Part V

COMMENTARIES

Globalization, Multiculturalism, and Law

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INTRODUCTION

Racism and multiculturalism are both products of globalization. Racism is generally regarded as the ideological justification and practical effect of imperialism and colonialism. It belongs to the rise of Western, capitalist dominance of the world, which proclaimed the superiority of Western culture and religion, and justified its mission to bring civilization and Christianity to heathen and barbaric peoples. The deliberate denigration of other cultures produced a deep sense of inferiority among those people. This enterprise involved a considerable misrepresentation and stereotyping of cultures, as typified in the concept of "orientalism." Multiculturalism, on the other hand, belongs to the contemporary stage of globalization and is seen as the tool to fight the legacies of racism and ensure a fairer social and political system.

The relationship between globalization and multiculturalism is thus ambiguous. At one level globalization brings different cultures into contact. Through the establishment and organization of states that—both during colonialism as well as in more contemporary migrations—brought diverse peoples together within common borders and a single sovereignty, globalization has led to the development of multicultural states and societies. Even within a state, globalization increases contacts among its different people—as the frontier of the market moves in search of raw materials—and thus many indigenous peoples have been brought into the general sphere of the state. With the current preoccupation with identity, stimulated in considerable part by globalization, it has given recognition and prominence to identities within states that have tended to regard themselves as ethnically and culturally homogeneous, thus giving a new spin to multiculturalism. It changes the context within which multiculturalism operates, bringing it

within the confines of a state rather than into a clash/relationship across broad and disparate geographical areas. Some of the most intense and interesting debates about multiculturalism now take place within the borders of a state, relating to the coexistence of its communities.

Today there is greater respect for other cultures. Developments in international law and global economy promote ethnic and cultural consciousness, often as a defense mechanism or response. Dominated cultures are not so vulnerable as previously; they have their own sovereign states, some of them successful economically, so that they are able to challenge the assumptions of the superiority of Western cultures, as in the "Asian values debate" (Ghai, 1994; Langlois, 2001). On the other hand, we must acknowledge the homogenizing influence of global capitalism and markets on cultures. There is ample evidence that market capitalism tends to disrupt and eventually destroy communal or common ownership of land and with it the bonds and cohesion of the community. It introduces new values that displace traditional ways of thinking and behaving. It breaks up the joint or extended family, around which are embedded core values and rituals of culture. It leads to new forms of labor and to new modes of organization. Today, additionally, we have the powerful influence of international media, films, and advertising, supported by trademarks and other forms of intellectual property rights. However, it has indeed been argued that capitalism need not have this kind of impact on a society and its traditional values. It has been suggested that Chinese and other communities in the Far East have developed and nurtured capitalist economies without having to give up Confucian values, and that instead Confucianism itself has been the primary organizing matrix for that capitalism (Redding, 1990). However, it is unlikely that capitalism can develop beyond a rather rudimentary stage in this way, and it is clear that as firms in the Far East achieve a degree of national or global operations they inevitably change their modes of organization, fundraising, and decision-making (Ghai, 1995). The argument that capitalism is consistent with various forms of culture appears untenable. Globalization has fundamentally changed the cultures of many peripheral regions. It has set a new framework within which cultures may coexist, and in which Western ideas of economy, the individual, community, and state dominate. There is resistance to this framework.

The project from which this book results is built around the crucial distinction "between hegemonic globalization, which is dominated by the logic of world neoliberal capitalism, and counter-hegemonic globalization, which includes the local-global initiatives undertaken by subaltern and dominated social groups in an attempt to resist the oppression, de-characterization, and marginalization produced by hegemonic globalization" (Santos, 2000a). Santos asks the question, "Is it possible to unite what has been separated by hegemonic globalization and separate what has been united by it? Is this all that counter-hegemonic globalization entails? Is it possible to contest the forms of dominant social regulation and from there reinvent social emancipation?" (Santos, 2000a). The usefulness of the project lies not just in the intellectual issues it engages with but in its implications for practical struggles as well. Among the issues to be examined in this ambitious project are the roles of constitutions, state structures, and human rights, both as instruments of domination and tools of counter-hegemony. The focus on these topics fits in the general strategy of the project: to examine, from the perspectives of the periphery, local initiatives as they impact on global forces. Constitutions and state structures clearly fall in the local category, although, in the cases studied here, they too reflect international conventions. Human rights occupy a somewhat different position, for they have become central to the rhetoric of international politics and are negotiated internationally with a growing global industry of the production and supervision of human rights, armed with some sanctions and powers of intervention.

Santos recognizes that there are many conflicts, resistances, struggles, and coalitions clustering around cosmopolitanism and the common heritage of humankind, demonstrating "that what we call globalization is in fact a set of arenas of cross-border struggles" (Santos, this volume). Chief among these arenas are emancipatory multiculturalism and alternative forms of justice and citizenship, which oppose in particular unequal identity differentiation, domination, and patriarchy (Santos, 2000a). Essays dealing with multiculturalism explore the revolutionary potential of human rights, including networking on the basis of human rights and local initiatives, the importance of group or collective rights, legal pluralism, and the redesign of state structures to accommodate ethnic, social, and cultural diversities—as well as the forms of struggle that are made possible by these developments. In general, the authors favor special legal regimes for minorities and indigenous people, support constitutional reform and state structures, including regional or cultural autonomy (which accommodate ethnic and cultural diversity), and highlight the benefits of the use of human rights for social movements and networking.

To an extent, as a friendly and sympathetic critic, I take issue with some suppositions that underlie the counter-hegemonic strategies. I do so partly to draw attention to the diversity of situations generated by globalization and to caution against the belief that there can be universal solutions to the challenges it raises. My own conclusions do not always coincide with them, in part because my own experience relates to situations somewhat different from those discussed in these essays. In that regard my approach is similar to the one foreshadowed by Santos, the editor of these studies, when he alerts us to the dangers of generalization or of the prescription of universal remedies. He writes:

It is actually possible that some initiatives that present themselves as alternatives to global capitalism are themselves a form of oppression as well. By the same token, an initiative that, in a given country at a given moment, may be seen as counter-hegemonic, may be seen as hegemonic in another country or another moment. [. . .] Just like science, is not social emancipation multicultural, definable, and valid only in certain contexts, places, and circumstances (since what is social emancipation for one social group or at a particular historical moment may be considered regulation or even social oppression for another social group or at a different moment in time)? Are all struggles against oppression, whatever their means and objectives, struggles for social emancipation? Are there degrees of social emancipation? Is it possible to have social emancipation without individual emancipation? And social emancipation is for whom, for what, against whom, against what?" (Santos, 2000a).

The value of the studies in this book is precisely that they are so carefully located in their specific contexts.

HUMAN RIGHTS

The complexity and contradictions of globalization allow its ideologies, institutions, and processes to be used to facilitate as well as fight globalization. Nowhere is this more obvious than in the case of human rights. Human rights has become a highly contested terrain, assisted by the multiplicity of norms and international and regional conventions, the plurality of enforcement or supervisory mechanisms, differing political and moral justifications for the primacy of rights, and the modes of challenge to the very concept of rights (Ghai, 2002a). The concept of human rights, legally formulated as entitlements, is generally accepted as Western in origin. The dominant tradition of human rights—civil and political rights—derives from western philosophy, and is closely connected to liberalism, individualism, and the market. Rights inhere in the individual and protect against the acts of the state, not private parties or corporations. The ideology and rhetoric of human rights are often regarded as a tool of Western domination, which provide critical support to globalization. The following are some of the ways in which the regime of human rights is seen to assist the assertion of Western hegemony.

—Using the notion of universalism, human rights enable western values to masquerade as universal, thus denigrating other cultures and values, particularly insofar as they retard the market economy;
—the notion of human rights as supreme over other rights, claims, or policies privileges Western values;

—Western personnel and institutions maintain supremacy in the interpretation of rights, through adjudication and educational processes;
—the values promoted through human rights assist in the globalization of economies: property rights (now enormously expanded), equality (discouraging discrimination against non-citizens), bringing corporations within the categories of beneficiaries of rights (but not duties), freedom of contract, independent judiciaries, etc.;
—weakening the state and strengthening civil society/economic corporations, defining a narrow role for the state, thus benefiting the already advantaged (also through questioning the status as rights of economic, social, and cultural rights—the concept of rights is determined in substantial part by intellectuals, and the West has the resources to fund intellectuals and their centers of learning);
—extending the range of interventions in other states through promoting and directing international NGOs and through support to local movements and NGOs, often under the hegemony of Western-based organizations;
—allowing sanctions against or "humanitarian" intervention in other states;
—selectivity or double standards, which allows an opportunistic use of rights, condemning states hostile to the West (such as Iran), but ignoring or glossing over the shameful record of its allies (Suharto's Indonesia), assisted by the Western media;
—possible for a powerful state, partly through its hegemony over international institutions, to get away with violations of rights (as regularly in the US), but not for weak states.

Equally, human rights can be or have been used as counter-hegemony, in the following ways:

—independence movements in the post-war period were based on the language of rights, particularly self-determination;
—challenging the notion of western values as universal and positing other values (the Asian values debate); using cultural relativism arguments to demonstrate the culture specificity of human rights; infusing notions of differential cultures in human rights regimes (compare the interpretations of Article 27 of the International Convention on Civil and Political Rights [see below]);
—gaining more space for derogations of and limitations on rights;
—denigrating the whole idea of rights, for example by reference to the primacy of duties, or the primacy of the community;
—downgrading rights through assertions of state sovereignty;
—seeking more democratic methods for the formulation of rights;
—expanding the notion of rights, e.g., self-determination, indigenous peoples' rights, rights of minorities and migrants, the right to development,

economic, social, and cultural rights, and gender rights; these rights challenge the hitherto dominant tradition of civil and political rights, some of which are closely connected to market economies;

—using rights for networking (particularly successful examples of which include campaigns by women and indigenous peoples);

—developing notions of collective rights (and arguing that the state personifies the collective);

—exposing Western hypocrisy over rights by demonstrating the uneven record of Western states (China, for example, has issued two official papers documenting and criticizing the reality of rights in the US);

—using ideas of universalism and interdependence to locate responsibility in the richer countries;

—using the concept of economic, social, and cultural rights to resist aid and other conditionalities, structural adjustment programmers, and the directives of the WTO, etc.

It would be evident from the above list that not all the "counter-hegemonic" strategies are directed against globalization. Tensions often arise among different local groups and forces, or between local actors and national forces and institutions. In some cases, the state is seen as an ally or surrogate of "external" forces (see Arenas, this volume). In others, the confrontation of the local with the national aims at securing gains at the local level, extracting concessions from the state, and granting or extending rights to local self-government. Counter-hegemonic strategies are often the product of debates or conflicts between East–West/North–South, which are neither intellectually sustainable nor capture the complexity of globalization. For example, the severest critic in Asia of human rights and the strongest proponent of Asian values is Lee Kwan Yew, who is also an ardent supporter of globalization. Other states infused with Confucian cultures have chosen to integrate their economies into the international system. The collusion of the US (and some other Western states) with "Southern" dictators in the suppression of rights and in cover-ups has been the most important factor in the oppression of their people. The blanket denigration of rights or the exposure of the failure of Western states to honor human rights may do little for counter-hegemony. To keep emphasizing the superiority of a society animated by the concept of duty may merely be a device to maintain patriarchy, male chauvinism, and other forms of social or family oppression (Ghai, 1998). It is clear, as studies in this book suggest, that many subaltern groups in the South benefit or can benefit from rights, that rights have played a valuable role in conscientising and mobilizing the oppressed, that rights have facilitated the articulation of local protests with international organizations, helping to establish the commonality of interests between the peoples

of the South and the North—for example, in the preservation of the environment or even the culture of faraway communities—and that the violation of rights has been instrumental in forcing international intervention to stop the slaughter of minorities. Counter-hegemonists should therefore beware of being seduced or entrapped by high-moral-sounding persons whose commitment to justice and diversity is questionable. If rights are to play a liberating and counter-hegemonic force, they have to be treated with respect. Equally, the potential of rights has to be carefully reviewed and then strengthened. As Santos rightly points out, the "tenuous line between emancipation and regulation oscillates according to the ambiguity of the "partnerships," which, for tactical reasons, may combine the emancipatory initiatives of the struggle with instruments of social regulation" (Santos, 2000b: 19).

Strengthening the regime of human rights

Human rights provide the most powerful and coherent challenge to the ideology of globalization. Globalization is individual-oriented, glorifying in the greed of and incentives to individuals, at the same time as it treats people as commodities (labor) or consumers, is profit driven, fragments, and destroys communities, and appropriates commons, producing vulnerability and in-security, without common values. Globalization is based on monopolies and hierarchies. The regime of human rights, on the other hand, emphasizes democracy and participation, solidarity, collective action, and responsibility, aims to ensure basic needs, dignity, social recognition, and security. It offers an alternative vision of globalization in which social justice and solidarity are emphasized. In fact, sometimes, human rights are the only weapons that the weak and the victims of different kinds of oppression and violence can draw upon. In its hegemonic version, however, the regime of human rights is a homogenizing device, and thus it does tend towards the suppression of cultures that are not dominant in the emergence of modern rights theory; but there are possibilities of its extension to other values and thus cultures. The human rights framework also offers options to individualism, which is contrary to community values: a kind of cosmopolitanism, freedom of association for communities to semi-opt out of the dominant culture and pursue their own culture, and some recognition of collective identity and goals.

Counter-hegemonic approaches to human rights often criticize the double standards in the upholding of these rights. But this should not be turned into an attack on human rights. The more productive approach to rights as "counter-hegemonic" is to develop the framework of rights in a balanced way. This can be done by focusing on the problems of the disadvantaged or the oppressed (international conventions on indigenous

peoples and migrants, women, and children are examples), by exploring the cultural dimensions of rights, promoting collective or group rights, with the capacity to remedy injustices of the past, taking seriously economic, social, and cultural rights, building on their interdependence (as in the conventions on women and children), mainstreaming rights into development policies and institutions, and emphasizing the obligations of the international community to protect and ensure equal rights to all (especially social and economic rights). This last point is particularly important in the age of globalization, when the ability of states to provide welfare has been eroded under neoliberal doctrines, and with the consequent transfer of decision-making power over key social and economic issues to international financial and trade organizations and transnational corporations (see Ghai, 1999, for the relationship between rights and globalization). We need to move away from the traditional notions that rights are organized within state boundaries and that their protection is the responsibility of state institutions—the concept of global citizenship vests that responsibility in the global community, especially with the transfer of key economic and political power to regional and international institutions. Equally, to the same effect, one can invoke the classical conceptualization of human rights as inherent, universal, and indivisible. Responsibility for the protection of human rights can also be ascribed to corporations, as the logical development of the rise of private economic power. Rights can also provide a better framework for competing forces in globalization if its cultural foundations can be broadened. Santos, in this volume, shows one method for enriching the corpus of human rights by drawing on the virtues and strengths of different cultures, as an aid towards fusion. Another method towards achieving interculturalism has been indicated by Charles Taylor, who, using Rawls's concept of overlapping consensus, aims at the convergence of specific rights by looking at common values and practices in different cultural, rather than their philosophical or religious, bases (Taylor, 1999). Yet a third approach is that of Abdulahi An-Nai'm, who advocates reinterpretations of tenets of religious traditions to fit in, where possible, with internationally accepted norms (An-Nai'm, 1990). Each of these approaches has of course different implications for multiculturalism, but they all point to the need for an intercultural consensus on rights. Santos's approach is the most imaginative and fruitful of those developing a bridge or synthesis. Whereas Taylor and An-Nai'm aim at finding commonality, Santos looks at differences in order to build a more complete conception of human rights. Restriction of space prevents a full discussion of these strategies for counter-hegemony. I propose to examine developments in international norms only in four related areas: self-determination, cultural rights, indigenous peoples' rights, and the right to development, which show the possibilities and potential of counter-strategies.

Self-determination

The broadest source of autonomy is self-determination, in itself a difficult and controversial concept, but which is increasingly being analyzed in terms of the internal, democratic organization of a state rather than in terms of secession or independence. The marked bias of the international community of states against the use of self-determination, other than for classical colonies, is well known (Franck, 1993). The UN General Assembly resolved many years ago that autonomy is a manifestation of self-determination. The greater involvement of the UN or a consortia of states in the settlement of internal conflicts has also helped to develop the concept of self-determination as implying autonomy in appropriate circumstances, such as in Bosnia, Eastern Europe, and Kosovo (Rosas, 1993; Franck, 1993; Higgins, 1993). However, the birth of new states following the collapse of the communist order in the Soviet Union, Eastern Europe, and the Balkans has removed some taboo against secession, and the international community seems to be inching towards some consensus that the extreme oppression of a group may justify secession. This position has served to strengthen the internal aspect of self-determination, for a state can defeat the claim of separation if it can demonstrate that it respects the political and cultural rights of minorities. A further, and far-reaching, gloss has been placed on this doctrine by the Canadian Supreme Court, which decided in 1999 that Quebec has no right under either the Canadian Constitution or international law to unilateral secession, but that if Quebec were to decide on secession through a referendum, Ottawa and the provinces would have to negotiate with Quebec on future constitutional arrangements (*Reference re Secession of Quebec* [1998] 2 SCR 217). However, these rules or understandings are not accepted everywhere and they are unlikely to persuade leaders in Africa or Asia. As for Latin America, the contributions by Souza Filho, Neves, and Arenas in this volume underline some of the ambiguities of the notion of self-determination as it relates to the rights of indigenous peoples.

Such a view of self-determination has some support in certain national constitutions, indicating no more than a trend at this stage. Often, constitutional provisions for autonomy are adopted during periods of social and political transformation, when an autocratic regime is overthrown (when there is considerable legitimacy for autonomy), when a crisis is reached in minority–majority conflicts, or when there is intense international pressure (in which case legitimacy is granted rather grudgingly). Propelled by these factors, a number of constitutions now recognize some entitlement to self-government, such as the Philippines in relation to two provinces, one for indigenous people and the other for a religious minority; Spain, which guarantees autonomy to the regions; Papua New Guinea, which authorizes provinces to negotiate with the central government for substantial devolu-

tion of power; Fiji, which recognizes the right of indigenous people to their own administration at the local level; and, recently, Ethiopia, which gives its "nations, nationalities, and peoples" the right to seek wide-ranging powers as states within a federation and guarantees to them even the right to secession. The Russian Constitution of 1993, in the wake of the breakup of the Soviet Union, provides for extensive autonomy to its constituent parts, whether republics or autonomous areas (Agnew, 1995; Lynn and Novikov, 1997; Smith, 1996). The Chinese Constitution entrenches the rights of ethnic minorities to substantial self-government, although in practice the dominance of the Communist Party negates their autonomy (Ghai, 2000a). In other instances, the constitution authorizes, but does not require, the setting up of autonomous areas, with China again an interesting example (Art. 31) in its providing a constitutional basis for "One Country Two Systems" for the reunification of Hong Kong, Macau, and Taiwan. It should also, on the other hand, be noted that some constitutions prohibit or restrict the scope of autonomy by requiring that the state be unitary or some similar expression; such a provision has retarded the acceptance or the implementation of meaningful devolution in, for example, Sri Lanka, Papua New Guinea, and China.

Indigenous peoples

The Convention on Indigenous Peoples adopted in 1991, representing a reversal of the paternalistic and assimilationist approach followed in the 1959 Convention, recognized the "aspirations of these peoples to exercise control over their own institutions, ways of life, and economic development and to maintain and develop their identities, languages, and religions, within the framework of the States in which they live." Their cultural and religious values, institutions, and forms of traditional social control are to be preserved (Art. 4). The system of land ownership and the rules for the transmission of land rights are to be protected (Arts. 14 and 17). The Draft UN Declaration on the Rights of Indigenous Peoples (submitted by the UN Sub-Commission on Minorities, August 1994) goes even further and proclaims their right to self-determination, under which they may "freely determine their political status and freely pursue their economic, social and cultural development" (Art. 3). The principle of self-determination gives them the "right to autonomy or self-government in matters relating to their internal and local affairs," which include social, cultural, and economic activities, as well as the right to control the entry of non-members (Art. 31). It recognizes their "collective rights" (Art. 7) and the right to maintain and strengthen their distinct political, economic, social, and cultural characteristics (Art. 4). These ideas have already formed the basis of negotiations between indigenous peoples and the states in which they live, giving recognition not only to their land rights (as in Australia and New

Zealand) but also to forms of autonomy (as in Canada), although Asian and African governments deny the existence of indigenous peoples in their states and the instruments have had little impact there (Brölmann and Zieck, 1993; Stavenhagen, 1990; Alfredson, 1998; and Kingsbury, 1999). The proposal for "autonomy" put forward by the indigenous movement of Brazil is a way of overcoming exclusion, which, in the field of inter-ethnic relations, shaped the "exclusive/defensive communities" closed in upon themselves in defense against the domination (social, cultural, environmental, agrarian, political, epistemological, etc.) of the state, as an "exclusive-aggressive community" (Santos, 2000b: 14). This statement is undoubtedly true—even in Hong Kong, autonomy, however flawed, gives a sense of empowerment and a base from which to attack Mainland hegemony—which also explains China's reluctance to give true autonomy to Tibetans and other cultural minorities (Ghai, 2000a). Much of the struggles of cultural communities today takes the form of demand for autonomy. This critical issue needs more attention. Indigenous people, particularly in North America, also base their claims on other legal bases: (a) their "inherent sovereignty," which predates colonization, and (b) treaties with incoming powers (for what has been called "treaty federalism," see Henderson, 1994). In several Latin American countries, the claims of indigenous peoples have given rise to the recognition of their collective identities, linked to specific territories (Souza Filho, Neves, and Arenas, this volume). It would be important to pursue the differences between indigenous people and other groups/minorities (in terms of legal instruments, public sympathy, historical context, their relative isolation from other communities and norms, etc.).

Cultural rights

When the UN began work on an international regime of rights, it emphasized individual rights and carefully avoided giving rights, particularly political rights, to groups. There are trends now, however, towards a greater recognition of the cultural and ethnic bases of autonomy. Article 27 of the International Covenant of Civil and Political Rights, until recently the principal UN provision on minorities, was drafted in narrow terms. It reads:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

There is a grudging acknowledgement that minorities may exist, giving states a way out by denying that minorities exist. The rights belong not to minorities as groups, but to individual members, denying minorities a legal

or corporate status. Rights given to members of minorities are negative, prohibiting the state from suppressing their culture or language, but imposing no positive obligations on it to promote minority culture, religions, or languages.

However, in recent years, the UN Human Rights Committee (which supervises the implementation of the Covenant) has interpreted the article in a more positive way, using it to develop the collective rights of minorities, including a measure of autonomy, and some positive obligations on the states (Spiliopoulou Åkermark, 1997). In a series of decisions, the committee has interpreted the article as a basis for collective minority rights,[1] as a basis for the preservation of the culture and way of life of a minority group,[2] and as a basis for protecting and developing the traditional way of life of minorities.[3] The committee summarized its view of the purpose and reach of Article 27 in a General Comment (*Rights of Minorities*, General Comment 23, 1994). The committee distinguished Art. 27 rights from the right to self-determination, the latter being a group right, so that complaints of its violation are not admissible under the Optional Protocol (which allows individuals to lodge complaints with the committee). On a more positive note, the committee accepted that in some situations Art. 27 rights may be associated with a territory, as when cultural rights consist of a way of life that is closely associated with territory and the use of its resources. The committee stated that Art. 27 rights are available to non-citizens resident in the state. Whether a group is a minority depends upon objective criteria and not upon a decision of the state. The committee has given a broad meaning to "culture," noting that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law." The committee has also interpreted the right to have elements of group rights. "Although the rights protected under Art. 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly positive steps may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group" (para. 6.2). The committee regards Art. 27 rights directed at the survival and continued development of the cultural, religious, and social identity of minorities. From this analysis, it draws the conclusion that despite the negative language of the article, it implies a positive obligation on the state to ensure the protection of the rights against their denial or violation by the state through its legislative, judicial, or administrative authorities, or by other persons. From the same analysis, particularly the nexus between culture and territory, the committee also draws the right

of minorities to participation, observing that the enjoyment of cultural and other rights implies the "effective participation of members of minority communities in decisions which affect them" (para. 7).

This broader approach is reflected in a UN Declaration on the Rights of Minorities adopted by the General Assembly in 1992. Unlike the ICCPR, it places positive obligations on the state to protect the identity of minorities and to encourage "conditions for the promotion of that identity" (Art. 1). The Declaration places particular emphasis upon the right of minorities to participation. It states that "[p]ersons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life" (Art. 2.2). They have the "right to participate effectively in decisions on the national and where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation" (Art. 2.3); presumably such legislation may not deny them the right to participation (Art. 4.1). Three further specific participation rights are guaranteed: the right to establish and maintain their own associations (Art. 2.4), the right to maintain free and peaceful contacts with members of other minorities, as well as, across frontiers, with citizens of other states to whom they are related by national or ethnic, religious or linguistic ties (Art. 2.5), and the right to participate fully in economic progress and development (Art. 4.5).

Right to development

The promotion of the concept and text of the right to development was one of the most sustained forms of the challenge of the South to Western versions of human rights based primarily on civil and political rights. After considerable efforts and time, a UN Declaration on it was adopted. The declaration states that the "right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised" (Art. 1.1). It also states that the human person "is the central subject of development and should be the active participant and beneficiary of the right to development" (Art. 2.1). While all human beings have a responsibility for development, states have the "right and duty to formulate appropriate national development policies that aim at the constant improvement of the well being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom" (Art. 2.3). The Declaration also states clearly the obligation of the international community to assist in development; international cooperation is a central theme of the declaration. This international aspect was emphasized at the Vienna UN

World Conference on Human Rights, which emphasized the obligation of states to "cooperate with each other in ensuring development and eliminating obstacles to development [. . .]. Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level" (para. 10 of the Vienna Declaration and Programme of Action).

The Right to Development has not been well received by some Western governments, and its endorsement at Vienna was due to horse-trading, whereby Southern states were persuaded to accept the universality and interdependence of rights. However, the document proclaiming the Right to Development is valuable for establishing a broad and humanistic definition of development as "a comprehensive economic, social, cultural, and political process, which aims at constant improvement of the well-being of the entire population and of all individuals" and "in which all human rights and fundamental freedoms can be fully realized." It provides a basis for the integration of various strands of rights, pointing to conditions under which all kinds of rights can be enjoyed. It prescribes the specific obligations of states and the international community that flow from the right, including the obligation to "eradicate all social injustices." The international community is enjoined to take collective steps to "ensure the full exercise and progressive enhancement of the right to development."

It is, however, necessary to temper enthusiasm for this declaration, for it has been promoted by many states whose commitment to human rights is suspect. Its detailed formulations could easily be used to obscure or evade the obligations of states for ensuring human rights, attribute the failure to ensure rights to wrong causes, and close off international scrutiny of the national record of the observance of human rights. By itself the declaration scarcely adds new rights, and its usefulness in providing a means to balance different kinds of rights or as a framework for achieving rights in a globalizing world with new powerful actors is limited. However, with refinement, and consensus, it could provide a useful basis for an integrated approach to human rights, and of course it does have considerable emotional appeal in developing countries.

The pluralism of human rights

The consequence of these developments is that the human rights regime is no longer focused exclusively on the individual—it includes strong norms of social justice, via economic and social rights; it is no longer indifferent to cultural differences; it engages with poverty and alienation; and the concept of equality has been enriched to include affirmative action and other forms of

group rights. Some of these developments may exist solely at the level of theory, but that is not a bad starting point. That the framework of human rights can be employed to negotiate inter-ethnic claims and to acknowledge diversities of cultures and values in a way that is broadly defensible and acceptable is evident from the experiences of India (see Randeria, this volume), Canada, South Africa, and Fiji when designing their constitutional orders (Ghai, 2000b). The cases of several Latin American countries are discussed in the contributions to this volume by Souza Filho, Neves, and Arenas. These countries not only represent different cultural and religious traditions but also share the common experience of struggling to manage conflicts arising from their ethnic and religious diversity. They also typify countries with gross disparities of access to resources, wealth, and opportunities, raising acute problems of social justice.

From the perspectives of this project, the most interesting case is Canada. Cairns says of Canadians, "Those issues that have most deeply divided us, and have agitated our passions to the point of frenzy, have revolved around race, ethnicity, religion, and language, all of which have pervasive symbolic overtones" (1992: 59). "Rights" have not traditionally been employed to cope with these issues. When Canada was constituted a state in 1867 through the British North America Act, the principal issue concerned the respective identities and privileges of the English and the French communities. It was resolved through the grant of a significant autonomy (particularly in relation to civil law and education) to the francophone community residing in Quebec by federalization. The solution lasted for a very considerable time, but it came under stress a few decades ago. Several factors seem to have contributed to the stress: an increasing role of the state, which generated controversy on social policies; a rising francophone professional class in Quebec resentful of economic domination by English speakers; the immigration of other national groups, from Europe but more particularly from Asia, which diluted the proportion of francophones and challenged the notion of the two "founding races"; and the politicization of the first nations advancing their economic and cultural claims. Canadians seemed threatened with fragmentation but it was the stridency of francophone claims, backed with the threat of Quebec separatism, that started the search for new constitutional solutions, in which a bill of rights came to play an important role (Cairns, 1992; Russell, 1992).

The Canadian Charter was adopted only in 1982, over a century after Canada was constituted a federal state. The primary aim of the charter does not seem to have been the strengthening of rights, for they were on the whole well protected under the law and traditions of Canadian polity (criminal law has been a federal subject, thus ensuring uniformity and allowing courts to review the criminal process in provinces).

The push for the charter came from the then Prime Minister, Pierre Trudeau, who was worried about a growing feeling of provincialism and wanted to offer Canadians an identity that they could all embrace. That identity was to come from a bill of rights. It was to infuse a new identity for Canada as a bilingual and multicultural state; in other words, it was intended to overcome narrow parochialism. The association of rights with the idea of the nation-state has, of course, an ancient pedigree.

Trudeau's aspirations towards universalism for the charter are reflected in the general rules for the qualifications of rights. Rights may be subject to "only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (Sec. 1). In so far as culture is relevant, it is "political culture," though of course the initial choice of rights is to some extent determined by "culture." But the context for the charter is also reflected in the rules of interpretation—human-rights guarantees not to be construed to abrogate or derogate from aboriginal treaties or rights or freedoms (Art. 25); the charter to be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada (Art. 27, which may become more problematic than envisaged with the increase in Asian and African immigrants—the original understandings of multiculturalism developed in the context of newer European immigrants); and the rights and privileges of "denominational, separate or dissentient schools" are not affected (Art. 29).

In the event, Canada accepted an even more complex regime of rights than perhaps even India (even if by exclusions from the regime—fragmenting rather than uniting). It has a greater orientation to group rights than India. It seeks to accommodate the francophones and the first nations through forms of collective rights. In another respect as well the charter recognizes groups, not just individuals. Article 15 allows derogation from equal rights in respect of "any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Two Canadian scholars have argued that section 15(2) is intended to redress the imbalance against those groups that have been subject to persistent disadvantage, by pointing to the grounds on which discrimination has been based. They also state (like the current Indian Supreme Court position) that the right to equality and the provision for affirmative action should be seen as serving a common purpose rather than as incorporating two inconsistent conceptions of equality (Black and Smith, 1996: 14–22).

The Canadian Supreme Court's view of the charter is of rights as governed by "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs,

respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society" (saying "to mention a few").[4]

All these concessions and compromises have not eased Canada's problems of identity and cultural differences. It was realized early that the repatriation process (and the charter) were not the end of the problem but rather the beginning and, in one sense, even a cause of the difficulties. The political process, long drawn out as it has been, has so far failed to resolve outstanding issues. Issues that were up for negotiations included a clearer recognition of the distinctiveness of the francophones and the greater acknowledgment by the first nations of the imperative of gender equality. The task of reconciliation has been complicated by the multiplicity of claims that have been advanced (themselves promoted by the introduction of the notion of rights as a framework), cutting across class, ethnic, and gender distinctions, pointing to the limits of the flexibility of that framework. The listing of interests, values, and groups that must be taken into account in interpreting the constitution that was contained in the Canada clause of the Charlottetown Accord provides a clear indication of the difficult burden placed on the charter. However, the impasse of that effort means that, at least for the time being, the baton has to some extent been passed to the courts, which have begun to grapple with the challenges of multiculturalism, distinct society, and aboriginal claims.

It is not possible to summarize other case studies, but the general conclusions that emerge from them may be stated. In all these countries, there were serious ethnic conflicts or competing claims. It might have been possible to deal with them through negotiations and compromises. However, at least in South Africa and Fiji, where the conflict was intense and a clear framework for the settlement of competing claims was hard to establish, the process would have been protracted and even then might not have succeeded.

In all cases, the relevance of human rights to the construction of the state was acknowledged. In South Africa and Fiji a prior agreement on this question was a prerequisite to the start of negotiations on other matters. It was in Fiji that there was perhaps the greatest initial resistance (by the indigenous Fijians) to accepting rights as the framework. The use of the framework of rights facilitated the application of norms that enjoyed international and some domestic legitimacy, and which were sufficiently malleable to provide broadly satisfactory outcomes.

The contents and orientation of rights were drawn from external sources: in India's case from foreign national precedents (the Universal Declaration of Human Rights had just been adopted), but in other instances from international instruments. A comparison of precedents used in India (1947) and

Fiji (1995) provides an insight into the periodization of rights that speaks to the concerns of universality. At the time of Indian independence, there was no internationally accepted body of norms or procedures. Nor was there a consensus that constitutions had to include a bill of rights. By the 1990s there was both a substantial body of internationally negotiated norms and a consensus that they had to be implemented in national constitutional systems. Likewise, between the Canadian Bill of Rights (1960) and the Charter (1982), a certain distance had been traveled in the use of international norms. In this way international law and procedures of human rights have the effect of binding states into a common regime and building a presumption of "universality" into the negotiating process.

"Culture" has nowhere been a decisive element determining attitudes to rights, though it has been important in Fiji, Canada, and South Africa. But it has been important in different ways. The francophones do not object to the philosophical basis of rights (indeed they could hardly object to an instrument that draws its inspiration from the French revolution), but see their "universalizing" tendency as a threat to the survival of their culture (closely connected with language). In that sense it can be seen as a defensive reaction. In Fiji, on the other hand, rights were presented as antithetical to the underlying values of indigenous social and political organization. "Culture" itself, as already indicated, was very broadly defined. It was used in an aggressive rather than a defensive way—as justifying claims to Fijian "paramountcy." Paramountcy implied then a wide degree of political and economy supremacy that had little to do with culture as such. Using human rights as a framework helped to pare down but not eliminate "paramountcy." Demands by South African traditional leaders and the Inkatha Party were based on culture, and the ability of the latter to derail the transition to democracy gave an importance to its demands that otherwise seem to have had little support. It was perhaps in the stance of the Canadian aboriginals that "culture" was most crucial. It was central to their demands of autonomy, the settlement of outstanding claims, and the preservation of their internal social organization. It was also the hardest case of the accommodation of cultural claims within the general framework of the charter. The accommodation was secured through wide exclusions from the charter rather than through forms of balancing as in other instances discussed in this text.

With the exception of the Canadian first nations, the proponents of the cultural approach to rights were not necessarily concerned about the general welfare of their community's cultural traditions. They were more concerned about the power they obtained from espousing those traditions. It is widely recognized that Quebec's separatist politics were mobilized by young francophone professionals who found it difficult to compete with the more established English-speaking professionals. The manipulation of "tradition"

by the Inkatha Party is well documented. Fijian military and politicians who justified the coup were accused of similar manipulations by a variety of respectable commentators.

Difficult questions arise if the culture of a group can only be maintained at the expense of the rights of another community, or via the agency of the state, as is the consequence of Fijian claims of paramountcy. The cultural relativism argument in a homogenous community (where the issue is purely between local values and international standards) is less problematic than in a multicultural state, where it can be divisive, lead to the subordination of one community by another, etc. Thus the debate about relativism in Tonga or Samoa (both homogeneous Polynesian societies) is of a different dimension than in Fiji. The aboriginal claims in Canada are easier to negotiate because, for the greater part, aboriginal peoples live in reservations where contact with other communities is minimal (and this may explain why the accommodation of Metis people, more spread and less well anchored in one culture, has proved more problematic).

In my view, the more interesting issues arose when the question of the relationship of rights to culture was debated *within* the cultural community itself. In most of the cases women opposed the claims of the "traditionalists," as with the first nations in Canada, the Muslims in India in regard to the application of the *shariah*, and the traditional leaders in South Africa. Hindus in India were divided over reforms of Hindu law, which followed from the mandate to codify and unify personal laws. More generally, significant numbers within the cultural community were anxious to build a more inclusive community instead of isolating their own community from the mainstream of developments. Such divisions provided opportunities for using rights to interrogate culture, and gave interesting insights into the nature of rights.

In no case are rights seen merely as protections against the state. They are instruments for the distribution of resources; a basis for identity; hegemony; and a social vision of society. Rights are not necessarily deeply held values, but a mode of discourse, of advancing and justifying claims, etc. Thus, important sectors of the white community in South Africa opt for group rights when it comes to autonomy, but settle for individual rights when it comes to economic rights.

Groups present their claims in different paradigms of rights: individual versus group; equality versus preference; uniformity versus group identity. This comes out clearly in the contributions by Souza Filho, Neves, Arenas, and Randeria. In Fiji as well, the conflicts between the two communities are played out in the competing currencies of human rights (universal human rights versus indigenous peoples' rights).

These case studies also undermine the myth that those who push for universalism are westerners and those who oppose it are easterners. It was the

British who resisted a bill of rights in India; it was the whites in South Africa who set up one of the most repressive regimes of this century. Both of them believed in the relativism of rights—one for whites and another for coloreds. The most powerful resistance to the charter has come from French Canadians. Indians wanted a universal regime, but had to make concessions to accommodate the claims of the historically disadvantaged minorities. The majority of the blacks in South Africa showed the greatest commitment to a universal regime. In Fiji it was the dominant majority within the Methodist Church that most strenuously resisted the regime of rights.

Constitutional settlements in multi-ethnic societies require the balancing of interests. This balancing is particularly important if there are prior, existing disparities of economic, social, or political resources, and particularly if these disparities are the result of state policies. Achieving this balancing has various implications for the regime of rights.

(a) It involves the recognition of corporate identities as bearers of rights (an issue, however, that remains deeply controversial, as does the scope of the recognition). It is in that sense that one can talk of collective rights. But we also find individual rights that are connected to being a member of a group. Most rights of affirmative action in India perhaps fall into this category.

(b) There cannot be, in relation to most rights, a notion of the absolutism of rights; there must be an acceptance of qualifications on rights.

(c) This exercise of qualification forces constitution-makers to try to understand and define the core of the rights concerned, in order to establish the qualifications that may be made consistent with maintaining that right.

(d) The appropriate formulation and protection of social, economic, and cultural rights, emphasizing the "positive duties" of the state, is often fundamental to a settlement, both to acknowledge the importance of culture and to redress ethnic inequalities. This is perhaps less so in Canada where the charter is more oriented towards civil and political rights, but there too problems associated with first nations are dealt with through redistributions. Thus, for this (and other reasons of "ethnic" management) there arises the necessity for an activist state.

(e) 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.

Juridically, there are a few important means for balancing:

(a) the traditional one of limitation clauses;

(b) closely associated is the direction as to interpretation;

(c) balancing of one right against another (what Galanter has called "competing equalities" [Galanter, 1991]); the most difficult task in this regard is the balancing of "negative" with "positive" rights (e.g., the protection of property versus affirmative action or other forms of social justice); and

(d) overcoming these dichotomies by a new conceptualization, e.g., "equality" defined in substantive terms as in India and South Africa.

(e) The Indian technique of the juxtaposition of rights with directive principles has not been followed elsewhere, perhaps because of the difficulties that the technique presented there.

A particular consequence of using the framework and language of rights and the juridical techniques mentioned above is the increase in the power and responsibility of the judiciary for the settlement of claims and disputes. It then falls ultimately to the courts to perform the balancing of interests and rights that is an essential part of using the human rights framework. They may represent a different understanding of the permissible limits of the balance, and may come in conflict with determinations by the legislature or the executive. This was the Indian experience with the courts taking a different view from that of the other branches as to the primacy of property rights over social rights. On the other hand, vesting the final authority in courts means that close attention is paid to the framework of rights and that the balance between the core of the right and its modification is done in a reasoned and principle way. Usually, the prestige of the courts helps also to bring the dispute to some resolution, although the Indian experience with the *Shah Bano* case (1985—2 Sup. Ct. Cases 556 [see below]) suggests that judicial decisions can themselves be a source of conflict.

On the more general question of universalism and relativism, it is not easy to generalize. It cannot, for example, be said that bills of rights have a universalizing and homogenizing tendency, for, by recognising languages and religions, and by affirmative policies, they may in fact solidify separate identities. On the other hand, there may be some necessity for a measure of universalism of rights to transcend sectional claims for national cohesion. Simple polarities—universalism vs. particularism, secular vs. religious, tradition vs. modernity—do not easily work; a large measure of ambiguity is necessary for the accommodations that must be made. Consequently, most bills of rights are Janus-faced (looking in the direction of both liberalism and collective identities). What is involved in these arrangements is not an outright rejection of either universalism or relativism but an acknowledgment of the importance of each, as well as a search for a suitable balance, using for the most part the language and parameters of rights (see Santos on rights in this volume).

DESIGN OF STATES

The criticism of the liberal theory of rights from the perspectives of multiculturalism is also reflected in the criticism of the liberal state. The argument is that the modern state, with its lineage of the market-oriented and homogenizing regime, built on the principle of individualism and equal citizenship, is inherently incapable of dealing with the 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. For the purposes of the present argument, it is argued that constitutionalism is not primarily concerned with the relations of groups to the state, or relations between groups.

Noting different communities or groups that 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 recognize 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 (Tully, 1995: 4). The modern constitution is based on the assumption of a homogeneous culture, but in practice it was designed to exclude or assimilate other cultures and thus deny diversity (Tully, 1995: 58).

He 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 (Tully, 1995: 6). Symmetries of power, institutions, and laws that 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 that is based on the 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 intercultural dialogue, in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time (Tully, 1995: 30).

A similar approach is taken by Bikhu Parekh, who argues that the theory of the modern liberal state presupposes a culturally homogeneous 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" (Parekh, 1997: 183). 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 by pre-existing bodies of customs or local law. The state favors 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.

Despite its claims of universality, both Tully and Parekh demonstrate the specificity of this system by contrasting it with pre-modern polities. Those 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 center aim towards a tight or detailed regulation of society, but rather 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, 1997; Tambiah, 1992). It is not my purpose to engage directly with this thesis—except to remark that it exaggerates the uniformity in the modern state and the flexibility and diversity in the pre-modern. Pre-modern China's experience, where the centralization of authority and the confucianization of the emperor's subjects were vigorously pursued, seems inconsistent with the picture sketched by Tully and Parekh. Several modern states have different categories of residents, there are differential spatial distributions of power, and religious and cultural affiliations are recognized for many public purposes. Many multi-ethnic states recognize diversity through a variety of devices, including differential citizenship rights, as in Israel (Peled, 1992), Malaysia,

and Fiji. Even "modern states" like the US, Canada, Australia, and the Nordic countries had less than a uniform system of laws, citizenship, or institutions when they dealt with indigenous communities; and if Lijphart (1977) is right about the prevalence of consociationalism in several parts of Europe, then also the monopoly of the centralized modern state is questionable. Several recent instruments and recommendations of the Organisation of Security and Cooperation in Europe and the Council of Europe seek to promote linguistic and religious diversity: decentralization, cultural councils, special voting rolls, language rights, and so forth. The general international law has come to recognize various categories of collectivities, such as minorities and indigenous people, with varying group rights. Even the regime of human rights, castigated for its obsession with the individual, has increasingly recognized group entitlements (Ghai, 2000b). There is considerable flexibility in the design of states, such as Bosnia-Herzegovina—perhaps in response to the kinds of criticisms leveled at the modern state by Tully and Parekh. Liberalism's tolerance of difference (admittedly a doctrine developed in the west for—relatively—culturally homogeneous societies) has some potential for being turned to use for the design of multicultural arrangements.

Nor is recognition of diversity always a virtue. The colonial state was *par excellence* a state of diversity and discrimination, deeply acknowledged, indeed entrenched, in constitutional and legal systems. While denigrating local cultures, colonial regimes sponsored numerous anthropological studies of "tribes." Anthropologists became the handmaidens of the colonialists in using indigenous cultures and institutions to establish more effective domination over them, often through indirect rule, often involving the preservation of these cultures and institutions, suitably modified to suit the aims of imperialism, which included the practice of "divide and rule" (Ghai and McAuslan, 1970; Mamdani, 2000). Traditional cultures and institutions were also "preserved" to avoid the uncontrollable social and political consequences of capitalism and to use them to absorb the costs of imperialism and the market economy. The organization of the apartheid regime in South Africa, which "glorified" racial and cultural diversity, used these distinctions to build its edifice of oppression. Jewish control over Israel is maintained through various legal institutions and distinctions that discriminate against Arabs or fragment the political community. More benignly, the essential principle for the organization of the political, social, and economic system of colonial Fiji was race: legislative representation and participation in the executive was allocated racially; indigenous Fijians had their own system of administration and the right to review legislative proposals before they reached the legislature, and there were several institutions to safeguard Fijian customs and laws. The division of labor was also structured along racial lines.

Many features of the colonial system survived into the independence period, not always with positive effects on racial harmony. The separation of the political and economic organization of indigenous peoples in the US, Canada, Australia, and much of Latin America had the effect, as was the intention, of marginalizing them. The preservation of indigenous cultures and the development of pluralistic legal orders in which various regimes of personal and customary laws were recognized produced a spurious kind of multiculturalism.

However, it is not my contention that the political recognition of diversity is always fragmenting or oppressive. Special regimes for communities based on sensitivity to their vulnerabilities, or the recognition of the centrality of cultures to them, or of past injustices, have contributed to justice as well as improvement in inter-ethnic relations. Whether the political recognition of diversity is fair or beneficial depends on the context, the preferences and aspirations of the various communities, and the forms that political recognition takes. Moreover, support for it depends on differing theories of ethnicity.

The principal modifications to the liberal state are in the forms of representation (as in Bosnia-Herzegovina, where ethnic groups are separately represented in the executive and the legislature, using separate electorates), territorial autonomy, and cultural autonomy—of which, for reasons of space, only cultural autonomy is discussed here (for a wider discussion, see Ghai, 2002b). To some extent, globalization has helped in these developments, both by the practical consequences of globalization for economic policies and choices, and by sanctioning, through the authority of international or regional institutions, interventions in "troubled states" not only to bring the fighting to an end but to impose solutions. Globalization makes states less salient in some respects, leads to regional economic integration, which facilitates regional autonomy, and enables small territories to carve out niches in the global economy. A new but uneven element in the spatial organization of government is the emergence of international regional organizations in which national sovereignty has been traded for a share in participation and decision-making in these organizations. Common policies over larger and larger matters are determined by the regional organization, so that a measure of control of the affairs of a national region has been transferred from national to supranational authority. The consequences are that the diminution of the salience of national sovereignty opens up possibilities of new arrangements between the state and its regions, the state feeling less threatened by regions in a multilayered structure of policy-making and administration and the region being more willing to accept the national sovereignty that may be the key to its participation in the wider arrangements. This trend is most developed in the European Union, with its developing concept of the Europe of Regions (Bullain, 1998), which is

helping to moderate tensions between states and border regions previously intent on secession, as in Spain and Belgium, and which has facilitated the interesting spatial arrangements for policy, administration, and consultation in the two parts of Ireland, each under separate sovereignty, which underlie the new peace settlement. Attempts to provide for unified Nordic arrangements for the Saami people, including a substantial element of autonomy, regardless of the sovereignty they live under, are another instance of similar kind (Hannum, 1990: 256–62).

Several initiatives have been taken in Europe, through the Organisation of Security and Cooperation in Europe (OSCE) and the Council of Europe and the European Union (EU) to promote the concept of autonomy, although its impact so far is restricted to Europe. This is manifested both in formal declarations and interventions to solve ethnic conflicts in Europe (such as in the Dayton Accord over Bosnia-Herzegovina or the Rambouillet proposals for Kosovo). Article 35 of the Copenhagen Declaration on Human Dimension of the OSCE recognizes "appropriate local or autonomous administrations" "as one of the possible means" for the promotion of the "ethnic, cultural, linguistic, and religious identity of certain minorities." The principal instrument of the Council of Europe is the Framework Convention for the Protection of National Minorities (1994), which protects various rights of minorities, obliges the state to facilitate the enjoyment of these rights, and recognizes many rights of "identity." It obliges state parties to "create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them" (Article 15). There is no proclamation of a right to autonomy, but the exercise of some of these rights implies a measure of autonomy. The Copenhagen Declaration and statements of principle by the Council of Europe, although not strictly binding, have been used by the OSCE High Commissioner for Minorities and other mediating bodies as a basis for compromise between contending forces, and have thus influenced practice, in which autonomy has been a key constituent (Bloed, 1995; Packer, 1998; Thornberry, 1998; see also the Lund Recommendations on the Effective Participation of National Minorities in Public Life, 1999, issued by the OSCE High Commissioner).

Globalization threatens or facilitates the reorganization of a state through the activities of the diasporas of the state, which fuel the manifestation of the discontent of particular communities with the state. A common form of assistance is money and the purchase of weapons, which facilitates political violence back home. Many a reorganization of states has taken place after long or short periods of violence or civil strife. But, equally, globalization forces do not favor violence, for that creates disorder, which on the whole is not congenial to trade and the economy.

Cultural autonomy

A major limitation of the 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 also 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 (Eide, 1998: 256–9). In principle, a council can be set up if a majority of the community desires 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 (Peeters, 1994; Murphy, 1995). In some new constitutions group autonomy is related to, or is part of a package of, federal or other devices for the protection of ethnic communities, frequently in consociational arrangements, such as in Belgium, Bosnia-Herzegovina, and Fiji.

Cultural autonomy can take the form of the application to the members of a community of its personal or religious laws, covering marriage and family, and occasionally land, particularly for tribal communities (see Ghai, 1988: 52–9; for a historical account of its use in Europe, see Eide, 1998). The application of personal laws, and thus the preservation of customary law or practices, 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 vigor 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 fourteen recognized 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 the 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 has helped in the social reproduction of the community—an important factor for a minority, many of whom live under foreign occupation. These conclusions corrobo-

rate an argument for cultural autonomy, namely, that it "supports political stability by providing non-dominant (and unassimilable) groups with mechanisms that enable them to minimize 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 both 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." 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" (1993: 37).

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 Bano* case (above), 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 that 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 (*Sandra Lovelace v. Canada*—Report of the Human Rights Committee. GAOR. Thirty-sixth session, Supplement No. 40 [A/36/50], 166–75). 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. The South African solution was to provide for the application of customary law but subject to the Bill of Rights.

CONCLUSION

The cases studied here show that no simple judgment on the utility or justice of the political recognition of ethnic diversity is possible. Separate legislative representation has sometimes been worthwhile, as the Indian example shows; but mostly it has been harmful. Asymmetrical federalism has great capacity to respond to the varying circumstances and needs of ethnic groups. But it is hard to negotiate and sometimes hard to operate. Cultural autonomy can give a beleaguered community a sense of identity and moral cohesion, and assist in preserving its traditions. But as with other asymmetrical devices, it can cause injustice to both the members of the autonomous community and those outside it. All three can produce resentment and conflict.

Each of these devices has supporters and opponents. Even if it were agreed that none of them was the preferred approach, it may be hard to generalize about the usefulness of particular modalities. The choice between these options may depend, in many situations, less on their inherent merits than on circumstances and constraints. The objective circumstances as well as the aspirations of minorities vary from place to place and from time to time. For example, the size of the minority is a material factor: a substantial and economically well-off minority might not require special rules for legislative representation, but a small minority might. Moreover, in the former case special rules might be resented or mistrusted by the majority, but not necessarily in the latter case. Several of the studies in this book concern indigenous peoples—which may be regarded as a special case. Indigenous minorities have a strong moral case for special treatment—few groups have suffered as much as they from the oppression of outsiders, to which they are still vulnerable, their cultural traditions and community life is still strong, they have a strong affinity with land and nature, and they have a firm desire to continue with their traditions.

The choice of approach and modalities would depend on the ultimate goals that the state and minorities have set themselves. The problem arises when there is no consensus either between the majority and the minority or within either group. One section of a minority may want to preserve its social structure and culture at all costs; another may wish to escape the constraints or even the oppression of the community and seek its identity in a cosmopolitan culture. The choice would also depend on the balance between individual and communal rights. Nor are particular solutions valid for all times; they may need to be reviewed as the socio-economic and demographic situation changes. It is worthwhile to caution against reifying temporary or fluid identities, which are so much a mark of contemporary times. There is a danger of enforcing spurious claims of primordialism and promoting competition for resources along ethnic lines, thereby aggravating ethnic tensions. Separate representation and institutions tend to lead to ethnic manipulation or extremism. Many proposals for diversity that have been made in recent years are untried; and, even when tried, it is too early to assess their success. Many of them are concerned excessively with management conflict, and perhaps not sufficiently focused on long-term objectives.

Nevertheless, these studies highlight some aspects of the constitutional recognition of diversity that pertain to policy on this matter. Several examples of legal recognition of cultural diversity were imposed rather than sought by minority groups—for example, apartheid structures, or divide-and-rule mechanisms used by colonial authorities. Historically, diversity arrangements have been connected with discrimination and domination. Often, if a culture or religion is constitutionally recognized, it is the culture or religion of the majority, resulting in the domination of the culture of others—as in Sri Lanka and Malaysia. Separate cultural systems are also a way of privileging some members of a community, such as traditional elites—usually male—or the wealthy, over others. For similar reasons, emphasis and efforts that go into developing separate systems for separate cultures mean that urgent social problems, whether of a community or of all the people, may be neglected. One might conclude that while multiculturalism does require the reconsideration of traditional legal and constitutional orders, it is not so clear what in each case the emergent reconfigurations will be.

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Notes

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4 *R. vs. Oakes* [1986] 1 SVCR 103, at p. 136.