Ethnic Diversity and Constitutionalism

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My paper will discuss the challenges to the Rule of Law, particularly the regime of human rights developed by the UN and regional associations, in multi-ethnic or multicultural states. The liberal vision of a multi-ethnic state 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.

This view of the liberal state has been challenged. 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 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. 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. 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, the encroachment of the private into the public, and the dominance of 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. 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 and their forms of association over time.

A similarly critical approach is taken by Bikhu Parekh, who 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. He identifies various institutional and structural features of the modern state that 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’.

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.

The specificity of this system, despite its claims of universality, is demonstrated by both Tully and Parekh by contrast with pre-modern polities. These polities cherished cultural diversity. It was no function of the state to impose moral or religious order, much less to impose conformity. The public sphere was narrow and the private extensive, allowing ample space for diverse cultural and religious traditions. Nor did the centre aim towards a tight or detailed regulation of society, but was content with a large measure of decentralization, frequently based on cultural communities. It accepted pre-existing bodies of customs and laws. There were multiple layers of authority and borders were porous, adding to the flexibility of the polity. Similar accounts of the diversity and flexibility of pre-modern or pre-colonial polities have been presented by other authors (for example, Kaviraj and Tambiah).

Transitional societies and state face the difficult task of accommodating a diversity of religions, languages and historical traditions. The centralisation tendencies of the modern state create particular problems for minority ethnic groups (broadly defined).
Sometimes this leads to intense internal conflicts, but almost every where leads to controversies on how to recognise different cultures. This is not merely the problem of developing states, but also of settled and stable states in the West. Many forms of accommodation involve departures from the accepted norms and institutions of the modern state which underpin the Rule of Law: codification and unification of laws, state courts, individual rights, a certain degree of separation of the state from religion and culture, etc. The concept of sovereignty as single, unlimited and indivisible has come under considerable challenge under notions of self-determination and autonomy. The emphasis on individual rights is confronted by claims of group or collective rights (see the recent UNGA Declarations on the Rights of Indigenous People). The traditional form of majoritarian democracy is being replaced by rules and procedure derived from the theory of ‘consociation’, under which ‘communities’ are recognized as corporate groups with political rights, of representation, participation in institutions of the state, the principle of proportionality, complex forms of decision making with double voting and vetoes in communities, the national scheme of uniform and hierarchical laws is modified by recognition of plural legal orders, particularly in the area of personal and family laws. Many rights of citizenship can only be exercised through membership of a community.

I will discuss these contemporary forms of accommodation, offer a critique of contemporary identity politics, and suggest some ideas for constitutionalism for multicultural states, which respect the underlying ideals (if not always the forms) of a liberal, Rule of Law based societies. I am attaching a recent paper I wrote on the dilemmas facing Nepal, with competing visions of its society and state. I shall use the framework of this paper to examine more generally the dilemmas facing many contemporary societies and states.