

Human rights and cultural identity in a constitutional framework

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Introduction:

The purpose of the proposed paper is to address the potential contradiction between human rights and the expression of cultural values through a comparative approach. The focus will be on the constitutional law framework, how it deals with the assertion of cultural identities and how basic human rights standards, in particular non-discrimination, are reconciled with the protection of cultural rights. I will also draw, as relevant, on international law.

I will ask a number of questions: why is the issue of the contradiction between human rights and culture arising? Is it because human rights are seen as opposed to a number of cultural values? or is it because human rights are interpreted through a particular cultural framework?

While the issue of the philosophical origin of human rights and their compatibility with different cultures and religions is an important aspect of global discussions on human rights, the present paper will be more concerned with concrete developments (and relevance) of positive law rather than with philosophical and moral justifications for human rights. In doing so, I will address the anthropological dimensions of human rights law. In particular, I will show that human rights have both a collective and individual dimension and the assertion of human rights goes hand in hand with a renewed expression of cultural identities.

The idea of human rights is historically tied with the idea of a “social contract” and the idea that the political framework for human rights (the State) and the group to which these norms apply (the nation) are automatically “congruent” (Gellner, 2006). This vision, derived in particular from the French revolution (Gauchet, 1989), is implicitly based on the idea that “contractual communities” are “natural” entities and that their existence as cohesive entities which can underwrite human rights is not problematic. This “statist” vision is still dominant in international law (Keitner, 2000), but has proved unsatisfactory, in particular in view of competing claims to self-determination and to cultural recognition.

As a result, I will focus on the actual context in which human rights are implemented and the tension between the individual and collective, as well as the universal and particular aspects of human rights. Culture and human rights will not be seen as operating in different spheres (even though they clearly are), but rather their articulation in a common framework where they intersect, here the legal framework.¹ The issue is therefore not so much to assert individual rights against group rights, but to define a model which articulates at the collective level both human rights and cultural identity.²

¹ on this approach see Wilson R. (1997)

² Van Dyke in Kymilkia (1995: 52)

1/ Individual, group and State: how to square the triangle ?

1.1 Individual and State: the “Janus face” of the nation-State

-Nation-state and citizenship:

The **nation-state** has been the original answer to ensure that individual and group, political and cultural are joined. For A.D. Smith (1998), nationalism is the “single red line (that) traverses the history of the modern world”, it is a “modern movement and ideology which emerged (in) the eighteenth century in Western Europe and America”. Culture is reconfigured through nationalism, which forms as well the basis of a civic community based on the equal recognition of the rights of its individual constituent parts.

For Dumont (1983), the nation is composed of persons who *see themselves* as individuals: **citizenship** represents the ideal model of the link between individual and collective levels. The nation-State responds to the need to protect both individual and group and, in order to do so, it transforms the individual and his or her private, personal attachments into a citizen guided by a concern for the public good.³ The nation-State thus represents the political and collective response to individualism, linking the individual and collective levels.⁴

The nation-State is a single entity which, at the same time provides a universal and equal protection to all its members and protects a distinct cultural character. The key issue is that the two objectives of *a community which is both universal and particular* are in constant tension: this is the “Janus face of the modern nation”⁵

The ideal model which allows the reconciliation of the particular and the universal is provided by “social contract” theorists, in particular Jean-Jacques Rousseau. Rousseau’s theory postulates the congruence between individual and general will of the “people”. The theory of the “general will” was the basis the Declaration of the rights of man and the citizen adopted in 1789: the link between human rights and the “general will” is made in article 6 of the 1789 Declaration (“the Law is the expression of the general will”) as the link between human rights and sovereignty results from article 3 (“the source of all sovereignty lies essentially in the Nation”). Sovereignty is tied to human rights: the Sovereign derives its legitimacy in the freedom and well-being of its constituent parts, the individuals. This relation is reciprocal: human rights legitimize the sovereignty of the nation, and in turn this sovereignty legitimizes human rights.

Modern democracy is thus born under the form of the nation (Schnapper, 1994). The nation provides the political framework to respond to aspirations to equality. The sovereign Nation is a “society of individuals”: sovereignty is not seen as limiting the freedom of the individual but on the contrary, in the “rousseauist” way, as enhancing this freedom.⁶ Sunstein (1988) provides an ideal model of what he calls “liberal republicanism”: 1/ deliberation in politics based on “civic virtue”, 2/ equality of political actors, 3/ “universalism” which allows to define a “common good” and 4/ citizenship based on rights which allow political deliberation.

³ see also Arendt (1968, 1966) on the link between nation-state, citizenship and human rights

⁴ see Balibar (1998: 127-130) and Noiriél (2001: 167, 203-205)

⁵ Habermas, cited in Benhabib, Seyla “Transformations of Citizenship: The Case of Contemporary Europe”, *Government and Opposition*, Volume 37, Number 4, October 2002, p. 450

⁶ Gauchet (1989: 48, 72-73, 78-79)

The idea of a “general will” is premised on the idea that a “common good” can always be identified and that neutrality is possible. Sunstein underlines that neutrality should be seen in an absolute way, but rather as relative to certain actions of the government, and is made possible by putting aside considerations (religion for example) only for the purpose of public deliberation: the idea of a public sphere distinct from the private sphere is here essential.

In the nation-State, the individual is recognized *both* as a member of a political community (a citizen) and a holder of rights (a human). As a result, the nation-State is dependent on a double source of legitimacy: the consent of the citizens and the respect for individual rights. The problem is that the idea that the sovereign deliberation of the people will always respect human rights appears axiomatic, grounded in natural law (which is today - unlike the time of the French revolution – at a minimum a highly questionable concept), but is not explained. The scope of human rights is also problematic: are rights those of the citizen or of all humans? In other words, how are the “universal” rights of all “men” connected to their implementation in the context of a given “particular” nation? A related issue is how to ensure that the nation is at all times “congruent” with the State, given the fragility of human rights as a logical and practical foundation for the political order. Keitner (2000) points to a number of paradoxes facing the “voluntarist” nation: what is the origin of the social pact, what is its anteriority? How to define a constitutional order which reflects truly the “general will”? How to separate insiders and outsiders in a nation based on universal ideas?

-Nationalism and ethnicity:

A.D. Smith sees a number of open questions facing any theory of nations and nationalism, in particular whether the nation is an end in itself or “a means to other ends” and whether it is “ethno-cultural in character” or a “social and political community”. These dilemmas are linked to the classical opposition between the “universalist”/“Western”, civic, liberal nation on one side and the “particularist”/“Eastern”, ethnic, cultural nation on the other, which has been critically discussed by a number of thinkers.⁷ This opposition needs to be revisited, as all nation-States are based *both* on the existence of a particular shared history and culture *and* a political community of equal citizens.

Another distinction which should be revisited is between (political) **nationalism** on one side as neatly opposed to (cultural) **ethnicity** on the other: for Dieckhoff & Jaffrelot (2005), “the convenient, but false, dichotomy between political and cultural nationalism should be discarded in favour of an analysis of the dialectic between politics and culture within each concrete nationalism.” A.D. Smith criticized the modernist view of the nation for having no theory of ethnicity and its relationship to nationalism. For Montserrat Guibernau (1999), nations become increasingly ethnic and ethnicities increasingly national.

Ethnicity as well as nationalism are the produce of mixed elements, both modern and ancient. Jaffrelot (in Dieckhoff & Jaffrelot, 2005) underlines the “congruence between theories of ethnicity and theories of nationalism”, referring in particular to Barth and his idea that ethnic identities, as much as national identities are largely constructed and deeply relational.⁸

⁷ Dumont (1983), Dieckhoff & Jaffrelot (2005), Schnapper (1994)

⁸ see also Schnapper (1994: 16-19) and Dieckhoff & Jaffrelot (2005: 65) on the difficulty to define ethnicity either based on biology which is too narrow or on culture which is too wide

The distinction between ethnicity and nationalism and the transition from one to the other needs to be reassessed: in both cases, the key is to understand how cultural transformation becomes political consciousness. Schnapper makes a distinction between ethnicity as a cultural fact and nation as a political fact, self-consciousness being the key – though sometime tenuous - distinction.

A convincing view of nationalism makes it the adaptation, the reaction of a given community when faced with the challenge of modernity: nationalism is a *political* response to *cultural* change and thus can be linked to ethnicity. B. Anderson (1983) and E. Hobsbawm (1983) have shown how nations supposedly based on deep historical roots are in fact “imagined communities” based on the “invention of tradition” or “fictive ethnicity”: both show how a supposedly deeply held ethnicity can in fact be a recent historically invention.

-A sociological approach to citizenship: integration

Schnapper (1994) advocates a sociological approach of the nation and makes of **integration** the defining sociological dimension of the nation: a nation defines itself by ability to integrate individuals in a “community of citizens” (see also Noiriel, 2001). This integration is first political, hence the close link between nation and State, even though political links and citizenship can be considered outside the State (regional with Catalans or Scots, European with the EU). Second, integration has also other social, economic and cultural dimension. Wilson (in Karst, 1986) distinguished between “status goals” and “welfare goals”: the first is about equal recognition and citizenship, whereas the second is more about equal access to public goods. Bosniak distinguishes between citizenship as status, as rights and as identity or solidarity: each distinction defines a potentially different reference community.⁹ The community providing status may not be the same as the one guaranteeing rights or solidarity: this is true in particular in federal States or supra-national institutions such as EU). With regards to migrants’ integration, Collett (2006) distinguishes three dimensions: a “legal-political” one, a “cultural-religious” one and an “economic-social” one. The success of integration thus depends on the transformation of the individual into a “*homo nationalis*” (Balibar, 1998), ie the institutional ability to transform an “imagined community” into an effective solidarity.

A number of policies have been carried out to foster integration. Cultural policies have been historically central: the cultural dimension is essential to define the specificity of the nation (role of linguistic, education and cultural policies). Welfare policies have also been used to foster integration. The nation (in particular in Western Europe) is increasingly linked to a conception of citizenship that includes social solidarity and to the welfare State (see TH Marshall, 1992). Externally, a similar model can be applied to migrants. Dieckhoff (in Dieckhoff & Jaffrelot, 2005) shows the role played by the State to consolidate cultural identity, in particular through linguistic policies: citing the example of France, he shows how education was used during the Third Republic to “standardize culture” through the spread of French as a dominant language and how internal migration from the countryside to the main cities was a factor of integration. The aim was the “fusion of culture and political society” (Gellner cited in Dieckhoff & Jaffrelot, 2005). Linguistic unification played a similar role in many eastern European countries. In Indonesia, one language (*bahasa*) among the many

⁹ see Karst (2000: 596), also Aleinikoff & Klusmeyer (2001: 237-252)

spoken in the archipelago has been used as an “inter-insular lingua franca” to unify disparate ethnies (see Anderson, 1983).

1.2 Groups and state: "liberal nationalism" vs. multiculturalism ?

If the nation-state is understood as both a community based on a given identity and on the equality of its members, the issue is to square the demand for cultural recognition and the equality principle. The importance of culture and ethnicity as part of the nation-building process raises the issue of how individuals and groups which do not recognise themselves in the majority culture can and should be recognised. In short, one could ask *whether there is a “right” not to assimilate* (Zook, 2006). The issue would be to what extent one can assert a "right to be different" or a right not to participate in some aspect of the dominant national public life.

Demands arise from groups, in particular minorities, competing with the group of citizens established by the nation-State. The previous link between nationality and citizenship, and between nation and State thus needs to be revisited. It will be aim of this chapter, as well as to articulate group rights (as “right to identity”) with the wider human rights framework, the main issue being *how to ensure equal treatment of various cultural groups within the State*.

This raises the issue of how the State should be linked with culture, while keeping its liberal democratic character. Two distinct answers can be given:

1/ **Unity:** the State is based on an official culture: this culture is defined in such a way as to be open to all, it is based on assimilation or integration.

2/ **Diversity:** the State is based on multiple cultures, citizenship is distinct from cultural belonging.

-Ethnic democracy / liberal nationalism:

Given the central role of the nation as a reference point for the State and its citizens, democracy cannot evict identity and culture from the political debate (seen as a neutral area where culture is not a criterion of choice). On the contrary, democracy means that identity becomes a matter for political deliberation, thus linking “ethnic” and “civic” dimensions. Incompatible visions of the nation in major democracies between left (civic, revolutionary) and right (traditionalist, racist/xenophobic) have not prevented a basic consensus on the content of national identity (language, constitution etc...). Conceptually, there is no reason why this identity cannot itself be as well a debated issue: the democratic nation-State offers a framework in which identity is a disputed and democratically contested concept.

A number of thinkers have termed this “liberal nationalism”, whereby the promotion of a national culture by the State does not prevent an open conception of citizenship and the tolerance for other cultural practices (Tamir, 1993). Whether one talks of “liberal nationalism” or “ethnic democracy” (Smootha, 2001), there are number of examples pointing to the compatibility between liberal and democratic principles and an ethnic definition of the nation. The end result is not so much an opposition between ethnic and liberal state, but a continuum between the liberal end and the ethnic end, between which a number of

intermediary solutions exist: the issue is therefore not the extent to which national identity is asserted, but whether this is accompanied by proper democratic and human rights safeguards. What needs to be assessed is how to ensure that the existence of a national culture does not lead to the repression of minority cultures as has been the case with virtually all countries mentioned above from France to Indonesia, Mexico or Turkey.

-From secularism to multiculturalism:

An alternative approach is multiculturalism which represents such an attempt to disconnect state and culture. One can draw a parallel here between secularism and multiculturalism: where secularism represents an attempt to separate religion and state, multiculturalism would be an attempt to separate culture and state. One could consider that multiculturalism could be defined as a “new secularism”, based on the separation between ethno-cultural differences and the State (Cassese, 1995; van den Berghe, 2002). Citizenship would mean a common civic space, but would not be based on a particular culture. For Gellner (2006), “in a nationalist age, societies worship themselves” just as they previously practised religious worship”: it is precisely this “worship” that is revisited by multiculturalism.

There are two distinct ways to approach both secularism and multiculturalism: one is to insist on neutrality (France, US) which in fact relegates religion and culture to the private sphere, the other is to insist on pluralism (India, Lebanon, Indonesia), whereby different cultures and religions are equally recognised. Sophisticated mechanisms to accommodate (reasonable accommodation) diversity can be seen as ways to implicitly recognise cultures or religions without necessarily granting these legal status.

Secularism has been a major element to legitimize the nation-State as distinct from religion. Two broad conceptions of secularism can be distinguished: a “negative” secularism whereby there is no established religion (France, US) as opposed to “positive” secularism whereby a multiplicity of religions is recognized (Belgium, most Western European States, India, Indonesia). Secularism is an essential condition to define an autonomous sphere for the State, but at the same time, total separation between State and religion proves impossible, as State laws and actions intersect with religion in a number of areas (education, freedom of worship etc...). The neutrality of the State is thus questioned, in particular by religious minorities (Islam in Europe or Christian minorities in the Arab world). Secularism thus means as much a withdrawal of the State from religion as fairness in the treatment of religion: a number of secular states (see West Europe) are based on an official religion (Ireland, Denmark, UK, Poland), but at the same time protect and recognise minority religions.

Multiculturalism has been another response to this tension which can be compared in some way to secularism, at it attempts to separate the *political* framework of the State from the *cultural* framework of the various groups present within a State, separating *political membership* from *cultural membership*. Once the limitations of the traditional model of the nation-State have been shown, the issue is to find ways to address cultural and group imbalances with the State, so as to ensure a genuine equality between different cultural groups. Multiculturalism is therefore not (only) about cultural groups living side-by-side, but about the equality between groups within a common civic framework: for Kymlicka (2001), “claims for minority rights must be seen in the context of, and as a response to state nation-building”.

One should also distinguish between multinational and multicultural demands. Sabbagh (in Dieckhoff & Jaffrelot, 2005) makes of political self-determination the key dividing line between nation and ethnicity: even if the two concepts, as we have seen overlap, they are not exactly identical: ethnicity tends towards the cultural and the nation towards the political. For Sabbagh, multiculturalism can either be understood as a way to integrate “ethnocultural minorities into mainstream national institutions, or ... as competing *nationalist* demands”.

This is raising a set of problems: first, the criteria according to which groups are recognised; second, the extent of group rights. Linguistic policies are illustrative of this tension, since all States need one or more official languages and need thus to make cultural choices, as it is virtually impossible or at least extremely impractical to use all existing languages as official languages. Most of the States will choose one official language and analogy could be made between the traditional principle *cuius regio, eius religio* (one king, one religion) and the modern principle one State-one language embraced by most of the States (de Varennes, 1999). Belgium or Canada, as well as India, provide examples of how State and language can be separated, but also of the difficulty to ensure fair treatment of various linguistic communities and maintain unity at the same time.

Another problem with multiculturalism is that it has been more concerned with minorities and asserting group rights within a wider community, but it does not address the problem of how to define citizenship for all: it has been a reaction to the cultural domination of the majority, but it has not defined a common framework for all. This criticism of multiculturalism relates also to the republican view of the nation as underpinning the possibility of expression of individual rights.

1.3 Conclusion:

We have come across two alternative models of how to address culture in a liberal democratic context. One emphasises unity, the other diversity. The key issue is whether the emphasis should be on promoting one single culture (possibly at the expense of minority cultures) or preserve pluralism (with the risk of promoting separate communities). Should cultural recognition come from the democratic process within one cultural framework, or should it be based on the prior recognition of diverse cultures?

Three concepts have been related to each other but should also be clearly distinguished: these are citizenship, nationality and ethnicity. The classical definition of the nation-state will clearly link citizenship and nationality as one single concept and exclude ethnicity as part of the private sphere as opposed to the public sphere. Drawing from the above it is clear that this neat distinction is at a minimum questionable at least insofar as it claims to be a fair description of reality (whether it is a worthwhile normative end is another issue which will be discussed below). Ethnicity appears increasingly as an alternative source of legitimacy as opposed to national identity: alternative scenarios appear, with citizenship grouping several nationalities (multinational democracies) or citizenship being "ethnicised" blurring a neat divide between nationality and ethnicity.

For example, in many East European countries, notions of citizenship (link to a State) and of nationality (link with ethnicity) are quite distinct, with even more refined distinction (in Poland) between ethnic and national minorities. Decolonisation offers another example where both nationality and ethnicity are linked: postcolonial leaders pursue a project of nation-

building, but at the same time need to draw on local ethnic references. Successful nation-building (Turkey, Mexico, Indonesia) is one that can draw on local cultural references and frame these in national terms.

Different scenarios thus appear as to how state and culture can be linked, with on one side unity and on the other diversity. However, two basic principles remain valid for any democratic state: first, a minimal definition of a common civic culture is essential; second, the assertion of culture should be compatible with the equality principle. This is what will be discussed in the second part.

2/ Models of articulation between cultural identity and human rights in a constitutional framework

Constitutions are the closest one can get to an explicit, written elaboration of a "social contract". They are based on the sovereignty of the people, provide the basic rules which unite individuals to a national community, granting rights and duties to citizens and laying down basic collective principles and rules. Constitutions are thus typically the key document where both the *particular* nature of the State, its specific cultural background is asserted and the *universal* nature of citizenship is laid down, usually in the form of a bill of rights or of general statements on the equality among citizens (sometime expanded to cover all persons, but we will be more concerned here with the provisions concerning citizens).

The issue is thus the extent to which particular provisions relating to the defense of a culture, a language or a religion are compatible with the general human rights framework, in particular the non-discrimination principle. The general definition proposed of human rights, unless stated otherwise, will be one laid down in the core international human rights instruments.

2.1 Models of cultural accommodation under a constitutional framework:

A number of authors detail models for multicultural accommodation. Smootha (2001), in particular outlines an interesting typology which can be arranged along the division between unity and diversity identified above. On the side of unity, Smootha (2001) distinguishes between: 1/ individual liberal democracy (based on non-discrimination and without official culture, religion or language), 2/ republican liberal democracy (based on a common civic culture), 3/ ethnic democracy (dominance of an ethnic definition of citizenship, which gives special status to the majority ethnic group, while ensuring basic rights to all). On the side of diversity, Smootha distinguishes between multicultural democracy (limited recognition of collective rights, in particular cultural rights) and "consociational" democracy (full and equal recognition of group rights, including political representation).

In addition to the opposition unity vs. diversity discussed above, another dimension need to be added based on the opposition equality/neutrality vs. inequality/partiality: the issue is not here whether one or more cultures are recognised, but whether culture is a factor of unequal or unfair treatment under law. The following table illustrates this:

	Unity	Diversity
Equality / neutrality	1) Neutral model: "Thick" common civic culture Non-discrimination Reasonable accommodation Integration (language, education policies) Separation State-Church	2) Multicultural model: "Thin" common civic culture Multiculturalism Minority/linguistic rights Multicultural/multilingual policies Positive recognition of religions
Inequality / partiality	3) Apartheid: State based one ethnic group/culture Forced assimilation Segregation / apartheid Non-members of dominant culture are denied rights	4) Asymmetric model: Asymmetric / Ethnic democracy Special rights for established religion, dominant culture, ethnic group Limited rights for minorities

Three basic models can thus be distinguished (leaving aside the "apartheid" model):

First, a **“neutral”** model, which would include the "individual liberal democracy" (based on non-discrimination and without official culture, religion or language) and "republican liberal democracy" (based on a common civic culture) identified by Smooha.

Second, a **“pluralist/communitarian”** model, which would cover “multicultural” and a “consociational” variants identified by Smooha.

Third, a **“cultural asymmetry”** model, whereby an ethnic, cultural or religious group is explicitly favoured by the state.

What is interesting to note is the circulation between these models: the neutral model can borrow some elements of the pluralist model (by recognising groups, for example through affirmative action) or to the cultural asymmetry (liberal nationalism). The pluralist model can tend towards the domination of one group, whereas the asymmetric one will recognise minorities.

2.2 Typology of relations between human rights and culture in constitutional frameworks:

The “neutral model”

This model can be subdivided between "republican" and "liberal" variants. The **"republican" model** (which I would also term “secularist” or “liberal nationalist”) is based on the active

promotion of a common unitary civic culture as opposed to particular cultures seen as sources of internal divisions. Under this model, the dominant culture of the majority will tend to be promoted at the expense of minority cultures. At best, minority cultures are ignored in the public sphere, the free expression of minority culture being allowed, but not afforded any official recognition (**France** and **Turkey** are representative of this model, although both are evolving towards enhanced recognition of minority cultures). This model is based on the link between State and a people defined as a unified entity, which excludes the recognition of other groups which would compete with this unity: as an example, the French Constitutional Court (Conseil Constitutionnel) removed a reference to the “Corsican people” in a law on the autonomy of the Corsican region, as this was incompatible with the idea that the sovereignty is exclusively vested in the French people (while at the same upholding most of the legal provisions dealing with the autonomous status).¹⁰

It is based on the assertion of a strong common civic culture, based in particular on a constitutionally recognised language. For example, in France, French is recognised in the Constitution (article 2) as the official language, at the exclusion of other languages: the Constitutional Court considered that the European Charter on minority languages was contrary to the Constitution as it would lead to the use of such languages in public life and to the recognition of separate territories and groups for the purpose of the Charter.¹¹ This situation has increasingly led to claims for a legal recognition of minority languages.¹² The same is true in Turkey with the promotion of a single common culture, based on Turkish language at the exclusion of a number of minorities (in particular Kurds).¹³

The “secularist” model is often hiding a special treatment for the dominant religion, based on the control of the Church by the State. It generally results from a history of struggle between the State and a dominant religion. As a result, the State tends to take over religious functions (e.g. personal law) and carve out a special legal framework for the dominant religion, despite formally legal neutral provisions. This is particularly true in Turkey, where the State has effectively taken control of Islam and is administering it through the Directorate for Religious Affairs in Turkey. There is also a *de facto* support to the dominant religion in France through subsidies to religious buildings built before 1905 (date of the separation between state and church) and to confessional, predominantly Christian, schools.¹⁴

The "**liberal model**" (termed also “constitutionalist” / non-discrimination / “reasonable accommodation”) model is based on the equal protection of cultures and communities by a neutral, “minimal” State. Under this model, the state is “culture-blind”. The vision of culture is purely negative: belonging to a given culture is irrelevant to enjoy guaranteed rights or

¹⁰ Decision 91-290 DC, 9 May 1991

¹¹ Decision 99-412 DC, 15 June 1999

¹² Several Members of Parliament have asked for a legal recognition of regional languages during the debate on the Constitutional amendment introducing French as the official language (see declarations of Mr Bello, Ms Jacquart, Mr Zeller, Mr Brianc, JO Débats AN 12 mai 1992, pp. 1020-1021)

¹³ Turkish is recognised as the official language under article 3 of the Constitution. Aydın & Keyman (2004: 34-39) have shown how the accession process to the European Union has contributed to remove restrictions on the Kurdish language, but without giving it official status.

¹⁴ The law of 9 December 1905 (article 13) on the separation between Churches and State provides for public funding for religious buildings that remain public property (see official text at: <http://www.legifrance.gouv.fr/texteconsolide/MCEBW.htm>, accessed 20 May 2007). 17% of French pupils go to private schools (95 % of which are catholic schools). Private schools receive around 10 % of the State budget for education (data provided by the official version of the 2006 education budget on <http://alize.finances.gouv.fr/budget/plf2006/bleus/pdf/DBGNORMALMSNEC.pdf>, accessed 20 May 2007)

benefit from State support (Federal States are more likely to adopt such a model, more acceptable to its various constituencies: **United States** are typical of this model).

India, South Africa, Nigeria and Indonesia have also adopted some elements of this model, but mixed with “communitarian”/“multiculturalist” elements. In these countries, there is an added element of legal pluralism: under the State-based legal framework, religious or customary law can be recognised (this applies also to some extent to the United States, Canada and Australia in the case of indigenous people).

The “liberal model” (unlike the “republican model”) does not explicitly impose a single version of national culture. It allows more room for the expression of different cultural expressions and group claims. This is the case with affirmative action provisions which introduce differentiated rights (unlike the “secularist” model which will insist on the formal equality of citizens as belonging to a single group).

The “multicultural” model:

Under this model cultural diversity is *explicitly* recognised and actively promoted at State level on an equal basis. It can be based on a more or less deep institutional and legal recognition of various groups present within the State. Two broad categories can be distinguished: the first is the deeper institutional recognition which leads to a form of “federation of groups” within the State called the “consociational” model. The second is the “multiculturalist” model proper where diversity receives limited constitutional recognition in the area of culture, personal law, but stops short of full political recognition.

Under the “**consociational**” model, various cultural communities are recognised on an equal basis by law (no particular community is singled out under the Constitution), are allowed to adopt their own laws and are represented within the State (**Belgium, Bosnia, Mauritius** or **Lebanon** would represent such a model). This model will tend towards “vertical” pluralism as opposed to “horizontal” pluralism. This model has been termed “consociational” as it favours the development of separate entities under a single institutional framework: institutional arrangements are not only territorial, but also non-territorial, communities being allowed to have their own arrangements across the whole territory (the Ottoman “millet system” being a classical example).

A key distinction is the “liberal/modernist” as opposed to the “authoritarian/traditional” dimension of group recognition. Some writers on multiculturalism (see Gutmann, 2003) have underlined the central importance of the *right to exit* as the central condition for a liberal approach to cultural recognition: issues such as conversion or mixed marriage often cause difficulties for legal models based on the division in different communities and raise the issue of the rights of individuals within their group (“internal protection” as opposed to “external protection”¹⁵). The existence of “constitutionalist” elements, such as the protection of fundamental rights and general provisions on equal protection of the law and non-discrimination, are guarantees of the liberal character of the State.

Under the “**multiculturalist**” model, a common constitutional “umbrella” is maintained without reference to a particular culture. A useful distinction can also be made between group

¹⁵ Kymlicka (1995: 14)

membership and the rights attached to it: while the individual belonging to a group has rights attached to this group, he/she would nevertheless remain under the protection of the wider legal framework (see Shachar, 1998). The existence of a neutral, civil (and optional) legal framework is here essential. More generally, the existence of “constitutionalist” elements, such as the protection of fundamental rights and general provisions on equal protection of the law and non-discrimination, are guarantees of the liberal character of the State.

Hungary offers an example of a large autonomy provided to minorities under a common constitutional framework. **India** and **Indonesia** offer other interesting examples where a formally “constitutionalist” model, which does not provide constitutional recognition to particular groups, is mixed with “communitarian” or “pluralistic” elements: in both countries, personal law is managed by groups according to their religion. In Indonesia, every individual has to be registered under one of six recognised religions.¹⁶ In India, religious law continues to apply despite the constitutional objective a single civil law.¹⁷ A key issue is the existence or not of a single optional civil law, which can allow individuals not to be attached against his will to any given group.¹⁸ In India, other “pluralistic” elements are the recognition of minorities, local languages and the indirect recognition of castes, through affirmative action measures. The case of castes is interesting as it has “communitarian” effects, while being derived from the “constitutionalist” aim of promoting equality through affirmative action measures in favour of lower castes.

In **Indonesia**, **South Africa** and **Nigeria**, beside religious law, customary law is also recognised as a source of law (*adat* law in Indonesia¹⁹). In all these cases, however, group recognition is limited by the formally neutral character of the Constitution and the judicial control, which limits the extent to which special rules can be applied.

The “cultural asymmetry” / “ethnic democracy” model:

Under this model, the State is explicitly established with reference to a particular culture or religion, which receives official support and whose members are explicitly favoured against members of other cultures. Smooha (2001) talks of “ethnic democracy”. Even though it can include at varying degree either “multicultural”²⁰ or “constitutionalist”²¹ elements, such a model is giving a privileged status to a dominant ethnic group. **Fiji**,²² **Malaysia**,²³ **Israel**,²⁴ as well as a number of Arab countries,²⁵ are representative of this model,

¹⁶ Six religions (Islam, Protestantism, Catholicism, Hinduism, Buddhism and Confucianism) were recognised by a Presidential decision of 1965 (Presidential Decree No. 1/Pn.Ps/1965) modified in 1969 Statute No. 5/1969. The status of Confucianism remains disputed, as it is not among officially recognised religions in subsequent legal documents.

¹⁷ see article 44 of the Indian Constitution

¹⁸ see discussions in Lebanon around facultative civil marriage (Assaf, 1999)

¹⁹ While there is no single definition of indigenous peoples or minorities, “traditional communities” are recognised under the 2002 amended Constitution (article 18B) as *adat* law (or customary law) communities.

²⁰ For example in Fiji, aside from the dominant Fijian community, another group, the Indians, receive a special protection as regards language (Chapter 1, Section 4 of the Constitution) and representation in Parliament (Chapter 6, Section 51 of the Constitution); in Iran, some religious minorities are also recognised under article 13 of the Constitution.

²¹ For example in Malaysia, religious freedom is protected under article 11 of the Constitution

²² The Fijian Constitution (Chapter 2, Section 6) provides for the special interests of the Fijian community, which is singled out among the groups present in Fiji.

²³ Article 153 of the Constitution provides for a special status for Malays (see definition under art. 160.2), as opposed to other citizens..

The key problem posed by this model, in particular as regards international law, is that the equality principle is not respected, as the recognition or preference given to one culture/religion is not compensated by similar rights for minorities or other groups present in the country.

It should be pointed out that the official recognition of a national religion or culture does not *in itself* prevent impartiality from the State: the UN Human Right Committee considers that the existence of a State religion is not in itself an obstacle to religious freedom.²⁶ In many countries (for example in Europe), such an official recognition is simply a reflection of the existence of a majority religion, without strong normative value: it is therefore not an obstacle to the recognition of other religions (even if there are –often historical- biases such as State funding, school curricula etc...).

Conversely, “pluralist”, “constitutionalist” or “secularist” systems do not necessarily prevent the domination of one culture or religion on public life. The cases of Turkey or France were mentioned. In India, while there is an official secular policy, hinduism can be considered a “special” case, as it has special obligations (for example, temple access for lower castes²⁷) and rights (affirmative action provisions are directed towards Hindus, despite the existence of castes outside Hinduism²⁸).

Another element often pointed out by “asymmetric” States such as Malaysia or Fiji is that the politically/culturally dominant community is also an economically disadvantaged community, hence entitled to affirmative action provisions. Even if this is true, it cannot justify a general policy of preferences which goes well beyond strictly economic/social matters and is also aimed at ensuring political dominance of this community.

Conclusion: what model for the articulation of cultural identity and human rights under international law?

The conclusion will aim at defining the elements found in the various constitutional framework which have been assessed with a few to find what elements can be compatible with international law and could thus be “replicated” and/or considered “good practices”.

²⁴ See Smooha, Sammy "The Model of Ethnic Democracy: Israel as a Jewish and Democratic State." *Nations and Nationalism* 8, 4 (October 2002):475-503

²⁵ Saudi Arabia is the most extreme example with the Sharia being the exclusive source of law. Egypt or Morocco are examples of unitary States based on one religion (Islam) and culture (Arab nation) but without recognition of minorities (see CERD concluding observations and summary records: CERD/C/SR.1020, 1484, 1485, 1554 & 1555; CERD A/58/18 (2003); CERD A/ 56/18 (2001))

²⁶ HRC General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) - 30/07/93 - CCPR/C/21/Rev.1/Add.4

²⁷ article 25 of the Constitution of India provides for “the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus”.

²⁸ This position was in particular affirmed by the Supreme Court of India which held in *S. Rajagopal v C. M. Armugam and Others* (1969 AIR(SC) 101), that the “caste system prevails only amongst Hindus”. This view is based on the 1950 Presidential Order [Promulgated in the Union of India, Ministry of Law notification No SRO 385 (CO 19) dated 10.08.1950] listing Scheduled Castes (SCs) which benefit from affirmative action, issued on the basis of article 341 of the Constitution: despite the absence of constitutional provisions in this sense, it has limited membership in SCs to Hindus - later extended to Sikhs (1956) and Buddhists (1990).

International law creates a number of obligations. First, it creates a general obligation for States to ensure that there is no discrimination in the enjoyment of rights. Second, there is an obligation to take positive measures to prevent discrimination (“affirmative action”). Third, there is an obligation to protect minority cultures and ensure the freedom to enjoy one’s culture. A number of conclusions can therefore be drawn as regards the position of international law on the various models outlined above. As a result the following comments can be made as regards the position of international law on the various models outlined above:

-The international framework is not conducive to “secular” or “cultural asymmetry” models: while the “secular” model is aimed at preventing discrimination, it will fail to protect minority groups through positive discrimination or by allowing particular cultural rights. By favouring the building of a civic culture based on the dominant culture, the “secular” model will tend to leave aside minority cultural claims. The single civic culture, being built on the notion that all individuals should be under the same law, is not conducive to the recognition of particular claims, either under the form of affirmative action or under the form of minority rights.

The “cultural asymmetry” model explicitly discriminates against minority cultures, by asserting a dominant culture. Even though it may grant some degree of legal recognition to minorities, it will often fail the test of non-discrimination as the rights granted will not compensate a more general pattern of discrimination and tend to separate minorities, rather than integrate them.

-The international framework contains “constitutionalist” elements: the imperative of equal treatment is central in the international framework. The UDHR forms the basis of minimal constitutional rules that have to apply to all members of any given political community and the ICERD creates an obligation to effectively ensure that there is no discrimination. However, nothing in the international framework prevents a State to explicitly refer to cultural traditions or a religion in its Constitution or laws, as long as the principle of equality before the law is protected.²⁹

International law allows and even imposes “affirmative action” to actively promote the rights of a given community/group of persons which is subject to a particular discrimination. The goal is however not to promote special rights, but is rather an extension of the non-discrimination principle, which is compatible with the “constitutionalist” framework.

-The international framework contains “pluralist/communitarian” elements: article 27 of ICCPR creates an obligation to protect minority rights and a “pluralistic/communitarian” framework is well suited to do so.

The key issue here is how the recognition of different groups can be made on a non-discriminatory basis, ensuring that such recognition does not lead to the domination of one group over the others. In particular, if the Constitution or laws of the State may refer to a particular culture, it should also provide explicit recognition and support to minority cultures present in the country.

Another key issue is the articulation of individual rights with group rights in such a framework. International law states that human rights apply to all aspects of the legal

²⁹ see HRC General Comment 22 (Article 18: The Right to Freedom of Thought, Conscience and Religion)

framework, including customary law and personal law.³⁰ In particular, a number of questions are raised:

-how does the non-discrimination principle apply to individuals under the traditional customary, tribal or religious laws, which may be recognised as a result of the recognition of a particular culture (see Lebanon and its confessional legal system or Nigeria and the implementation of Sharia: more generally, see Ibhawoh, 2000, on the compatibility between constitutional and cultural norms)?

-is there an obligation to ensure that any member of minority groups can opt for the general laws rather than the special laws of his or her community?³¹

³⁰ see HRC General Comment 19, Protection of the family, the right to marriage and equality of the spouses (Article 23) and cases of Lebanon (ICCPR, A/52/40 vol. I 1997 para. 348), India (ICCPR, A/52/40 vol. I 1997 para. 432) and Zimbabwe (ICCPR, A/53/40 vol. I 1998 para. 214)

³¹ See cases of Lebanon (CERD/C/SR.1628 9 March 2004 para. 13) and Indonesia (CEDAW A/53/38/Rev.1 1998 para. 286-287)

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