitution making process and nature of constitutions</u>

Traditionally, the role of the constitution has been to establish institutions of the state and to define their jurisdiction. There is an assumption that that due to underlying cultural understandings and a common history, there is substantial agreement on values, aspirations and identity. It is indeed these understandings (and joint commitment to live together) which makes it possible for the people to form a state. Britain, it is said, did not need a written constitution because of the great agreement among its people ('a nation') on values and procedures of government[24] (and James Madison thought that the underlying assumption on

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and participate in state institutions as corporate groups. The idea of consociation is much older than Lijphart's writing—the debate on constitutional reform in India from the early 20th century contains a bewildering variety of consociation devices. The other strand of literature adopts an 'integrative' approach with the emphasis on individual rights but devices to encourage co-operation among ethnic communities, of which Donald Horowitz is a principal proponent. Here again Indians presaged this approach, in the policy statements of the Indian Congress during the freedom struggle. A modest attempt to describe these approaches and suggest a middle ground is my chapter "Constitutional Asymmetries: Communal Representation, Federalism, and Cultural Autonomy" in Andrew Reynolds (ed.), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford: Oxford University Press, 2002).

[24] McIlwain noted that England had no occasion, "or rather no such necessity, as we in America had about 1776, to codify her fundamental constitutional principles, to avoided the necessity of a written constitution. But such

which the Philadelphia Convention could proceed to make a constitution was that the people of the thirteen colonies had already agreed to 'form one society'—as with Rousseau, he considered that the agreement among the people to form one nation was necessary (but 'nowhere reduced to writing'), before they could proceed to establish a system of government)[25]. In these circumstances of a consensual coming together, it might be argued that a written constitution is scarcely necessary, but Madison, following Locke, could see the virtue of a written constitution because as all 'men' are equal, no one has the right to rule another, the constitution is also meant to bind future generations, and even immediate parties to the compact can forget their obligations under it, especially when it is to their advantage to do so[26].

In a 'nation state' the constitution's primary value is in setting up a system of government; However, when there is not this commonality (as we assume that there is not in multi-ethnic states, given the diversity of cultures and history) the constitution has to provide that commonality, a commitment to values that must include the ways the communities will relate to each other and to the state, Thus there are at least two roles of the constitution in multi-ethnic societies faced with identity crisis: to fashion or consolidate a compact among the people, defining a new identity, and to establish and maintain political and legal systems for its different communities, with very fine balances (inherently subject to continuing contestation)[27]. The first compact is usually negotiated around the principles of the constitution since differences among the communities are about the organization of the public space—and their share in and control of it. This is primarily a process which involves communities (or at least is conducted in the name of communities). In its idealized form, it would resemble the framework that the Canadian Supreme Court sets out in its decision on whether Quebec has a unilateral right to secede from Canada (*Reference re the Secession of Quebec* 2 *SCR* 217 (1998)). The court held that there was no right under Canadian or international law which entitled Quebec to secede unilaterally. But that was not the end of the matter, for if in a democratic and pluralistic society as Canada, a member wished to secede,

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principles did exist, and still do exist and in times of stress we hear occasional even for a codification of them" (p. 16, op.cit). Curiously he does not say much about Cromwell's attempt at a constitution. In our own time Martin Loughlin writes Martin Loughlin writes that by 'eulogizing the status of Parliament" as "as an omnicompetent representative forum of the 'community of the realm', parliament—'the grand inquest of the nation'—has usurped the role of 'the people' in the constitutional imagination" ('Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007), p. 28. It might be said that constitutional reforms in the UK starting with the devolution of power to a Scottish Parliament and the adoption of a bill of rights under the Blair administration reflect a certain strain in the 'consensus' of the people. The recognition of multi-culturalism, including separate communal schools, was part of the new approach. However now, perhaps because of the allegations of the involvement of some British Muslims in al-Qaida activities, there is a reversion to 'British values' (as demonstrated by a policy paper on citizenship issued by the Attorney General, Lord Goldsmith (reference??). On the other hand, there is a statement of the Archbishop of the Anglican Church supporting the recognition of Islamic law and tribunals in matters of family law (see below).

[25] Walter Berns, 'The Making of the Constitution of the United States' in Robert A. Goodwin and Art Kaufman (eds), *Constitution Makers on Constitution Making* (Washington, DC: American Enterprise Institute, 1988), pp. 121-22.

[26] Op. cit., pp. 122-24.

[27] James Tully and Simone Chambers, "Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis", 26:1 (1998) *Politics and Society* pp. 143-72.

the central and other governments were obliged to negotiate with it to solve the problem, even if it ended in secession[28].

An interesting aspect of the framework is that before a community is entitled to negotiate, it must prove that there is a significant support within the community for secession or some other adjustment in its relations with the rest (in this case to be manifested through a referendum ("clear support on a clear question"). Communities therefore enter into negotiations with the support of their members. On the one hand this results in the communalization of politics; and on the other it excludes from negotiations those members of communities who support a more cosmopolitan or national approach.

The Court also implies that the negotiations must be conducted in good faith, which means that each side must try to understand the concerns of the others, and search for ways in which differences can be resolved. The decision therefore has particular relevance to constitutional discourses and the making of constitutions[29]. A common identity is a matter of negotiations. Negotiations must involve not just a few 'leaders' but communities and the people generally. A settlement reached after such negotiations will the more stable and will strengthen the sense of belonging to the new political identity so fashioned. In practice it is unlikely that negotiations will be conducted in this form: the negotiators do not often carry the mandate of their communities (they are often commanders of warring factions); they have interests which may not reflect the true wishes of the community; the circumstances of armed conflict are such that the Supreme Court's formula for 'clear support for clear question' may be impossible to implement (Sri Lanka is a classic example)—it is not surprising that few of these 'negotiated' agreements are successful.

This form of determining the national will has implications also for understanding sovereignty and the political community. It is not the 'people' who negotiate; few of the negotiators claim to have a national mandate. They speak for specific communities[30], and there is considerable disagreement as to which communities are entitled to a seat at the table—perhaps a combination of success at reinventing a group as a 'nation', 'a nationality' 'a distinctive people' and the possession of a sufficient number of AK47s. If a constitution is achieved, it is proclaimed not in the name of "We the People" but 'We the Nations, Nationalities and Peoples of [Ethiopia]' or in the name of "Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina". Or there are other indications that the true bearers of sovereignty are not the people but 'constituent peoples". Progress in the making of the Spanish constitution of 1978 became possible only when the question of sovereignty was resolved, enabling a move away from Franco's unitary and centralized state, through an ambiguity that both recognized Spaniards as a sovereign people and gave its communities considerable sovereignty through autonomy[31].

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[28] The Court said, 'Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order (para. 150).

[29] For a useful analysis of the decision from the perspectives of the politics of multi-national states, see James Tully, "Introduction" in James Tully and Alain-G. Gagnon (eds), Multi-National Democracy [to be checked].

[30] When sovereignty vests in the people as a whole, it leads to the majoritarian principle and the centralization of power, with the majoritarian state regarded as the custodian or trustee of the sovereignty. We have already noted some consequences of this.

[31] Article 1 (2) of the Constitution says: "National sovereignty belongs to the Spanish people from whom emanate the powers of the state".

The incorporation of communities as political entities makes the constitutional and political systems complex (with complicated electoral system and rules for decision making, including communal vetoes), dependent on continuing negotiations (many political systems introduce communal partnership as well as autonomy)—I examine later, as an example, the constitution of Bosnia-Hercegovina. Thus the constitution is important not only for defining political identities but also setting up complex and delicate balancing between them, vulnerable to the dynamics of communal politics. The fragmentation of sovereignty compels toward the consensus principle, introducing considerable rigidity. Thus, unlike constitutions in 'nation-states' which operate for the most part smoothly due to common understanding of the national interest, the constitution of multi-ethnic states requires constant support and nourishment, often with outside intervention.

Sovereignty is not only fragmented internally, but it seems to be conditional. The incipient doctrine of "earned sovereignty" is a threat, but for the moment, the more critical is international supervision (especially now with another incipient doctrine, the duty to protect, requiring international intervention in national politics). The United Kingdom suspended the "sovereignty" of Northern Ireland for non-conformity with the Good Friday Agreement, and in Bosnia-Hercegovina, there is an international component to its sovereignty (particularly in the appointment and powers of the High Commissioner and the external presence in the Constitutional Court). Apart from fragmented sovereignty, the complexity arises from the changed concept of citizenship to which I now turn.

IV.   2. Citizenship

What might seem at first sight as the strength of the liberal state from the perspectives of minorities, that is equal rights and obligations of citizenship, is seen as problematic from identity point of view. The primary political relationship in liberalism is that between the individual, as citizen, and the state. By prescribing that all citizens, regardless of gender, origin, race, religion, status, have the same rights and obligations, liberalism upholds one of its major values, that of equality.

But if citizenship with plenitude of rights, is a means to inclusion, it can also be the means of limited or extensive exclusion—by the denial of citizenship. Certain categories of persons will be entitled to citizenship (e.g., those born in the country or born of parents at least one of whom is a citizen). But the prospects of others to citizenship depend on the discretion of the government within rules which define eligibility rather than entitlement. In most states there are restrictions on the acquisition of citizenship (sometimes on racial or

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Article 2 says: "The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards, and recognizes and guarantees the right to autonomy of the nationalities and regions which make it up and the solidarity among all of them".

These articles represented a compromise (based on ambiguity) between those who believed in one, unified, sovereignty and others who believed in multiple sovereignties. A commentator writes the eventual wording of the constitution was not absolutely clear. "The provision declaring 'the indissoluble unity of the Spanish nation' also declared the right of autonomy of the 'nationalities and regions' which form it, thus introducing the word 'nationalities' which, besides lacking precise meaning in Spanish, was insufficient for some people (those who saw a multi-national Spain) and inadmissible for others (those who believed in one nationality" (Francisco Rubio Llorente, "Writing the Constitution of Spain" in Robert A Goldwin and Art Kaufman (eds), *Constitution Makers on Constitution Making*, op. cit., p.263.

cultural criteria), and in some there are rules for the deprivation of citizenship. Even liberal states vary in this respect, some with greater bias towards territory, some towards 'culture/nation'. [32]

Citizenship rules produce anxiety produces anxiety among long term residents or migrants at the prospects of expulsion and makes it difficult for them to integrate in the "host community" or to protect their legitimate interests (Amartya Sen notes that the generous British rules of political participation granted to all members of the Commonwealth have facilitated their integration). The application of the rules can also result in some members of a "foreign" community becoming citizens and others not, and yet the community has social and cultural cohesion, and common interests.

Even when members of minorities have equal citizenship, the critique of liberalism advanced earlier says that this equality is superficial; that it hides the reality that the values and mores of the majority in fact suffuse the state, to the great economic, social and political disadvantage of minorities and their culture. Because the public space in which many of these rights are exercised may not be culture or religion neutral (for example, holidays based on the dominant group's major religious days, its language the official language, and laws, for example on marriage or inheritance grounded in the social or religious traditions of the majority, and electoral laws favouring the majority), minorities may feel alienated and insufficiently recognized. Consequently they demand what has come to be called 'differentiated' citizenship which, by recognizing their cultural, linguistic or religions differences, provides them with effective equality and participation. There are many ways in which 'differences' can be recognized, as this paper has tried to show: special representation in law making and executive bodies, easier access to education, proportionality in public service recruitment and employment, application of the regime of personal laws, the right to engage with state officials in the language of the minority.

Some, perhaps most, of these rights can be secured only through political and constitutional recognition of ethnic communities, as collective or communal rights. We have already seen how under some constitutions ethnic communities are treated as components of the 'people', with a corporate character. What happens when communities are so recognized? How are rights and entitlements attached to these identities or groups? How do they affect the structure and procedures of the state? We have seen how they can affect the understanding of sovereignty. How do they bear on the understanding of citizenship? The following sections on human rights, democracy and autonomy spell out the structural and procedural aspects of the recognition of special rights. Here it is sufficient to note that the consequent recognition of communities introduces a key factor in citizenship: some rights can only be exercised through membership of the prescribed community, when certain voting, economic or land rights, for example, are restricted to the community. Thus the rules defining membership of the community can take a significance no less critical than the rules defining citizenship. As part of the autonomy of the community, rules whereby a person acquires and loses

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[32] Rogers Brubaker (*Citizenship and Nationhood in France and Germany* (Cambridge, Mass.: Harvard University Press, 1996)) compares and contrasts the attitudes towards citizenship and the rules for acquiring it, with France more generous but also more assimilationist, and Germany ethno-cultural and restrictive. He writes, 'In the French tradition, the nation has been conceived in relation to the institutional and territorial frame of the state [that is, a political understanding of nationhood]…The German understanding has been Volk-centred and differentialist…Since national feeling developed before the nation-state, the German idea was not originally political, nor was it linked to the abstract idea of citizenship. This pre-political German nation, this nation in search a state, was conceived not as the bearer of universal political values, but as an organic, cultural, linguistic, or racial community—as an irreducibly particular *Volksgemeinschaft*. (p. 1).

membership of the community, and the differential consequences of membership, are left to the community itself. While on the whole this kind of scheme is intended for the benefit of members of the community, it is possible that some of them may be disadvantaged, such as women or persons belonging to lower castes within the community.

How then are their citizenship rights to be protected? And as under autonomy regimes, authority structures of the community are vested with functions of government and regulation (e.g., the allocation of resources, or rule making), how can equal political and participatory rights of all its members can be protected (when traditionally a key characteristic of the community may have been age, gender or caste discrimination—sometimes sanctioned by sacred texts?) So here we are concerned not only with relations of the members of the community with citizens outside the community, especially as the exercise of special rights impact on the latter (for example as land historically vested in the community) but also the equality of rights between different members of the community. Obligations also vary among different categories of citizens, not only because of duties owed to the community, but also because there may be exemptions for certain citizens from duties owed to the state (e.g., the wearing of helmets when riding a motor bike which is extended to Sikhs who wear turbans, or the consumption of liquors otherwise prohibited often extended to indigenous communities). Thus the relationship of some citizens to the state is defined through membership and mores of the community. It is then easy to see how fundamental principles and values of citizenship under liberalism can come under severe strain through this kind of mosaic, in the spheres of rights and democracy.

There is a further dimension to the constitutional recognition of communities. Communities compete with the state for jurisdiction and moral authority—and loyalty. Sometimes the relationship of the community to the states is set out in the law, and in any case it is deeply influenced by politics. And then there is the relationship between communities. For example, in Pakistan, an Islamic state, the religious status of a community will not only effect is relationship with the state but also with other communities (as the Ahmediyyas have learnt to their cost). And in a place like Fiji with communal forms of representation and voting, the state is forced to mediate between competing claims of communities. The state is inevitably drawn into the affairs of the community—something a liberal state tries to avoid.

<u>IV.   3. Human Rights</u>[33]

Ethnicity both invokes and undermines human rights. The fundamental dilemma of rights and diversity is well captured by Charles Taylor when he writes, 'Now underlying the demand [for recognition of diversity] is a principle of universal equality. The politics of difference is full of denunciations of discrimination and refusals of second class citizenship. This gives the principle of universal equality a point of entry within the politics of dignity.

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[33] This and the next sections draw upon several of my publications, including *Public Participation and Minorities* (London: Minority Rights Group, 2001, rev. edition, 2003); 'Constitutional Asymmetries: Communal Representation, Federalism, and Cultural Autonomy' in Andrew Reynolds (ed.), *The Architecture of Democracy* (Oxford: OUP, 2002); *Human Rights and Governance: The Asia Debate* (San Francisco: The Asia Foundation, 1994); "Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims" 21:4 *Cardozo Law Review* (2000) 1095-1140; and "Understanding Human Rights in Asia", in Martin Scheinin and Markus Suksi (eds), *Human Rights: A Textbook* (tentative title, forthcoming).

But once inside, as it were, its demands are hard to assimilate to that politics. For it asks we give acknowledgement and status to something that is not universally shared. Or, otherwise put, we give due acknowledgment only what is universally present—every one has an identity—through recognizing what is peculiar to each. The universal demand powers an acknowledgement of specificity'.[34]

The post-second world war development of the regime of human rights was based on the assumption of a nation-state. All citizens are equal before the law and enjoy the same rights. The sovereignty of the people is expressed through the state, which provides a common regime of laws, the machinery for justice, democratic rights of franchise and candidacy in elections, protects other rights of individuals, and ensure law and order, through it monopoly of the use of force. As has been already stated, linguistic, religious and cultural affiliations, and membership of a community, of the citizen are irrelevant to his or her relationship to the state. This model of the nation-state has come under strong criticism in recent decades.

The other aspect of rights in a liberal state is the emphasis on civil and political rights, which apart from equality, include the freedom of conscience, rights to and of family, freedom of movement, freedom of expression, and the right of association, assembly and demonstration. Many of these are undoubtedly of benefit to minorities, as it helps them to organize politically and socially and lobby for their interests. But until recently international instruments were parsimonious about cultural or minority rights.

Nor could the liberal regime of rights accommodate economic and social rights. This was undoubtedly due to the hostility of supporters of the market economy, as distorting the economy and increasing the role of the state. But the resistance to economic and social rights has been expressed in term of their inconsistency with the rule of law. A distinction is made between law and policy; civil rights, with clear rules, are compatible with law but economic and social rights, dependent on the availability of resources and open ended scope, is policy. Courts are considered an unsuitable forum to interpret economic and social rights, as there may be no clear standards or rules by which to resolve a dispute concerning the scope and modality of these rights. This makes the feasibility of adjudication by courts the primary criterion of rights. [35] When the validity of the inclusion of economic and social rights in the South African Constitution was challenged on the basis that they violated the separation of powers for they would involve courts in policy and budgetary matters, the Constitutional Court rejected the argument. It said that that 'by including socio-economic rights with a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers'. It said that many civil and economic rights 'will give rise to similar budgetary implications without

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[34] Op. cit., 39.

[35] Jill Cottrell and Yash Ghai, 'The role of the Courts in the Protection of Economic, Social and Cultural Rights' in Yash Ghai and Jill Cottrell (eds) *Economic, Social and Cultural Rights in Practice: The role of judges in implementing Economic, Social and Cultural Rights* (London: Interights, 2004). M Craven writes, "The principal argument against the creation of a petition system relating to economic, social and cultural rights [under international law] has and remains the idea that they are essential non-justiciable. More specifically, it is argued that, given the promotional nature of the rights and generality of their terminology, it would be impossible for a supervisory body to decide whether or not a state is acting in conformity with its obligations under the Covenant' (M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective in its Development* (Oxford: Clarendon Press, 1995, p. 101).

compromising their justiciability'.[36] The obligation of the state to provide economic and social rights to the people, particularly the black communities who were the principal victims of apartheid and most of whom lived in great poverty and deprivation, was a necessary part of the agreement for the balancing of the interests of the whites, enjoying great privilege, and others—and essential to future harmonious race relations and political and social integration.

The earliest attack, based on diversity of cultures, to the UN's project on universality of human rights in the late 1940s, came not from Asia (which at the time was emphasizing democratic rights in the struggle of many people for freedom from colonial rule), but from the Association of American Anthropologists. Its members challenged the individual orientation of human rights, saying that in a world order (of which the Universal Declaration of Human Rights would be a part), "respect for the cultures of differing human groups is equally important"[37]. Their principal position was that cultures were important moral judgments are formed by association with the community and its culture. Consequently human rights declarations must take full account of "the individual as a member of the social group of which he is a part, whose sanctioned modes of life shape his behavior, and with whose fate his own is thus inextricably bound". They argued that definitions of freedom and concepts of the nature of human rights were narrowly drawn, ignoring the cultures of non-European peoples as well hard core similarities between cultures.

This debate has been revived in recent years, although in a somewhat context. The attack on this conception of rights is itself expressed in terms of human rights. Minorities and other disadvantaged communities challenge the liberal concept of rights, based on formal equality and the non-recognition of the rights of participation (as for example in article 24 of the ICCPR) which are not possible unless they have separate representation in state institutions) or access to the basic necessities of life (as guaranteed in the ICESCR) or special measures to overcome their historic or cultural discrimination and injustices. They claim that their right to culture is threatened by educational systems in which their children have to learn in a foreign language, and the conduct of state business in another language further marginalizes their own language at the same time as they economic, political and social prospects are jeopardized (due to insufficient familiarity with the official language). All these, they claim, are violations of the fundamental right of equality.

This attack has highlighted what seem various contradictions between human rights and ethnicity. Human rights seek to be color blind, aloof from religious or other affiliations; ethnicity makes these affiliations basic to identity and human existence. Human rights empower the individual; ethnicity the group. Human rights are the framework for relations between citizens *inter se* and between citizens and the state; ethnicity compels attention to and regulation of inter-ethnic relations, and the relations of the group to the state. Human rights aim to be inclusive, ethnicity exclusive. Ethnicity has posed problems for human rights in a way that nationalism did not, for the principal reason that nationalism did not seek accommodation of rights within an existing state, but its own state; ethnicity seeks accommodation within an existing state. It internalizes to the state problems that would otherwise dissipate on the formation of a new state; it brings problems of cultural relativism not as concerns between distant societies, but as basic to the very definition and existence of

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[36] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa* [1996] 4 SA 744, at 800-1.

[37] Executive Board, American Anthropological Association 1947 'Statement on Human Rights' in *American Anthropologist* Vol. 49 No. 4 October-December 1947 reproduced in Philip Alston (ed) *Human Rights Law* 1996 (Aldershot, Hants.: Dartmouth Publishing Co.)

a state, and of the co-existence of groups, which under the theory of nationalism are incompatible. Ethnicity seeks to re-configure the state, the principal framework for the formulation and enforcement of rights, with fundamental implications for how the scope and nature of rights are perceived.

Ethnicity dulls the consciousness of rights (although ethnicity can also be emancipatory, as a basis for resistance to oppression and a primary source of identity, pride and solidarity). While human rights seek to bring groups within a broader unity, emphasizing our common humanity, ethnicity fragments. Violations of rights of members of other groups excite little disquiet; indeed considerable gratification, as the foundation for its own prosperity (e.g., Malays did not criticize the prime minister Mathahir's disregard of human rights whose victims were principally citizens of Chinese and Indian origin and it was only when a fellow Malaya, Anwar Ibrahim, was persecuted that Malays took to the streets). Even more serious is the suspension of rights that accompany ethnic conflicts: freedom of speech, due process, habeas corpus, rights of personal liberty or movement, personal or group security, leading to the militarization of state and society. When ethnicity is translated in the language of rights, it takes the form of group rights which often undermine the essential principles of human rights such as equality, autonomy and due process; both of outsiders and members of the group.

For multi-cultural states (which most states are today, and even without new immigration), as people everywhere are finding new identities, human rights, as negotiated understanding of the acceptable framework for co-existence and the respect for each culture, are more important than for mono-cultural or mono-ethnic societies, where other forms of solidarity and identity can be invoked, to minimise or cope with conflicts. The conflict between human rights and cultural relativism cannot be treated simply as a philosophical or political discourse, but as a conflict which must be resolved concretely if some degree of order, stability and mutual respect is to be achieved. In other words, precisely where the concept and conceptions of rights are most difficult, they are most needed. The task is difficult, but possible, even if it may not be always completely successful.

Disadvantaged communities sometimes invoke the right of self-determination to advance their claims. In its origin 'self-determination' was conceived of as entitling a cultural or national community to a state of its own; successive disintegration of empires was based on this principle, largely in Europe. The UN Charter gave special attention to territories still under colonial rule and highlighted the need to bring them to an independent status, determining this an act of self-determination (under which of course a colony could vote to stay allied to the imperial power or enter into a special relationship). These origins suggested that self-determination was justification for secession, in appropriate circumstances (although outside the colonial context, there was considerable controversy as to what were 'appropriate circumstances'). Unlike the approach taken in Europe during the dissolution of empires like the Austro-Hungarian or the Ottomon, when new states emerged largely on the basis of linguistic nationalism, a curiously paradoxical approach was taken in respect of Asia and Africa[38]. While the UN pushed for decolonisation, it also set its fact against disturbing boundaries established during imperialism. So many new states emerged with highly diverse peoples (and some communities barely integrated with the rest during colonialism (as in the

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[38] T.M. Frank, "Postmodern Tribalism and the Right to Secesssion" in Catherine Brolman, Rene Lefeber and Marjoleine Zieck (eds) *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff, 1993).

north east of India and the present ethnic minorities in Myanmar). Many of whom have not acknowledged the authority of the independent states over them.[39]

The adoption in the two major human rights covenants of the right to self-determination provided a new focus for 'self-determination': as the principle of the democratic organization of the state. It means that every citizen and community should have full rights of participation in the decisions on the structure and operation of the state. "Self-determination" could take several forms: special modes of representation, or federalism or autonomy. 'Self-determination' in its extreme manifestation of secession (sometimes called the "external aspects of self-determination") would come into operation only if there was a massive denial of human rights to a community. Meanwhile the indigenous peoples claimed, and secured, the right of self-determination in the limited form of autonomy and land rights, as necessary to preserve their life style. Although the accepted orthodoxy now is this restricted understanding of self-determination (endorsed by the UN Human Rights Committee), self-determination evokes powerful emotions of a community wronged and entitled to its own sovereignty. In the political discourse over numerous troubled spots in Asia, self-determination is proclaimed as the moral and legal authority for a disenchanted community to secede. But when both sides are pragmatic, self-determination has provided or can provide the basis of autonomy (India, Indonesia, the Philippines). Autonomy was accepted in India at an early stage of its independence, to accommodate linguistic minorities, and most recently tribal communities in North East India (India like many other Asian states does not like to refer to such communities as indigenous peoples). An aspect of tribal autonomy is the disapplication of considerable national or state laws in favour of customary laws or local legislation.

In large part because partition or secession was denied under the principle of self-government, ethnicity has become a powerful political force. That force has challenged the paradigm of the regime of rights that rights belong to individuals. If the quarter century after the end of the second world war saw the rise of the ideology of individual oriented human rights, the last quarter of that century saw a major challenge, in the name of the community, to that approach. If in the first period, self-determination was the foundation of state sovereignty, in the second period it was mobilized to challenge that sovereignty. Ethnicity has not yet vanquished earlier understandings of human rights (and indeed feeds on it) but it has posed greater challenge to it than autocrats ever did—precisely because it presents the challenge in the language of human rights.

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[39] The outstanding exception was British India which was split into two, with the establishment of Pakistan. The claims of a sizeable portion of the Muslim community was based on the European theory of the 'nation state'. The leading ideologue of the secessionist movement, the poet Muhammed Iqbal said that the proposition that religion is a private matter is 'not surprising on the lips of a European', because Christianity is a 'monastic order, renouncing the world of matter and fixing its gaze entirely on the world of spirit'. In his view the experience of the Prophet as revealed in the Quran is of a wholly different nature, 'creative of a social order'. 'The religious ideal of Islam is, therefore, organically related to the social order it has created. The rejection of one will eventually involve the rejection of the other. Therefore the construction of a polity on national lines, if it means the displacement of the Islamic principle of solidarity, is simply unthinkable to a Muslim". He rejected Renan's view that nation is not tied to race or religion or geography: a great aggregation of men, sane of mind and warm of heart, creates a moral consciousness which is called a nation', due to the persistence in India of caste divisions and rivalries (Presidential address to the All India Muslim League, December 1930, reprinted in Sir Maurice Gwyer and A Appadorai (eds) *Speeches and Documents on the Indian Constitution 1921-47*, Vol. II (London; Oxford University Press, 1957). Ethnic carnage and the transfer of population of millions of people no doubt contributed to the international position against revision of colonial boundaries of new states.

The challenge to individual, citizen oriented rights was cast in terms of group or collective rights: rights to autonomy, language, special measures ('affirmative action" or "reservations"), regimes of personal laws, separate electoral laws, representation in the government, and proportionality in public services. In these instances citizenship right of equality would have to be sacrificed to the claims of particular communities. While there is increasing recognition of collective rights, the matter remains deeply contested and controversial, not only at the philosophical level, but also at the material level, for it concerns the distribution of resources and benefits. Some say that if there are too many group rights, the national interest suffers and the national unity is threatened. Others say that unless group rights to benefit minorities are provided, they will protest and try to secede. Yet others say that individual and collective rights have to be fairly balanced so that both national and group identities are recognized, for it is only in this way that national unity can be preserved or enhanced.

Here the Indian approach is of interest, and shows ways of balancing national identity and interest with the communal. In preparing the bill of rights, the Indian Constituent Assembly tried to meet various objectives. Rights had to be the means to unify the country and promote a common identity (just as Pierre Trudeau thought many years later for Canada when he promoted the Charter of Rights). At the same time as it had to deal with (a) cultural diversity; (b) minorities; (c) poverty; (d) social hierarchies and societal oppression. Far from regarding these factors as obstacles to a bill of rights, rights were deemed essential to resolve them. They were anxious to protect minorities (but after the partition of the sub-continent, they wanted to avoid forms of entrenchment which might promote fresh demands for separatism). They wanted to move away from what they regarded the divisive way the British had ruled India, abandoning the conferment of corporate identities to religious or cultural groups, shifting towards a more liberal framework. More generally, they were conscious of the cultural diversity of India and the need to fit rights within this diversity. At the same time they were pre-occupied by the imperative of 'nation building', cultivation of a common identity and common loyalties, especially as they were drawing the constitution at a time when the country was being torn asunder, with horrendous problems of security, lawlessness, and communal carnage. To an extent these opposing objectives were balanced by adopting the device of an enforceable Bill of Rights for, but not exclusively, civil and political rights, and a non-justiciable charter of Directive Principles for measures of social and economic equality. Where the necessary social and economic reforms could only be achieved by qualifying civil or political rights, such as those of equality and property, this was clearly stated in the Bill of Rights and authority or obligation for remedial action laid down.

Notwithstanding that India was a deeply religious society, with many beliefs between whom there was tension, the Indian Constituent Assembly decided that the Bill of Rights was to be the principal agency of social reform. The bill is strongly oriented towards universalism and social reform. Most rights are drawn from western precedents. Rights are used as a critique of culture, especially Hindu culture. 'Untouchability' is abolished and its practice prohibited (art. 17). Traffic in human beings and *begar* (a form of servitude) and similar practices of forced labor are also abolished (art. 23). The freedom of conscience and religion was drawn carefully to ensure that practices like *purdah* or *sati* (widow burning) were not indirectly entrenched (art. 25(2) says that the freedom of conscience shall not prevent the state from regulating or restricting any economic, financial, political or other secular activity associated with religious practice, or to provide for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus). Reform of Hindu practices is also aimed at by provisions which prohibit discrimination in access to the use of wells, tanks, bathing ghats, and roads and places of

public resort maintained wholly or partly out of public funds or dedicated to the use of the general public--with the abolition of discrimination against lower castes the primary objective. The imperative of social reform is evident also in Directive Principles, particularly in article 38(1) which requires the state to 'strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life'. India placed limitations on the protection of property to reduce the obstacles it would face in the abolition of *zamindari* (a feudal-like form of landholding).

Achieving this balancing has various implications for the regime of rights, as we have seen. It involves the recognition of corporate identities as bearer of rights (which issue, however, remains deeply controversial, as does the scope of the recognition). To preserve their culture, some communities claim wide exemptions from the application of the bill of rights. This has a dual effect on possibilities of rights. One is internal to the community which seeks exemptions: cultural values may in many respects be hostile to rights and modern democratic thought, and this places groups within the community at risk, such as women and lower castes. Discrimination within the community has become a matter of intense controversy in India and Israel, where the Islamic and Jewish personal laws disadvantage women. The discrimination is resented both within the community as well as by groups outside the community. The consequences spill over into the political domain, raising questions of national integration. In Israel, for example, 14 religious communities are recognised, each with its own system of courts. For Muslims, the presence of sharia courts has reinforced their sense of community and its values. But it has disadvantaged women (as also in India) and has isolated Arabs from the mainstream of Israeli politics. For the Jews, the rabbinical courts have been deeply divisive, symbolising the fundamental schism between orthodox and secular Jews. In both instances the courts give the clergy, committed to the preservation of orthodoxy, a specially privileged position. The law is slow to change in these circumstances, and lags well behind social attitudes and social realities[40].

Special regimes of laws can also disadvantages members of other communities. Affirmative action in Malaysia and India for "indigenous" Malays or Dalits or tribals in India have caused much resentment among other communities as this limits their access to education, business opportunities and employment in the public sector. At the same time it reinforces ethnic and caste communities, particularly among the disadvantaged communities who would have an interest in national and social integration as an escape—for it is only through preserving those classifications that the preferential scheme can be sustained. And yet it is by redressing past or present injustices that a sense of national unity can be fostered[41].

The lesson perhaps is that there cannot be, in relation to most rights, a notion of absolutism.; there must be an acceptance of qualifications on rights. This exercise of qualifying rights forces constitution makers to try to understand and define the core of the rights concerned, so that qualifications are consistent with maintaining that right. The

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[40] For contrasting views on the effect of personal laws in Israel, see Martin Edelsman, *Courts, Politics and Culture in Israel* (Charlottesville: University of Virginia, 1994) and J Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the US* (Princeton: Princeton University Press, 1993).

[41] Various attempts have been made to reconcile these conflicts of interests within a framework of rights (including, at least in the case of personal laws, possibilities of 'exit' for a person or group unhappy with the rule of the community—but this is seldom satisfactory, for it posits a sharp separation of identities). One such interesting effort (not entirely convincing to me) is Will Kymlicka 1996 'The Good, the Bad and the Intolerable—Minority Group Rights' in *Dissent* Summer 1996.

appropriate formulation and protection of social, economic and cultural rights, emphasising the 'positive duties' of the state, is often fundamental to a settlement, both to acknowledge the importance of culture and of redress of ethnic inequalities. Thus for this (and other reasons of 'ethnic' management) there arises the necessity for an activist state. Since inter-ethnic relations are so crucial to an enduring settlement and past history may have been marked by discrimination or exploitation, a substantial part of the regime of rights has to be made binding on private parties.

IV.   4. Regime of personal laws

Some of the dilemmas for the regime of human rights in the recognition of diversity can be illustrated by an examination of the schemes of personal laws, covering marriage and family, and occasionally land, particularly for tribal communities.[42] Schemes of personal laws have a long history. Most imperialists retained pre-existing religious or customary laws of the communities they colonised; their interests lay largely in establishing imperial control (public law) and in economic exploitation (commercial law). Personal laws may be derived from religion or customary rules and practices. The application of personal laws is considered important for maintaining the identity of the community. When India tried, during the drafting of its constitution, to mandate a common civil code for all of the country, some Muslim leaders objected. The supporters of a common code argued that common laws were essential for national unity. The opponents argued that it amounted to the oppression of minorities and the loss of their communal identity. The result was that the constitution merely set a common code as an objective of state policy, and it is now a well-established convention that the *shariah* will continue to apply to Muslims so long as they desire it.

The scope of the application of personal laws, quite extensive during the colonial period in Africa and Asia, is now diminishing under the pressure of modernization, although it is being reinforced in some countries committed to a more fundamentalist view of their religion. However, one place where regimes of personal laws still apply with full vigour is Israel, where each of the major religions has its own laws on personal matters (Edelman 1994, on which the following account is principally based). Israel has civil courts, military courts, and courts of 14 recognised religious communities. The principal and exclusive jurisdiction of religious courts is over matters relating to marriage and divorce, there being no civil marriage or divorce in Israel. These courts also resolve other personal and private-law issues. Since legislative authority over these matters is rarely exercised, courts have a profound effect on shaping the country's political culture, involving rights of women, contacts between members of different communities, and more generally the lives of Israelis. For the Jews, most matters of personal law fall exclusively within the rabbinical courts, while Muslims are subject to the jurisdiction of *shariah* courts applying the *shariah*. Although linked to and supported by the state, these courts are administered independently of the state.

For the Muslims the presence of *shariah* courts has reinforced their sense of community and the values they want to live by, and helped in the social reproduction of the community—an important factor for a minority, many of whom live under foreign occupation. These conclusions corroborate an argument for cultural autonomy, namely, that it 'supports political stability by providing non-dominant (and unassimilable groups with

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[42] Asbjorn Eide,"Cultural Autonomy: Concept, Content, History and Role in the World Order" in Markku Suski (ed.), *Autonomy: Applications and Implications* (The Hague: Kluwer, 1998).

mechanisms that enable them to minimise the effects of their inferior position in the larger society' (Jacobsohn 1993: 30). But the separate regime of Muslim law has isolated Arabs from the mainstream of Israeli politics. For the Jews, the rabbinical courts have been deeply divisive, symbolizing the fundamental schism between orthodox and secular Jews. In both instances the courts give the clergy, committed to the preservation of orthodoxy, a specially privileged position. The law is slow to change in these circumstances, and can lag well behind social attitudes and social realities. In contrast to civil courts, which have sought to promote a democratic political culture based upon the rule of law, religious courts and personal regimes of laws have sharpened distinctions among Israel's communities, and retarded social relations among them and the development of a unifying political culture.

Edelman (1994: 119) concludes that religious courts have emphasized group identity and solidarity at the expense of a unifying political culture: 'Yet without a shared political culture and the concomitant sense of a shared national identity, the prospects for a sustained, peaceful national existence are not bright'.[43] This view is not endorsed by Jacobsohn, who says that studies of Jewish public opinion in Israel reveal that shared ethnicity and a shared set of religious symbols are much more important than a shared set of values in providing unity for Israeli society. 'Thus, the subordination of cultural aspects to individual liberties on the basis of the assertion that the latter are "principles" has less justification in a polity where cultural imperatives may legitimately demand principled consideration.' [44]

One of the major problems with cultural/religious/legal autonomy of this kind is that it puts certain sections of the relevant community at a disadvantage. Edelman (1994) shows how both Jewish and Muslim women come off worse in their respective autonomous courts. In India, Muslim women are unable to benefit from the more liberal legal regime that has applied to other Indian women after the reforms of the 1960s. One aspect of their disadvantage was illustrated in 1985 by the famous *Shah Banu* case,[45] where the Supreme Court held that the maintenance that a Muslim divorced woman could claim from her former husband was to be determined under the general national law, which provided a higher amount than she would get under the *shariah*. This decision provoked a violent reaction from a section of the Muslim community, which considered that its identity was thrown in jeopardy. The government gave way to pressure from the Muslim clergy and other sections of the Muslim community and legislatively overruled the decision. The rise of Hindu nationalism is often ascribed to this 'capitulation' by the government to Muslim minority demands. In Canada the application of the customary law of Indian bands has also disadvantaged women; the UN Human Rights Committee has held invalid the law which deprived an Indian woman of her land and other community rights if she married an outsider, men who marry outside the community not incurring a similar liability.[46] In South Africa, demands by traditional leaders for the continuation of customary laws were resisted by African women because of the discriminations against them, such as in relation to custody and inheritance.[47] The South African solution was to provide for the application of customary

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[43] Martin Edelman, *Courts, Politics and Culture in Israel* (Charlottesville: University of Virginia, 1994), p. 119.

[44] J. Jacobsohn, Apple of Gold: Constitutionalism in Israel (Princeton, NJ: Princeton University, 1993), p. 37.

[45] (1985) 2 Sup. Ct. Cases 556.

[46] *Sandra Lovelace v. Canada* (Report of the Human Rights Committee. GAOR. Thirty-sixth session, Supplement No. 40 (A/36/50), 166–75.

[47] T W Bennett, *Human Rights and Africa Customary Law Under the South African Constitution* (Cape Town: Juta, 1995).

law but subject to the Bill of Rights. The Canadian government is negotiating a similar solution for the band laws.

IV.   5. State and Democracy: Partnership and Autonomy

In the consociation approach to the organization of the state, manifested in such recent constitutions as Northern Ireland, Bosnia Herzegovina, Kosovo and to a qualified extent Fiji, communities are treated as corporate groups and entitled to rights as such. This separation of communities in reflected in some countries in separate electoral rolls and reserved seats. The legislature operates through a complex system of voting, sometimes by a vote of all the members together, sometimes separate voting by communities, and on sensitive issues a combination of the two. The form of government is often a coalition of different communities. Sometimes there is a joint presidency, three person or so executive with a rotating chair (as in Bosnia-Herzegovina); and membership of different communities in the cabinet based on proportionality or fixed numbers. Complex voting systems apply even in the cabinet. A general principle of proportionality applies to public service appointments. Where the geographical distribution of population allows, each community has control over its own region. If this is not the case, complex systems of cultural or religious councils are established to exercise community autonomy cutting across the country. Citizenship rights are less important than the entitlements of communities. There are serious restrictions on mobility from one community to another—although some people are allowed to or forced to designate themselves 'others'. Such constitutions, privileging culture over a common or secular nationalism, pose a clash between the universal and the particular. This clash is played out in the dialectics of individual and group rights.

IV.   6. Autonomy

A principal device, much favoured by minorities and much resisted by majorities, for accommodating diversity is autonomy. The demand for autonomy can arise because a community does not feel part of the wider political nation (as with the Swedish speaking inhabitants of the Finnish islands of Aland, or the Banabans of Kiribati) or arises from disenchantment with the state (Sri Lankan Tamils, Southern Sudanese, Bougainville). Today there are many examples of autonomy defined as the special relationship of a part of the country to the whole. Most of these are successful[48]. However autonomy of this kind is problematic The autonomous area is small and the central authorities govern a large area (for example, Aland-Finland, Hong Kong-China, Kashmir-India, Puerto Rico-US, Zanzibar-Tanzania, Corsica-France). There are often no strong constitutional guarantees of autonomy. The autonomous area has to protect itself against larger forces (for this reason, ironically the much greater degree of sharing of power through federalism is often more effective). Self-restraint on the part of the central authorities is critical. This may be possible when the autonomous area is really small compared to the overall size of the state (Finland leaves Aland alone, as does the US with respect to Puerto Rico—most of the time).

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[48] See my paper, 'Autonomy as a Strategy for Diffusing Conflict' in Paul Stern and Daniel Druckman (eds), *International Conflict Resolution after the Cold War* (2000).

A major limitation of territorial devolution of power, its restriction to circumstances where there is a regional concentration of an ethnic group, can be overcome by 'corporate or cultural autonomy' whereby an ethnic group, dispersed geographically, is given forms of collective rights. There are different forms and uses of corporate autonomy. Rights or entitlements protected under such autonomy can be personal, cultural, or political. They can be entrenched or subject to the overriding authority of the government. They normally consist of positive and substantive rights and entitlements, but they can be negative, such as a veto. They form the basis of the communal organization of politics and policies and of the collective protection of their rights. The Cyprus constitution of 1970 was an example of expansive corporate autonomy, while the current constitution of Bosnia-Herzegovina combines more traditional federalism with corporate shares in power and communal vetoes.

Cultural autonomy was a significant feature of old and modern empires. Modern examples include provisions in the constitutions or laws of Estonia, Hungary, Slovenia, and the Russian federation, which countries provide for the establishment of councils for national minorities that assume responsibility for the education and cultural affairs of the minorities. In principle, a council can be set up if a majority of the community desire it, as expressed in votes. Once established, its decisions bind members of the community throughout the state, except that a member can opt in or out of membership—the important principle of self-identification is maintained. Within the areas in relation to which powers are vested in it, the council's regulations prevail over those of the state. The council has the power to levy a tax on its members and also receives subsidies from the state. It has authority over the language, education, and culture of the minority. The principal objective of the system is the maintenance or strengthening of the identity of the minority, based on language and culture. The objective is to take culture out of 'politics', and leave other matters to the national political process, in which minorities may or may not have a special status through representation. It is too early to evaluate their experience as the few councils established so far, often under external pressure, have existed for only a short period. However, it would seem that the distinction between culture and politics may be too simplistic, especially today when the survival of culture is closely connected to the availability of resources and to national policy in several areas.

More central reliance on group autonomy through cultural councils is found in the developing constitutional dispensation of Belgium. In 1970 separate councils were established for Dutch, French, and German language speakers with competence over aspects of cultural and educational matters; their competence was considerably extended in the 1980s. In some new constitutions group autonomy is related to, or is part of a package of, federal or other devices for protection of ethnic communities, frequently in consociational arrangements, such as in Belgium, Bosnia-Herzogovina, and Fiji.

IV.   7. Multi-ethnic constitution

To give a fuller picture of an ethnic based constitution, I turn to Bosnia-Herzegovina ('Bosnia'). Bosnia was a republic in the former Yugoslav Federation, but unlike other republics, its population was ethnically mixed with no community in a dominant position. So the solution of declaring itself as an independent 'national' state was not feasible (the path chosen by other republics). Leaders of the three major communities, Serb, Bosniac and Croatian, incited their followers to violence against others, partly to drive them out of particular areas where they hoped for form their own state. The international community had

a vested interest in maintaining Bosnia as a united state—and to achieve this took off the sponsors of these communities in Serbia (including Milosevic) and Croatia to Dayton military base in Ohio, US, to craft a constitution for Bosnia. The Federation of Bosnia-Herzegovina is composed of two Entities: Bosnia and Srpska. Bosnia itself is a federation of Bosniac and Croatians, while Srpska is a Serbian entity. Most powers are vested in the Entities (in the case of Bosnia, in the constituent part of the Entity), the federation being left largely with those powers that are necessary to constitute and exercise external aspects of state sovereignty. The constitution is built around the concept of ethnic communities as separate corporate bodies. Arrangements for representation and power-sharing take the communities as building blocks, carrying forward the proposition stated in the preamble of the Constitution that Bosniacs, Croats, and Serbs are 'constituent peoples' of Bosnia and Herzegovina, 'others' and 'citizens' being mentioned only in passing—effectively making these three communities, rather than the people as a whole, the source and bearers of sovereignty.

The parliamentary assembly consists of five Croats and five Bosniacs from Bosnia and five Serbs from Srpska; they are elected by voters of their own communities (Art. 4). Nine of them constitute a quorum, so long as there are at least three from each community. The House of Representatives is constituted on the same principle and in similar proportions. The result of these arrangements is that politics are entirely communal, and almost perforce all political parties are ethnically based. Parties get together in parliament or government only after the elections. The system creates incentives for parties and their leaders to intensify appeals to narrow ethnic interests, linked to their kinfolk in other states, which does little for the unity of the country. In the 1996 elections, the most extreme ethnic party in each community won, leaving their leaders the impossible task of finding a common purpose.

The constitution also provides for extensive power sharing. The Presidency, in which executive power is vested, consists of three persons, chosen directly by each of the three main communities. Decisions are made by consensus, giving each community a veto. Similar provisions apply for appointments to other public bodies, including the Constitutional Court and the Board of the Central Bank. The chair of the legislative chamber rotates among the representatives of the three constituent peoples. Voting rules ensure that each of the three main ethnic communities is involved in all decisions. Any one of them can declare that a proposed decision affects its vital interests, triggering special procedures for mediation and reconciliation. If that fails, the matter is referred to the Constitutional Court.

Both parliaments and Entity governments are required to have a proportional ethnic balance, and the distribution of key political functions is along ethnic lines. Ironically, in this pre-occupation, the rights of national minorities are seriously downgraded or ignored (as for example the restriction of the office of the Presidency, or legislative vetoes, to Bosniacs, Croats and Serbs). Rights of citizens, as citizens rather than as members of particular ethnic group, are also limited. Given this complex process of decision-making, it is not surprising that numerous deadlocks have occurred. The state level government is seriously handicapped in its capacity to make or execute policy. The constitution provides a key role for foreigners. Three judges of the Constitutional Court are foreigners, appointed by the President of the European Court of Human Rights; and eight of the 14 members of the Human Rights Chambers are also from outside. The first governor of the Central Bank had to be a foreigner, appointed by the IMF. The highest executive and key policy powers are vested in the Office of the High Representative (appointed in accordance with UN resolutions), whose mandate covers monitoring the implementation of the Dayton Accord. Due to differences within the collective presidency and the unwillingness of any of them to take decisions that might be resented by his or her community, many matters end up on the desk of the High Representative who then has to make the decision.

V.   Concluding Observations

As this paper has tried to demonstrate, there is no one type of 'multi-ethnic constitution'. I have taken the Bosnia-Hercegovina Constitution as an example of an extreme tendency, where most structures and procedures are built around communities, not citizens. But even in less extreme constitutional arrangements, there are very marked differences from characteristics which have defined the rule of law and constitutionalism. In many instances the distinction between the public and private has become tenuous (although this has to some extent has been happening in contemporary liberal systems). Citizenship now represents a complex set of relationships; and can be highly differentiated. Cultural communities have become political entities; sometimes the public sphere is carved among them. In Bosnia-Hercegovina the traditional principle of the separation of legislative and executive authorities has little relevance; increasingly in multi-ethnic constitutions, the task of balancing power is achieved by powers vested in communities (of which multiple membership of the presidency, as in Bosnia-Hercegovina and Iraq are examples, or by the system of voting in the legislature when in addition to an overall majority, each community has a veto, at least on certain important issues).

Claims of community compete with claims of individuals. The concept of equality is redefined; it is based on the legal recognition of *diffearance*. And individual equality is not particularly valued, as we have seen in the case of schemes of cultural autonomies. Distinctions may be more principled and carefully circumscribed when related to social justice (as in affirmative action). An important function of the regime of rights is to accommodate diversities, with particular regard to definitions of religion and entitlements under it. There is a move away from thematic rights to group rights (indigenous peoples, women, children, the disabled).

The nature of state sovereignty is re-configured, moving away form one central point. This diffusion of sovereignty fragments the political community and leads to legal pluralism undermining the uniformity of the legal system. There are new understandings of democracy, away from majoritarianism to the balancing of community interests. Rights of participation can depend even more on membership of communities than citizenship. Fundamental issues of public policy may be disregarded in the pursuit of ethnic balances, in the pursuit of singular rather than multiple identities. Accountability can become difficult when politics are dominated by alliances of ethnic leaders.

The constitution becomes more important because it is a register of negotiated identities and difficult compromises that must be sustained. But the constant inter-ethnic negotiations that are required by the constitution deprive the law of some of its "autonomy", and certainly can weaken the institutions of the law. A framework constitution privileges negotiations over adjudication (although most ethnic constitutions are a detailed codification of a settlement, unlike the Canadian constitution which retains elements of the "framework', at least as far as the first nations are concerned, less so for Quebec.

I leave it at that and postpone to another occasion the important question: Do these developments represent merely differences of technique from traditional rule of law and constitutionalism practices (uniformity of law, the centrality of the judiciary, the separation of powers) or reflective of a fundamental shifts in values and policy?