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James Tully

Excerpt

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## CHAPTER I

*Demands for  
constitutional recognition*

*The constitutional question raised by the politics of cultural recognition: six examples and three similarities*

The question I wish to address in this book is the following. Can a modern constitution recognise and accommodate cultural diversity? This is one of the most difficult and pressing questions of the political era we are entering at the dawn of the twenty-first century. The question can even be said to characterise the coming era, for when it is not described in relation to the preceding period, as a post-imperial or post-modern age, it is often described in its own terms, as an age of cultural diversity. The question is not whether one should be for or against cultural diversity. Rather, it is the prior question of what is the critical attitude or *spirit* in which justice can be rendered to the demands for cultural recognition.

We can begin to gain an initial grasp of this elusive question by briefly surveying the range of political struggles which have rendered cultural diversity problematic, causing it to become a locus of political action and philosophical reflection. In contemporary political vocabulary, the various struggles for recognition of cultural diversity are classified as different in kind and studied by different specialists. There is no single term which covers them all. As a result, whatever similarities and differences in degree, rather than in kind, may exist among them are hidden from view by our ordinary forms of language. Accordingly, I will introduce the phrase 'the politics of cultural recognition' to gather together the broad and various political activities which jointly call cultural diversity

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into question as a characteristic constitutional problem of our time.

The most familiar form of the politics of cultural recognition is the claims of nationalist movements to be constitutionally recognised as either independent nation states or as autonomous political associations within various forms of multinational federations and confederations. As existing nation states and former empires are hard pressed by these cultural demands from within, they are also faced with pressures to recognise and accommodate larger, supra-national associations with powerful cultural dimensions, such as the European Union and the North American Free Trade Agreement. Caught in the interstices of these large and volatile struggles, longstanding linguistic and ethnic minorities advance claims for constitutional recognition and protection.

Cutting across the complex terrain of these three forms of demand, and frequently conflicting with them, the multicultural or 'intercultural' voices of hundreds of millions of citizens, immigrants, exiles and refugees of the twentieth century compete for forms of recognition and protection of the cultures they bring with them to established nation states. These intercultural demands (as I shall call them) range anywhere from schools and social services in one's first language, publicly supported TV, film and radio, affirmative action, and changes in the dominant curricula and national histories, so that they respect and affirm other cultures, to the right to speak and act in culture-affirming ways in public institutions and spheres. In response, modern societies have begun to be called 'multicultural', yet with no agreement on what difference this makes to the prevailing understanding of a constitutional society.

Complicating further this bewildering landscape, the demands of feminist movements for recognition are raised within and across each of these struggles for national, supra-national, minority and intercultural recognition. The claim of cultural feminists, broadly speaking, is not only that women should have an equal say within the constitutional institutions

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of contemporary societies and their authoritative traditions of interpretation. Because the constitutional institutions and traditions of interpretation were established long ago by men to the exclusion of women, it follows that they should be amended from the ground up, so to speak, in order to recognise and accommodate women's culturally distinctive ways of speaking and acting, so that substantive gender equality will be assured in the daily political struggles in the institutions the constitution founds. Making this task even more difficult, women's culture itself is not homogeneous, but multicultural and contested.

The last example of the politics of cultural recognition, yet the first in time and history, is the demands of the 250 million Aboriginal or Indigenous peoples of the world for the recognition and accommodation of their twelve thousand diverse cultures, governments and environmental practices. Throughout the world, they are fighting to be recognised as First Nations in international law and in the constitutions of modern societies that have been imposed over them during the last five hundred years of European expansion and imperialism. Their struggles for constitutional recognition intersect and clash with the other examples of cultural recognition in many different ways.

The struggles of the Aboriginal peoples of the world, and especially those of the Americas, for cultural survival and recognition are a special example of the phenomenon of the politics of cultural recognition. By my lights, they are exemplary of the 'strange multiplicity' of cultural voices that have come forward in the uncertain dawn of the twenty-first century to demand a hearing and a place, in their own cultural forms and ways, in the constitution of modern political associations. By 'exemplary', I do not mean that their challenge is an instance of a general rule or an ideal type of the politics of cultural recognition, but that it is a particularly enlightening example.

There is abundant scholarship on constitutionalism from the perspective of nationalism, supranationalism, linguistic and ethnic minorities, interculturalism and feminism. There

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is also considerable specialised scholarship on Aboriginal peoples and international law and the constitutional law of specific countries. However, there is little on the Aboriginal peoples and the historical formation of contemporary constitutionalism. One of the central arguments of this book is that if constitutionalism is approached from the perspective of the struggles of Aboriginal peoples, unnoticed aspects of its historical formation and current limitations can be brought to light. I believe that the vision of constitutionalism that this unique perspective affords, in conjunction with the perspective of the other, more familiar, demands, is capable of transforming the way we think about constitutionalism.

If sharp boundaries are drawn around each of these six types of cultural recognition on the basis of their dissimilarities and they are studied separately, as is usually the case, then the similarities among them are overlooked. Their separation in theory is reinforced by the fact that they clash, often violently, in practice. It is thus often assumed that they are incompatible and incommensurable. However, when they are rearranged and grouped together as examples of the politics of cultural recognition, and we look and see, their disregarded resemblances come to light and disclose the landscape of contemporary political conflict which raises the question of constitutionalism and cultural diversity.

Among the many similar aspects, three are important for the purposes of this book. First, demands for cultural recognition are aspirations for appropriate forms of self government. The forms of self rule appropriate to the recognition of any culture vary. Some, such as nationalist movements and Aboriginal peoples, strive for their own political institutions. Others, such as linguistic minorities, multicultural groups and women, seek to participate in the existing institutions of the dominant society, but in ways that recognise and affirm, rather than exclude, assimilate and denigrate, their culturally diverse ways of thinking, speaking and acting. What they share is a longing for self rule: to rule themselves in accord with their customs and ways.

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The call for forms of self rule, the oldest political good in the world, has been obscured by the redescription and adjudication of the various claims in terms of nationalism, self determination, the rights of individuals, minorities and majorities, liberalism versus communitarianism, localism versus globalism, the politics of identity and the like. Although these dominant and exhaustively analysed categories catch aspects of the phenomenon, they mis-identify the shared aspiration and segment it into a cacophony of heterogeneous claims. The resemblance is further obscured by the sheer diversity of forms of self rule they long for and, as we shall see, by the restricted conception of self government available in the prevailing language of constitutionalism.

The second similarity is the complementary claim that the basic laws and institutions of modern societies, and their authoritative traditions of interpretation, are *unjust* in so far as they thwart the forms of self government appropriate to the recognition of cultural diversity. The sovereignty of the people is in some way denied and suppressed, rather than affirmed and expressed, in the existing constitutional forms, thereby rendering unfair the daily politics that the constitution enframes. The constitution, which should be the expression of popular sovereignty, is an imperial yoke, galling the necks of the culturally diverse citizenry, causing them to dissent and resist, and requiring constitutional amendment before they can consent. Again, the similarity of the injustice claimed in each of the six examples is obscured by the wide variety of forms it takes.

The final similarity I wish to draw to your attention is the ground of both the aspiration to culturally appropriate forms of self rule and the claim of injustice. It is the assumption that culture is an irreducible and constitutive aspect of politics. The diverse ways in which citizens think about, speak, act and relate to others in participating in a constitutional association (both the abilities they exercise and the practices in which they exercise them), whether they are making, following or going against the rules and conventions in any instance, are always to some extent the expression of their

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different cultures. A constitution can seek to impose one cultural practice, one way of rule following, or it can recognise a diversity of cultural ways of being a citizen, but it cannot eliminate, overcome or transcend this cultural dimension of politics.

Hence, the argument is that if the cultural ways of the citizens were recognised and taken into account in reaching an agreement on a form of constitutional association, the constitutional order, and the world of everyday politics it constitutes, would be just with respect to this dimension of politics. Since the diverse cultural ways of the citizens are excluded or assimilated, it is, to that extent, unjust. Moreover, a certain priority is claimed for justice with respect to cultural recognition in comparison with the many other questions of justice that a constitution must address. Since other questions of justice must be discussed and agreements reached by the citizens, the first step is to establish a just form of constitutional discussion in which each speaker is given her or his due, and this is exactly the initial question raised by the politics of cultural recognition.

So, despite their variety and apparent novelty, the examples of the politics of cultural recognition, in virtue of their three family resemblances, share a traditional political *motif*: the injustice of an alien form of rule and the aspiration to self rule in accord with one's own customs and ways. Seen in this light, they are struggles for 'liberty' in the remarkably enduring sense of this term. From the struggles of the Italian city states for *libertas* against imperial rule during the Renaissance, to the European and American revolutions for liberty in the early modern period, and to the national liberation movements of the twentieth century, 'liberty' has meant freedom from domination and of self rule. What is distinctive of our age is a multiplicity of demands for recognition at the same time; the demands are for a variety of forms of self rule; and the demands conflict violently in practice.

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*The mutual recognition of cultural diversity: three features of the common ground and three historical movements*

Consequently, the question of our age is not whether one or other claim can be recognised. Rather, the question is whether a constitution can give recognition to the legitimate demands of the members of diverse cultures in a manner that renders everyone their due, so that all would freely consent to this form of constitutional association. Let us call this first step towards a solution ‘mutual recognition’ and ask what it entails.

In the first instance, it cannot be the traditional nationalist recognition of one culture at the expense of excluding or assimilating all others. This widespread constitutional nationalism comes in a variety of types and has been recommended by writers as different as the authors of *The federalist papers* in the 1780s, Johann Gottlieb Fichte in the *Addresses to the German nation* in 1807–8 and Sir John Seeley, in *The expansion of England* in the 1880s. I also believe the solution cannot be to presume that a constitution can avoid recognising any culture. As we shall see, such Esperanto constitutionalism, recently defended by a number of liberal theorists, is an illusion which hides from view the imperial culture embodied in most liberal constitutions, as the classic liberal theorists realised. A recent example of presumed, culture-blind liberal constitutionalism is the Canadian Charter of Rights and Freedoms of 1981. Rather than uniting the citizens on a constitution that transcends cultural diversity, it has fostered disunity. The province of Québec, the Aboriginal peoples, women and the provinces resisted it at various times as the imperial imposition of a pan-Canadian culture over their distinct cultural ways. Many other countries, such as the United Kingdom and New Zealand, have experienced similar public debates over charters of rights and cultural diversity.

The consequence of national and liberal constitutions, which have been the dominant forms over the last three hundred years, is precisely the contemporary resistance and demands for recognition of the members whose cultures have



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been excluded, assimilated or exterminated. A just form of constitution must begin with the full mutual recognition of the different cultures of its citizens.

Second, mutual recognition cannot be simply the recognition of each culture in the same constitutional form. There is a tendency to imagine this is possible because 'cultures' are conceived as analogous to the more familiar constitutional concept of 'nations'. Hence, the age of 'multiculturalism' is seen as a kind of extension of the last three centuries of multinationalism with no fundamental change in constitutional thinking required.

When the revolutions of central and eastern Europe overthrew the old imperial constitutions after 1989, the peoples who demanded recognition redescribed their cultures as 'nations' (the most prestigious form of cultural recognition). They then inferred that the only form of constitutional recognition of a nation must be an independent nation state. Under the logic of this inference, they tended to pass rapidly through multinational constitutional federations and to disintegrate into nationally defined states. These revolutions thus continued one of the oldest conventions of modern constitutionalism: every culture worthy of recognition is a nation, and every nation should be recognised as an independent nation state. Although this has been the dominant form of constitutional recognition since the seventeenth century, it cannot be simply extended to the demands for cultural recognition today.

As writers as different as Ernest Gellner and David Maybury-Lewis have argued, the consequence is impractical. There are over fifteen thousand cultures whose members demand recognition, yet a world system of fifteen thousand independent states on this tiny and interdependent planet would be unworkable. It does not follow that the present system of nation states is unalterable, as conservatives have concluded. Change and impermanence have been features of the system since 1648. The international system would still be workable if, say, East Timor separated from Indonesia, Scotland from the United Kingdom, Catalonia from Spain,



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Québec from Canada or the predominantly Spanish-speaking states from the United States.

The system would be unworkable only if the norm that every nation should be a state were applied universally as the solution to demands for cultural recognition. The established nation states have constrained the proliferation of states in the past by restricting the application of the term 'nation' in international law. The reason why continuing in this manner is now in question is the sheer number of demands for recognition as nations, coupled with the exposure of the manipulation of the criteria of nationhood in the past to preserve the powers that be.

It is clear that the dominant constitutional norm that every nation should be recognised as an independent state needs to be supplemented by the idea that nations can achieve just recognition in multinational federations of various kinds, such as Germany, Israel–Palestine, India, the United Kingdom, the Russian federation and the European Union. However, even though the *practice* of multinational and multiregional federation is as old as modern constitutionalism, the norm of independent nation states is so predominant that the basic concepts of contemporary constitutionalism are defined in agreement with it. The concepts of the people, popular sovereignty, citizenship, unity, equality, recognition and democracy all tend to presuppose the uniformity of a nation state with a centralised and unitary system of legal and political institutions. Accordingly, when forms of multinational federalism are advanced as solutions to some of the demands for cultural recognition, they appear *ad hoc*, even as a threat to democracy, equality and liberty, rather than as forms of recognition that can be explained and justified in accordance with the principles of constitutionalism.

The more important reason why the two assumptions that cultures worthy of recognition should be nations and nations should be recognised as states need to be revised is that they mis-identify the phenomenon of cultural diversity we are trying to understand. According to the concept of a culture (or nation) that developed with the formation of modern

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constitutionalism from the seventeenth to the twentieth century, a culture is separate, bounded and internally uniform. Over the last forty years this billiard-ball conception of cultures, nations and societies has undergone a long and difficult criticism in the discipline of anthropology. As Michael Carrithers summarises in *Why humans have cultures*, it has gradually been replaced by the view of cultures as overlapping, interactive and internally negotiated. Let us look at each of these three features of cultural diversity, for we cannot grasp the politics of cultural recognition without them and the way they transform our understanding of being with others in the world.

The way the inherited normative vocabulary misrepresents the cultural diversity of our time was tragically exposed in the early 1990s across the Ukraine, the Baltic states, the Caucasus, central Asia, Russia and the former Yugoslavia. As new nation states were formed and recognised, overlapping minority cultures within, as well as nationals left without the new boundaries, in turn immediately demanded recognition as nations. Cultural minorities in these minorities in turn demanded recognition and protection. There is no end or exception to this criss-crossing and overlapping of cultures in the world. The tragedy of Bosnia–Herzegovina, or of the Hutu, Twa and Tutsi of Rwanda, Burundi, Zaire and Tanzania in East Africa, is only a recent example of the policies and wars of repression, assimilation, exile, extermination and genocide that compose the long and abhorrent history of attempts to bring the overlapping cultural diversity of contemporary societies in line with the norm of one nation, one state. Aboriginal peoples of America, for example, have suffered similar ethnic cleansing for five hundred years. Far from silencing demands for cultural recognition, these wars in the name of the unity of the nation have been met with unconquerable resistance, as the suppressed cultures snap back like so many bent yet unbreakable twigs, as Sir Isaiah Berlin aptly puts it.<sup>1</sup>

Constitutionalism in an age of diversity is yet more difficult than this. Not only do cultures overlap geographically and