

A Postmodern Account on Cultural Pluralism and Harmony Comparing the Constitutional Experiences of Bolivia and Nepal

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Abstract Cultural pluralism and the legal acknowledgment of diversity are currently pervasive topics within comparative constitutional law debates. From the post-Westphalian conception of the nation-state, contemporary and avant-garde forms of constitutionalism in Latin America and South Asia had to struggle with the colonialism's legacy of monoculturalism, claiming for a proper space for their autochthonous traditions within the legal systems. To this extent, the constitutional experiences of Bolivia and Nepal represent suitable examples to 're-think' the role of culture under a less legalistic approach. From these assumptions, the article aims to verify whether the concept of harmony within the constitutional frameworks of pluralistic societies could be considered as one of the main features of their legal systems (or even the founding myth of the state) through intercultural/multicultural approaches to diversity.

Keywords Interculturalism. Multiculturalism. Legal Comparison. Bolivia. Nepal.

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1 Premise. A “Counter-Hegemonic” Account on Harmony and Law¹

From a constitutional perspective, harmony is frequently linked to the pluralistic composition of societies, where ethnic and religious diversity is a fact and the peaceful coexistence among groups is a wish expressed through the search of balance and tolerance. The aspiration to communal harmony receives attention in constitutions and statutes of several countries of the Global South, where it assumes the form of a legal principle. This emphasis on harmonious relationships is a legacy of the philosophical basis of these states, which embrace a societal vision where the collective good prevails over individual interests and rights². Accordingly, in the management of multicultural societies, generally harmony leads state actions and legitimizes the choices made in this sphere, for example limiting the freedom of speech. This is the reason why harmony is often regarded as an instrument for imposing a coercive power over society to maintain public order and ensure peaceful coexistence among diverse cultural groups.

From an anthropological perspective, Laura Nader emphasizes that harmony is a technique of pacification with a double meaning. Historically rooted in the colonial era, the harmony model is both a counter-hegemonic political strategy used by colonized groups to protect themselves from the authority of the colonizers and a hegemonic strategy used by the colonizers to defend themselves from the colonized groups. Analyzing the Zapotec people in Oaxaca (Mexico), Nader states that their harmony ideology, imposed by Christian missionaries and Spanish colonizers, was based on dangers and dysfunctions of conflict and the superior state of harmony. The basic elements of harmony as an ideology are the same wherever they are implemented. They emphasize conciliation, as well as the recognition that resolution of conflict is inherently good and that its opposite, namely to persist in litigation, is bad. They support a view of harmonious behavior as being more civilized than conflictual ones, the belief that consensus is of greater survival value than controversy. With its strong focus placed on compromise and cooperation, harmony was exploited by natives as a rhetoric of peace, as a shield to

¹ The paragraphs 1, 2 and 3 have been authored by Serena Baldin; the paragraphs 4, 5, 6 and 7 have been authored by Pasquale Viola. The essay is published within the framework of the research project PRIN 2017 “From Legal Pluralism to the Intercultural State. Personal Law, Exceptions to General Rules and Imperative Limits in the European Legal Space” (PI prof. Lucio Pegoraro - 2017RYJAFW_001).

² In this sense, NEO, *Dimensions of Religious Harmony as Constitutional Practice: Beyond State Control*, in *German Law Journal*, 2019, 20, p. 967.

protect their autonomy³. In a context where increased conflict means increased state intervention, this indigenous community used harmonious self-representation as a means of securing continued local independence. As a strategy for resisting the state political and cultural hegemony, harmony has been adapted to counter-hegemonic ends⁴.

Turning to the legal viewpoint, recently Jaclyn L. Neo has argued that the constitutionalisation of harmony is a multivalent concept. Besides being a tool of state ideological control that entails vertical state-group relationships and serves as a rights-limiting interest, harmony involves other two types of relations. Firstly, it implies a horizontal relationship that legitimates intercultural dialogue among groups and that overcomes the idea of passive tolerance. Secondly, as a bottom-up demand, harmony can impose obligations on the state when peaceful coexistence among groups is threatened⁵.

From the aforementioned assumptions, the analysis aims to verify whether the concept of harmony within the constitutional frameworks of pluralistic society could be considered as one of the main features of their legal systems, questioning its role as guiding principle for intercultural/multicultural approaches to diversity. To address such purpose, the essay deals with two contemporary and remarkable state-building experiences, namely those of Bolivia and Nepal, for two main reasons: 1) the mono-cultural, nationalistic and unitary impositions collapsed under the society's pluralistic demands, leading to the establishment of an inclusive constitutionalism; 2) cultural foundations shaped an inclusive concept of harmony, conveyed from cosmogonic and religious beliefs, fostering plurinational, multicultural, and/or intercultural approaches.

The constitutions of Bolivia and Nepal, in force since 2009 and 2015 respectively, provide for the participation of minorities and indigenous groups to the public legal domain. Moreover, the "legal openness" to those who have always been marginalized and discriminated marks the birth of a new "form of State", in which the relationships between the state and the groups, and among groups, are (or should be) based on mutual recognition and respect. To this extent, the essay introduces the concept of living well (*vivir bien*) in Bolivia, which refers to the cosmovision of the indigenous people based on harmony and on a strict interconnection between the community and nature, while paragraph 3 analyses the principle of harmony

³ See NADER, *Harmony Ideology. Justice and Control in a Zapotec Mountain Village*, Stanford, 1990.

⁴ An analogous strategy has been applied by other groups, as those living in Ladakh and in Swaziland. See PIRIE, *Peace and Conflict in Ladakh. The Construction of a Fragile Web of Order*, Leiden, 2007; Ros, *The Politics of Harmony. Land Dispute Strategies in Swaziland*, Cambridge, 1992.

⁵ NEO, *op. cit.*, p. 969.

as constitutionalized in Bolivia. Paragraph 4 offers a brief outline of the Nepalese constitutional system as resulted after the new state-building process, while the following part aims to provide a general framework of the concept of “harmony” within the Nepalese constitutional text. The following paragraph deals with the Nepalese shift from the *ethnic-based hegemonic state* to the *consociational state*.

2 Harmony in the Andean Cosmivision and Its Transposition into the Concept of Living Well (*vivir bien*) in Bolivia

While harmony is a word which has almost disappeared from the moral and political vocabulary of Western thought, it is a founding and essential value for indigenous societies. In the Andes, a guiding tenet of native peoples is *kushikuy kawasy*, translated as principle of relationality or as harmony among human beings, family, community and nature. Equilibrium helps avoid social relations in the community from leading to problems or conflicts. From the point of view of the indigenous justice systems, when an offense is committed the harmony is broken. Thus, the intervention of the authorities and the community is mainly based on reconciliation; it focuses on restoring the balance and the social cohesion⁶.

In order to understand why harmony is so relevant in the constitutional framework of Bolivia, it seems worth recalling that it is the most culturally diverse country of Latin America. It has the highest percentage of indigenous peoples, namely 41% of the total population according to the national census of 2012⁷. Aymara and Quechua are the most consistent native groups, followed by nearly another forty autochthonous peoples. In spite of their important political advances from the Nineties onwards, they still remain marginalized in social and economic terms and face discrimination and exploitation.

The Constitution in force since 2009 has been demanded from below and during the Constituent Assembly the indigenous claims have been accepted in great measure. The higher norm is not only a milestone for the recognition of indigenous rights and of legal pluralism; it has a special importance given that it founds a Plurinational and Intercultural state where all groups are formally posed at the same level, without differences among a majority and other minorities as

⁶ HUANACUNI MAMANI, *Buen Vivir/Vivir Bien. Filosofía, políticas, estrategias y experiencias regionales andinas*, Lima, 2010. See also Plurinational Constitutional Tribunal of Bolivia, sent. 1127/2013-L, 30 August 2013; the constitutional sentences are available at <https://tcpbolivia.bo/tcp/>.

⁷ See the vox Bolivia at <https://minorityrights.org/>.

corollaries. This aim is clearly expressed in the first article: «Bolivia is constituted as a Plurinational Communitarian Unitary Welfare State, free, independent, sovereign, democratic, intercultural, decentralized and with autonomies. Bolivia is founded on plurality and on political, economic, legal, cultural and linguistic pluralism in the integration process of the country».

What this country wants to pursue is a new order where pluralism informs the institutional and social organizations toward the inclusion of all the ethnic components. This implies an epistemological turn, embraced through the acceptance of the indigenous values and life visions. The fights for a more equitable system has led to the creation of new political institutions and territorial autonomies and to the recognition of a considerable number of individual and collective rights of equal importance, without hierarchies in order to emphasize the prominence of social rights. In other words, the Constitution represents an attempt at communication between native and Western concepts thanks to their intention of integrating local values as pillars of the constitutional order.

The Bolivian new model of civilization is expressed with the term *vivir bien* (*suma qamaña* in native idiom). The literal translation of *vivir bien* into living well is not correct as it evokes the Western view of well-being and the related idea of living better, which is very distant from the indigenous concept of existence that the *vivir bien* represents. The term *suma qamaña* means living in harmony with all forms of existence, be they human beings, communities and nature. It takes inspiration from the autochthonous cosmovisions and lifestyles where the concept of development is unknown. Rooted in the worldview of the Quechua and Aymara peoples of the Andes, the *vivir bien* describes a way of doing things and living that is community-centric, ecologically-balanced and culturally-sensitive. It indicates a harmonious equilibrium between material and spiritual components, only possible in the specific context of a community conceived in social and ecological terms jointly⁸.

Harmony, among the different elements that make up the whole, is essential to the *vivir bien* as a search for an equilibrium in the community and between humans and nature. The challenge posed by the *vivir bien* is not to be or have more, but to seek balance between the different parts of the Earth's community. From this angle, it promotes

⁸ Similarly, in the Constitution of Ecuador of 2008 one finds the term *buen vivir* or *sumak kawsay*. On this concept see BAGNI, *Il sumak kawsay: da cosmovisione indigena a principio costituzionale in Ecuador*, in BALDIN, ZAGO (eds), *Le sfide della sostenibilità. Il buen vivir dalla prospettiva europea*, Filodiritto, 2014, p. 73 ff.; HUANACUNI MAMANI, *Buen Vivir/Vivir Bien. Filosofía, políticas, estrategias y experiencias regionales andinas*, Lima, 2010. In a comparative perspective, see BALDIN, *Il buen vivir nel costituzionalismo andino. Profili comparativi*, Torino, 2019.

the dissolution of the dualism between society and nature, and the latter becomes part of the social and political arena. The use of lands, water, and natural resources in general must respect the ancestral lifestyle, where economy is linked to solidarity, and production and work should be done with respect for and in harmony with nature, recognizing the intrinsic value of *Pacha Mama* (Mother Earth), notwithstanding its use on part of humans. Thus, contrary to the Euro-American vision, the *vivir bien* embraces a holistic approach that sees social, cultural, environmental and economic issues working together, being parts of the same reality. It is aimed to radically transform the state moving away from the neoliberal model of development and founding social relationships based on equality, solidarity and respect of ethnic diversities and nature⁹.

3 The Concept of Harmony in the Constitution of Bolivia

To sum up the argument thus far, the constitutional system of Bolivia is radically distant from the previous one. In the same vein, the concept of harmony has a different relevance in the new Constitution respect to the former one, where it was only used as a synonym of the term in accord or in conformity¹⁰. At present, harmony is mentioned first in the preamble, where one reads that Bolivia is based on «principles of sovereignty, dignity, interdependence, solidarity, harmony, and equity in the distribution and redistribution of the social wealth, where the search for *vivir bien* predominates».

In a quite different mode, this concept reappears in the text. More precisely, in Part I, Title I, Chapter II, devoted to «Principles, values, and purposes of the State», there is a reference to the native ethical-moral principle of *ñandereko* (harmonious life): «The State assumes and promotes as ethical-moral principles of the plural society: *ama qhilla*, *ama llulla*, *ama suwa* (do not be lazy, don't be a liar, don't be a thief), *suma qamaña* (living well), *ñandereko* (harmonious life), *teko kavi* (good life), *ivi maraei* (land without evil) y *qhapaj ñan* (noble path or life)» (art. 8, para. 1, Const.). Moreover, in para. 2 of art. 8 Const., harmony is enumerated among many other values which support the

⁹ GUDYNAS, ACOSTA, *La renovación de la crítica al desarrollo y el buen vivir como alternativa*, in *Utopía y Praxis Latinoamericana*, 2011, 53, p. 71 ff. The *vivir bien* as a constitutional principle expresses different legal meanings; on this aspect see also BALDIN, *La tradizione giuridica contro-egemonica in Ecuador e Bolivia*, in *Boletín mexicano de derecho comparado*, 2015, 143, p. 1 ff.

¹⁰ In the current Constitution, a reference to «in harmony with the Constitution and the law» as a synonym of in accordance to, is found in art. 290. Moreover, «the criteria of harmony and coordination» is mentioned in art. 77, para. 2, Const., devoted to the educational system.

basis of the state aimed at pursuing the *vivir bien*¹¹.

In the opinion of the Plurinational Constitutional Tribunal, the ethical and moral values and the axiological precepts embodied in these two paragraphs reflect the guidelines that support the state's refoundation¹². They strengthen the collective construction of the state, making reference to the values derived from the autochthonous tradition as well. In this sense, *vivir bien*, harmonious life, and the other native values are axioms that go beyond their ethical and moral significances. They shape a vision whose horizons are not limited to an individualistic conception, being directed to a shared renaissance of the state that pursues the *vivir bien*.

This provision is further specified by a reference to a fair and harmonious society. The values mentioned in art. 8 Const., which support the collective construction of the state, reinforce the validity of the purposes embodied in the art. 9 Const., where the first goal of the state is: «To construct a just and harmonious society, built on decolonization, without discrimination or exploitation, with full social justice, in order to strengthen the plurinational identities».

I suggest that in Bolivia the core of the legal meaning of harmony is conveyed by the «just and harmonious society» clause. It expresses the relationship between society and the state, to determine in which measure the latter can actively contribute to build the former. Such achievement is feasible acting against the disparities among individuals and among ethnic groups. In this perspective, the fundamental axes are identified in decolonization, in the absence of discrimination and exploitation, in social justice, with the aim to consolidate the plurinational composition of society in the public sphere. This clause brings to mind the expression «free and democratic society» contained in section 1 of the Canadian Charter of Rights and Freedom, which stipulates that the rights set out in the Charter are «subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society». Also, it resembles the «open and democratic society» clause inserted in art. 36 of the South African Constitution, according to which «rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom». In such hypotheses, courts are often asked to resolve conflicts between competing individual and collective interests.

11 Namely: unity, equality, inclusion, dignity, liberty, solidarity, reciprocity, respect, complementarity, transparency, balance, equality of opportunities, social and gender equity in participation, common well-being, responsibility, social justice, distribution and redistribution of products and social assets.

12 See the const. sent. no. 1850/2013, 29 October 2013, part III.5.1.

In the case of Bolivia, the formula containing the invocation to a just and harmonious society does not explicitly configure a balancing test between individual and group rights. Differently, in this earlier period of consolidation of a new order, the imperative to guarantee the effectivity of rights not yet respected even if legally granted, as the rights of the indigenous peoples, has emerged from the decisions of the Plurinational Constitutional Tribunal. Moreover, the task to affirm that all the rights inserted in the Constitution have equal hierarchical recognition and are directly applicable and justiciable has come forth¹³. I argue that in future this clause could be interpreted to justify limitations to individual rights in order to preserve and promote the native communitarian lifestyle, read in conjunction with the articles regarding indigenous rights. In this sense, it seems plausible to assert that harmony may be conceived as an instrument for imposing obligations on the state to protect rights and interests of the most marginalized and excluded groups, whose cosmovisions and ways of life are very different from those predominant in a country that has developed according to the individualistic culture of the Western societies. The principle of harmony is primarily addressed to change power relationships to counteract the coloniality accused of maintaining disparities and subordination among ethnic groups. Hence, a fair and harmonious society is based on decoloniality processes¹⁴. Therefore, harmony can be considered a subversive tool that natives may invoke to enhance their culture, communitarian lifestyle, and customs, and may invoke to resist to discriminations, exploitations, and social injustices.

A similar assertion may be referred to the «harmony with nature» clause that incorporates the ecocentric cosmovision of the native peoples. In Bolivia, nature is considered a legal entity with a sphere of rights, enumerated in the Law on the Rights of Mother Earth no. 071 of 2010¹⁵. In this law, harmony refers to the human activities that, in the context of plurality and diversity, must achieve a dynamic balance with the cycles and processes inherent to Mother Earth. At constitutional level, harmony with nature is joined with economy. Specifically, the industrialization of natural resources has two aims and must respect two conditions. The objectives are to overcome the de-

13 See const. sent. no. 0572/2014, 10 March 2014, and const. sent. no. 0487/2014, 25 February 2014.

14 See const. sent. 0006/2013, 5 June 2013.

15 Law on the Rights of Mother Earth no. 071, 21 December 2010, at <http://www.harmonywithnatureun.org/content/documents/158Bolivia%20Ley%20071.pdf>. On the rights of nature, see CARDUCCI, *Natura (diritti della) (voce)*, in *Digesto delle Discipline Pubblicistiche. Aggiornamento*, 2017, p. 486 ff.; BALDIN, *Los derechos de la naturaleza: de las construcciones doctrinales al reconocimiento jurídico*, in *Revista general de Derecho Público Comparado*, 2017, p. 1 ff.

pendence on exports of raw materials and to achieve a productive economy. The conditions are that it should be carried out within the framework of sustainable development and in harmony with nature (art. 311, para. II, no. 3, Const.). In this case, the industrialization of natural resources and respect for the environment have to find an equilibrium to satisfy both priorities. In addition, in the sphere of indigenous territories, the Constitution affirms that natives define their concept of development pursuant to their own cultural criteria and principles of harmonious coexistence with nature (art. 403, para. I, Cost.). These provisions could be interpreted as limits to state actions in order to respect the equilibrium between humans and nature. This attention for the ecosystems also leads the Bolivian foreign relations, as it is stated in art. 255, para. II, Const. In this case, harmony with nature is mentioned as a guiding principle of international agreements ratified by Bolivia.

Another perspective through which to understand the meaning of harmony in the constitutional framework of Bolivia calls into question the concept of interculturalism. The link between harmony and the heterogeneous composition of Bolivia is evident in art. 98 Const., titled «Cultures», where interculturalism is conceived as «the means for cohesion and for harmonic and balanced existence among all the peoples and nations». The Plurinational and Intercultural state proposes an encounter among ethnic groups adopting an intercultural approach to overtake multiculturalism and the simple coexistence or juxtaposition of cultures¹⁶. To flourish, interculturalism requires the decolonization of European and American thinking which promotes a homogenizing vision.

In Bolivia, intercultural education and intercultural dialogue are not the only approaches that can be used to manage the coexistence of different groups. Indeed, interculturalism is embedded in the public institutions as well, with the aim to seek solutions to guarantee equality between subordinate and hegemonic groups and to ensure a democracy open to the customs and rules of indigenous peoples. In this vein, the harmonious relationships cultivated among different ethnic communities resemble only in part the group-group relationships of mutual control recognizable in the Asian context. In Bolivia, interculturality surely implies much more than passive tolerance and it overcomes the idea of a reciprocal control in the sense that the legal order aspires to subvert the former dominant social, political, and economic structures and to configure the commitments among

16 On the relevance of interculturality, see WALSH, *Interculturalidad, Estado, Sociedad: Luchas (de)coloniales de nuestra época*, Quito, 2009. On the concept of Intercultural State, see BAGNI, *Lo Stato interculturale: primi tentativi di costruzione prescrittiva della categoria*, in BAGNI, FIGUEROA MEJÍA, PAVANI (eds), *La ciencia del derecho constitucional comparado. Libro homenaje a Lucio Pegoraro*, Ciudad de México, 2017, p. 137 ff.

individuals, communities and nature in a different manner, closer to the ancestral vision of the Andean peoples. It is in this view that one should also consider the principle of social harmony expressed in art. 178 Const., referred to the power of the judiciary to impart justice. Social harmony forms the basis for social cohesion, tolerant co-existence, and respect of differences, as clearly stated in art. 3 of the Law on Plurinational Constitutional Tribunal and reiterated in the court's sentences¹⁷.

4 Outlining Contemporary Nepal: From Hinduisation/ Nepalisation to Multiculturalism

Postcolonial studies have emphasised the common cultural and sociological fate of Asia and Latin America during colonialism, especially concerning the clash between the imposition of Western law and the ancestral beliefs of existing social groups¹⁸. Nowadays, the overlapping of pre- and post- legal structures, as well as the arising recognition of cultural diversity, are reversed in the contemporary concept of legal pluralism¹⁹, trying to consolidate domestic instances with international ones.

In the political and legal fields of study, such degree of diversification has challenged the doctrinal construction of Western dogmatic concepts like 'state' and 'nation'²⁰, obliging the adoption of differ-

17 Law on Plurinational Constitutional Tribunal, no. 027, 6 July 2010, at <http://www.tcpbolivia.bo/tcp/content/leyes>; see also const. sent. no. 0450/2014, 25 February 2014.

18 For further analysis on this subject: VIOLA, *La protección constitucional de las minorías y la influencia de elementos de diferenciación social sobre la organización estatal. Una mirada a algunos ejemplos relevantes de Asia y América Latina*, in *Derecho y Sociedad*, 2020, 55, p. 73 ff.

19 MENSKI, *Beyond Europe*, in ÖRÜCÜ, NELKEN (eds), *Comparative Law. A Handbook*, Oxford, 2007, p. 198 ff.; GALANTER, *Justice in many rooms: Courts, private ordering and indigenous law*, in *Journal of Legal Pluralism*, 1981, 19, p. 1 ff.; CHIBA (ed.), *Asian Indigenous Law in Interaction with Received Law*, London-New York, 1986; ID., *Legal Pluralism: Towards a General Theory through Japanese Legal Culture*, Tokyo, 1989.

20 AMIRANTE, *Post-modern constitutionalism in Asia: perspectives from the Indian experience*, in *NUJS Law Review*, 2013, 6, p. 213 ff.; BASILE, TORRI (a cura di), *Il subcontinente indiano verso il terzo millennio*, Milano, 2002. On the debate about legal classifications and models see AMIRANTE, *Al di là dell'Occidente. Sfide epistemologiche e spunti euristici nella comparazione "verso Oriente"*, in *Diritto Pubblico Comparato ed Europeo*, 2015, 17, p. 1 ff.; cf. ZWEIFERT, KÖTZ, *Introduzione al diritto comparato. I Principi fondamentali*, Milano, 1992; DAVID, JAUFFRET-SPINOSI, *I grandi sistemi giuridici contemporanei*, Padova, 2004; GAMBARO, SACCO, *Sistemi giuridici comparati*, Torino, 2008. On the nation-state and state-nation theory see STEPAN, LINZ, YADAV, *Crafting State-Nations: India and Other Multinational Democracies*, Baltimore, 2011, p. 8. About the state-nation theory applied to Nepal's contemporary constitutional history, VIOLA, *Lingua e diritto nella Costituzione nepalese del 15 settembre 2015: 'diversità non discordante' e Stato multiculturale*, in *DPCE Online*, 2016, 28, p. 77 ff.

ent pragmatic approaches. Distinctive languages, customs, and cultures are located within the same boundaries, and constitutional texts dealt with these issues, elaborating suitable solutions for guaranteeing a stable and (not always) peaceful co-existence among different ethnic groups²¹.

Currently, the Federal Democratic Republic of Nepal is one of those examples that challenge the classic conception of nation-state. The social features of the country may provide the idea of a state with substantial unitary features, especially after the so-called process of Hinduisation/Nepalisation²². The 'Hinduisation' (or 'sanskritisation') defined the increasing role of high caste hindus within political and economic powers²³; while the 'nepalisation' served the purposes of the hindu elite in securing their authority through the application of their cultural, religious and political rules²⁴. In this phase of Nepalese history, the processes of 'Hinduisation' and 'Nepalisation' at times coincided or served each other²⁵. To this extent, Louise Brown argued that three main processes «dominated Nepal's history and political development»: i) the immigration of Indo-Arian people; ii) the 'hinduisation'²⁶; iii) the strengthening of a distinct and single political entity²⁷.

Despite this unifying narrative, the Nepalese state has evolved on a basis of diversities that influenced the state-building phase succeeding the Maoist Revolution and the transition from monarchy to the republic²⁸, shifting from authoritarianism to a democratic and

21 On the effects of ethnicity issues on state-building, GHAI (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States*, Cambridge, 2000.

22 LOUISE BROWN, *The Challenge to Democracy in Nepal: A Political History*, London-New York, 1996.

23 *Ibid.*, p. 2.

24 *Ibid.*, p. 8. Another example of "nepaliness" is the speech of King Mahendra regarding the "democracy without political parties" known as the Panchayat System: «people were confused by the Western institutions of political parties and parliamentary government, [...] Nepal must have a political system in keeping with Nepal's culture and tradition. It had to be a Nepali system, not one copied». SMITH, *The Ideology of Nepal's Panchayati Raj*, 1967, p. 26 f. See also *Ibid.*, fn. 1: *Pages of History: A Collection of Proclamations, Messages, and Addresses Delivered by His Majesty King Mahendra*, I (December 15, 1960-December 10, 1961), Kathmandu, 1961, pp. 1-4.

25 LOUISE BROWN, *op. cit.*

26 *Ibid.*, p. 2: «The Kathmandu Valley, which was the home of the Newars, a group who spoke a Tibeto-Burman language, formed an exception to this pattern of Indo-Aryan domination of the hills, because Newari society had become stratified on the basis of a Hindu caste hierarchy long before the less developed hill society».

27 *Ibid.*, p. 1. See also HUTT, *Drafting the Nepal Constitution, 1990*, in *Asian Survey*, 1991, vol. 31, n. 11, p. 1020 ff.; MALAGODI, *Constitutional Nationalism and Legal Exclusion: Equality, Identity Politics, and Democracy in Nepal (1990-2007)*, Oxford, 2013.

28 GHAI, *The old order is dying, the new order is not yet born: Politics of constitution demolishing and constitution building in Nepal*, in CHEN (ed.), *Constitutionalism in Asia*

participatory system of governance²⁹. The socio-cultural context of the “new” state is deeply plural, with many ethnic, religious and linguistic differences³⁰.

In order to grasp the Nepalese legal and constitutional system, the outline of some geographical and social data is essential. The territory³¹ extends for 147,181 km², with a population of approximately 30 million (density 180/km²). As far as the political and administrative scheme is concerned, Nepal is divided into 7 states³², 77 districts, and 753 new and rural municipalities. The number of territorial units is a factual sample of the social diversity that characterises Nepal: the official Report of the Central Bureau of Statistics identified 125 ethno-caste and 207 religious groups³³.

Ethnicity can be defined as «a sense of group belonging, based on ideas of common origins, history, culture, language, experience and values»³⁴. However, the definition of the term ‘ethno-caste’ is necessary for a better understanding of the Nepalese society, politics and law. In English, the terms ‘ethnicity’ and ‘caste’ are synonyms, while the ethnographic and sociological studies on Nepal distinguish between them. The word ‘caste’ refers to the model proposed by Du-

in the *Early Twenty-First Century*, Cambridge, 2014, p. 367 ff.

29 *Ibid.*

30 GHAI (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States*, Cambridge, 2000.

31 The Second Constitutional Amendment of 2020 provided legal status to the new map of Nepal, including Limpiyadhura, Lipulekh and Kalapani as Nepalese territory. These territories are under dispute with India.

32 As also affirmed in AMIRANTE, VIOLA, *South Asian Constitutionalism in Comparative Perspective: The Indian “prototype” and some recent borrowings in the 2015 Nepalese Constitution*, in SINGH (ed.), *The Indian Yearbook of Comparative Law 2018*, Singapore, 2019, p. 151 ff., I prefer the word ‘state’ instead of ‘province’, though the dominant legal and non-legal literature favours the inverse option. This is not an arbitrary choice, but is based on two specific criteria: 1) the word ‘pradesh’ can be translated both with ‘province’ and ‘state’; 2) the official translation by the Ministry of Law, Justice & Parliamentary Affairs adopted the word ‘state’ for the territorial units that compose the federation (e.g. see Part 20 of the Constitution).

33 CENTRAL BUREAU OF STATISTICS, *Population Monograph of Nepal*, vol. II (Social Demography), Kathmandu, 2014.

34 DECIMO, GRIBALDO, *Boundaries Within: Nation, Kinship and Identity Among Migrants and Minorities*, Cham, 2017, p. 24. On ethnicity, cf. HOPENHAYN, BELLO, *Discriminación étnico-racial y xenofobia en América Latina y el Caribe*, in CEPAL – *SERIE Políticas Sociales*, 2001, 47, p. 7: «Mientras la raza se asocia a distinciones biológicas atribuidas a genotipos y fenotipos, especialmente con relación al color de la piel, la etnicidad se vincula a factores de orden cultural, si bien con frecuencia ambas categorías son difícilmente separables». In this essay, starting from the ideas pointed out by SAID, *Cultura e imperialismo* (Barcelona, 1993), the authors state that: «El colonialismo va a ser una fuente primordial para la constitución de las ideas sobre las diferencias raciales. La misma idea de la superioridad racial europea frente a la supuesta inferioridad y salvajismo de los nativos de América serán parte de los procesos históricos de construcción de imágenes culturales de conquistados y conquistadores».

mont³⁵, indicating those social groups built hierarchically according to Hindu precepts and, specifically, the idea of *pure* and *impure*. In Nepal, the classification into Brahman, Chhetri, Sanyai, Maithil Brahman, Rajpur Kayastha and Dalit (the *untouchables*) adopts this method. The term ‘ethnicity’, on the other hand, refers to specific cultural attributes, such as the collective name, the founding myth, a shared history, living on a specific territory. Adibasi/Janajati groups are designed according to the last classification³⁶. For instance, when referring to Brahmans or Dalit, the classification follows the caste, while the classification of the Janajati is arranged on an ethnic basis³⁷.

The classification shaped by Dahal reorders ethno-caste diversity in Nepal into five major groups: (i) caste-origin; (ii) Newar, (iii) Adibasi/Janajati or nationalities, (iv) Muslim and (v) other residual groups. In turn, the aforementioned cultural categories are classified into 9 sub-cultural groups: (i) Caste-Origin Hill, (ii) Hill Adibasi/Janajati, (iii) Hill Dalit, (iv) Madhesi caste-origin (Level 1), (v) Madhesi caste-origin (Level 2), (vi) Madhesi caste-origin low caste or Dalit (Level 3), (vii) Tarai (Madhesi) Adibasi/Janajati, (viii) Muslims, and (ix) other cultural groups. The ethno-caste data is particularly important for a hierarchically structured society. In Nepal, especially during the Hindu Kingdom, belonging to a caste impacted—and that is still partially true—on inclusion and enjoyment of civil and political rights. Furthermore, only in recent times the concept of ‘secularism’ has been placed among the fundamental principles of the state, which previously was influenced by Hindu religion and traditions³⁸. Moreover, as supported by some ethnographic studies, only the highest caste level (Brahmins, Chhetri) detained the political power and the resources of the country, realising a complete social restricted policy³⁹. What has just been emphasised explains the link between ethno-caste and religious factors, as well as their influence on the Nepalese social architecture. The Hindu majority (about the 80% of the

35 DAHAL, *Social Composition of the Population: Caste/Ethnicity and Religion in Nepal*, in *Central Bureau of Statistics, Population Monograph of Nepal*, (Social Demography), Kathmandu, 2014, vol. II, p. 1 ff. See DUMONT, *Homo Hierarchicus: The Caste and Its Implications*, Oxford, 1970.

36 CENTRAL BUREAU OF STATISTICS, *op. cit.*; SMITH, *The Ethnic Origin of Nations*, Oxford, 1986.

37 VIOLA, *The Nepalese Constitutional System: An Overlap of Change and Stability*, in AMIRANTE (ed.), *South Asian Constitutional Systems*, The Hague, 2020, p. 159 ff.

38 LETIZIA, *Shaping Secularism in Nepal*, in *European Bulletin of Himalayan Research*, 39, 2012, p. 66 ff.

39 See LAWOTI, *Domination and Exclusion: Continued Marginalization of Minorities in Democratic Nepal*, Kathmandu, 2000; LAWOTI, *Toward a Democratic Nepal: Inclusive Political Institutions for a Multicultural Society*, London, 2005; LAWOTI, *Looking Back, Looking forward: Centralization, Multiple Conflicts, and Democratic State Building in Nepal*, Washington, 2007.

population) reveals the centuries-old influence (1769-2006) of religious precepts. Buddhism and Islam have a particular relevance (9% and 4.4% of the population), while other minor religious groups are Kirat (3.0%) and Christians (1.4%).

A further factor of the ontological multiculturalism of the Nepalese state is its linguistic diversity, which influences the entire state structure along with ethnic and religious factors. In fact, there are 123 languages having different roots: Indo-European, Sino-Tibetan, Australasian and Dravidian. The official language is Nepali, spoken by approximately the 48% of the population, while several languages can be officially recognized by individual states (Maithali, Bhojपुरi, Tharu, Tamang, Newar, Magar, Bajjika, Urdu, Avadhi, Limbu, Gurung, Kusunda). English is considered a *lingua franca* for practical reasons related to tourism and trade⁴⁰.

In this context, the contemporary Constitution of Nepal is trying to manage socio-economic issues in such a way to avoid political instability, secession, or dispersion of state power. The state-building phase aimed to introduce cooperative federalism and a parliamentary system of government inspired by the Indian legal and political schemes⁴¹, considering the cultural and linguistic factors as crucial elements, clearly shows the close relationship between ethnicity and identity⁴².

The Constitution of Nepal, in Art. 306, defines minorities as «ethnic, linguistic and religious groups whose population is less than the percentage specified by the federal law, and includes groups that have their distinct ethnic, religious or linguistic characteristics, aspirations to protect such features and are subjected to discrimination and oppression»⁴³. The establishment of a new state demands

⁴⁰ VIOLA, *Lingua e diritto nella Costituzione nepalese del 15 settembre 2015: "diversità non discordante" e Stato multiculturale*, cit.

⁴¹ Cf. VIOLA, *Costituzionalismo autoctono. Pluralismo culturale e trapianti giuridici nel subcontinente indiano*, Bologna, 2020.

⁴² VIOLA, *Inequality and discontent: A comparative constitutional law inquiry on South Asia and Latin America*, in BELOV (ed.), *Peace, Discontent and Constitutional Law: Challenges to Constitutional Order and Democracy*, London-New York, 2021, p. 157: «In the past, the binomial Hindu religion/Muluki Ain inspired legal provisions, supported by the elites, aiming to exclude from the political agenda the demands of backward social groups (e.g. Madhesi, Janajati and women). According to some authors, the Madhesi versus Pahadi dichotomy is an example of 'democratic' exclusion. This form of ethnic identity has an impact also on other ethnic groups in the Terai, i.e. on the Tharu people, who would be totally excluded from a political agenda investing only on the creation of 'one Madhesi' land, exacerbating the relationships among ethnic groups. Furthermore, also an opening to a more peaceful co-existence between Madhesi and Tharu in the Terai would not take into account further minor ethnic groups that live in the same region».

⁴³ Part 34, Definitions and Interpretations, Art. 306, Constitution of the Federal Democratic Republic of Nepal. All the articles mentioned in this paragraph with no further information are part of the Nepalese Constitution, 2015. As mentioned on p. 158: «the

for the foundation of an identity consistent with the social context. Article 3 deals with the definition of the Nepalese nation, highlighting the multicultural roots of a state that had been forced to be mono-cultural in the past. In fact, the different cultural heritages are collectively responsible and mutually inspired by a common aspiration of “unity in diversity” to constitute a nation. In contrast, Art. 4 recognises inclusiveness as one of the keystones of the “new” Nepal. The definition of Art. 306 and the provisions contained in Articles 3 and 4 provide a clear idea of the new ideological foundation of Nepal, departing from the old conception of the nation-state, and further pursuing the same contextual approach which had characterised the state-building phase. Moreover, the composition of local bodies is strongly influenced by minorities.

Starting from the aforementioned assumptions, a quantitative analysis of the nouns ‘multiculturalism’, ‘interculturalism’ and ‘harmony’⁴⁴, as well as of their respective adjectives, within the constitutional text underlines the shift from mono-cultural and nationalistic approaches towards the recognition and protection of diversity.

5 A Textual Analysis of the Concept of “Harmony” in the 2015 Nepalese Constitution

In spite of the absence of references to interculturalism, the constitution of Nepal specifically recalls multi-culturalism two times: with-

village executives must include women and Dalit or people belonging to minority communities elected by the members of the village assembly amongst themselves. The municipal executive must also include women and Dalit or people belonging to minority communities elected by the members of the Municipal Assembly. As for the state structure, the impact of the existence of minorities and the demand for social and political inclusion led the Constituent Assembly to give a peculiar arrangement to the directive principles, policies and obligations of the state; in the same way, the Constitution aims to develop social and cultural values founded on national pride, democracy, pro-people, respect for labour, entrepreneurship, discipline, dignity and harmony, and to consolidate national unity by maintaining social cohesion, solidarity and harmony, recognising cultural diversity. The importance of minorities and the adoption of an inclusive policy in a socialist-oriented democracy is also demonstrated by the creation of the National Inclusion Commission. The functions, duties, and powers of this Commission are quite wide, and include conducting research on the condition and the implementation of the policies related to minorities and other vulnerable communities (Khas Arya, Pichhada class, persons with disabilities, senior citizens, labourers, peasants, minorities and marginalised communities, backward classes, people of Karnali and the indigent class). Besides the National Inclusion Commission, the Constitution provides for the establishment, by the Federal Parliament, of several constitutional bodies, i.e. the Indigenous Nationalities Commission, the Madhesi Commission, the Tharu Commission, and the Muslim Commission».

⁴⁴ The textual analysis is based on the English translation of the text provided by Oxford Constitutions (<http://oxcon.ouplaw.com>) and Constitute Project (<https://www.constituteproject.org/>).

in the Preamble,

We, the people of Nepal, in exercise of the sovereign powers inherent in us

[...]

Embracing multi-caste, multi-lingual, multi-cultural and diverse geographical specificities, by ending discriminations relating to class, caste, region, language, religion and gender discrimination including all forms of racial untouchability, in order to protect and promote unity in diversity, social and cultural solidarity, tolerance and harmonious attitudes, we also express our determination to create an egalitarian society on the basis of the principles of proportional inclusion and participation, to ensure equitable economy, prosperity and social justice,”

and in Art. 3 ‘The nation’

Having multi-ethnic, multi-lingual, multi-religious, multi-cultural characteristics with common aspirations of people living in diverse geographical regions, and being committed to and united by a bond of allegiance to national independence, territorial integrity, national interest and prosperity of Nepal, all the Nepali people collectively constitute the nation.

In reference to cultural issues, the adjective ‘multi’ was adopted in order to highlight the recognition of diversity within the social fabric of the country, especially regarding ethnic factors, castes, religions and languages. About languages, along with the Preamble and Art. 3, the Nepalese Constitution provides for the positive obligation of the state to pursue multi-linguistic policies (Art. 51).

Beside the aforementioned section of the Preamble, in which the word ‘harmony’ follows the words ‘solidarity’ and ‘tolerance’, within the Nepalese constitutional text the references to ‘harmony’ and to the adjective ‘harmonious’ are quite relevant, especially for the Parts in which they are allocated.

Part IV - Directive Principles, Policies and Responsibilities of the State

50. Directive Principles

[...]

(2) It shall be the socio-cultural objective of the State to build a civilized and egalitarian society by ending all forms of discrimination, oppression and injustice based on religion, culture, cultural practices, customs, traditional practices, or on any other grounds; develop socio-cultural values based on national pride, democracy, people orientation, dignity of labor, entrepreneurship, discipline,

dignity and tolerance, by respecting cultural diversity and maintaining communal harmony, solidarity and amity.

The choice to set this reference in Part IV of the Constitution implies the possibility for the enforcement of such provision.

The Parts of the Constitution devoted to the recognition of fundamental rights and to the state policy highlight the importance of the “new attitude” of the state towards diversity and harmonious relations:

Part III – Fundamental Rights and Duties

17. Right to Freedom

(2) Provided that,

1. Nothing in section (a) shall be deemed to prevent the making of an Act to impose reasonable restrictions on any act which may undermine the nationality, sovereignty, independence and indivisibility of Nepal, or federal units, or jeopardizes the harmonious relations subsisting among the people of various caste, ethnicity, religion, or communities, or incites racial discrimination, or untouchability, or disrespects labor, or any act of defamation, or contempt of court, or an incitement of offence, or is contrary to decent public behavior or morality.

2. Nothing in section (b) shall be deemed to prevent the making of an Act to impose reasonable restrictions on any act which may undermine the nationality, sovereignty, independence and indivisibility of Nepal, or jeopardize the harmonious relations between federal units, or public law and order situation.

3. Nothing in section (c) shall be deemed to prevent the making of an Act to impose reasonable restrictions on any act which may undermine the nationality, sovereignty, indivisibility of Nepal, or an act of espionage against the nation, or disclosing national secrets, or helping foreign state or organization that may jeopardize Nepal’s security, or an act of treason, or an act that undermines the harmonious relations subsisting between federal units, or instigates communal animosity, or jeopardizes the harmonious relations subsisting among different caste, ethnicity, religious groups and communities, or an act of acquiring or depriving the membership of a political party only on the grounds of caste, language, religion, community or gender, or the formation of a political party that creates discrimination against citizens, or an act that incites violence, or is contrary to decent public behavior.

4. Nothing in section (d) shall be deemed to prevent the making of an Act to impose reasonable restrictions on any act which may undermine the nationality, sovereignty, indivisibility of Nepal, or an act of espionage against the nation, or disclosing national secrets, or helping foreign state or organization that may jeopardize

Nepal's security, or an act of treason, or an act that undermines the harmonious relations subsisting between federal units, or instigates communal animosity, or jeopardizes the harmonious relations subsisting among different caste groups, ethnicity, religious groups and communities, or an incitement of violence, or an act which is contrary to public morality.

5. Nothing in section (e) shall be deemed to prevent the making of an Act to impose reasonable restrictions on any act which may undermine the interest of the general public, or the good relations between federal units, or the harmonious relations subsisting among various caste groups, ethnicity, religious groups or communities, or an act of committing crime or violence, or inciting such acts.

19. Right to Communication

Provided that nothing shall be deemed to prevent the making of laws to impose reasonable restriction on any act which may undermine the nationality, sovereignty, and indivisibility of Nepal, or the good relations between federal units, or jeopardizes the harmonious relations subsisting among different caste groups and tribes, or communities, or an act of treason, or defamation of social dignity of individuals through the publication and dissemination of false material, or contempt of court, or material that incites criminal offence, or an act that is contrary to decent public behavior and morality, or disrespects labor, or incites untouchability or gender discriminations.

Part IV - Directive Principles, Policies and Responsibilities of the State

51. State Policies

The State shall pursue the following policies:

1. [...]

b. Policies regarding political and governance system:

[...]

6. Expanding and developing a harmonious and cooperative relations between federal units through partnerships in the management of resources and means, administration and responsibilities.

[...]

c. Policies regarding social and cultural transformation:

1. Building a society based on harmonious social relations by developing a healthy and civilized culture.

The section of the Constitution of Nepal devoted to the recognition of fundamental rights and duties seeks to introduce new forms of legal protection of freedoms, in spite of some specific exceptions. Amongst the constitutionally established limits, Art. 17 seems to be a "mantra-limit" due to its repetitiveness within the Nepalese con-

stitutional text, emphasising two necessary elements for the implementation of rights and, by contrast, for the adoption of legislative acts that could affect fundamental rights: i) the rationality and ii) the harmony of relations. First of all, the concept of ‘rationality’, recognised also throughout Western legal tradition, provides for a limit to the political power’s discretion, imposing the necessary balance of collective and individual interests in the case of legally imposed restrictions. The second limit, namely the one based on ‘harmony’, refers to interconnected facets of human relationships within a society: this principle would potentially apply to all human and legal concerns, representing the real “centre of conscience” of the Nepalese Constitution. For instance, the concept of ‘harmony’ could refer to territorial units and to how much regional and local policies may affect the whole country, jeopardizing the “unity in diversity”. A further example could derive from an erroneous interpretation and implementation of positive actions aimed at favouring specific minorities, rather than others, leading to potential social conflicts. Another example of the pragmatic application of ‘harmony’ could regard the freedom of expression and opinion, in the case of attempts aiming at revising the very essence of the Maoist revolution or the democratic formula, pushing the masses to uncritically accept the return to the monarchy or to the previous political system.

The aforementioned three examples prove the potential pragmatic application and enforcement of the concept of ‘harmony’ within the public law space through three vectors: i) public and private, ii) vertical and horizontal, iii) individual and collective, in cases in which there is the risk of undermining the relations between local authorities, collective entities, and individual subjects.

6 Contextualising Harmony: Diversity and State-Building Choices

After the completion of the reconciliation following the Maoist revolution, the new Constitution of 2015 sought to primarily absorb the socio-economic and political outcomes of the long constituent process⁴⁵. The Federal Democratic Republic of Nepal challenges the classical concept of nation-state. As it was previously emphasised, the socio-cultural context is highly heterogeneous, presenting deep ethnic,

⁴⁵ Over sixty years, six Constitutions have been adopted: The Government of Nepal Act of 1948, the Interim Government of Nepal Act of 1951, the Constitution of the Hindu Kingdom of Nepal of 1959, the Constitution of Nepal of 1962, the Constitution of the Hindu Kingdom of Nepal of 1990, the Interim Constitution of Nepal of 2007. Cf. BHANDARI, *Self-Determination & Constitution Making in Nepal: Constituent Assembly, Inclusion, & Ethnic Federalism*, Singapore, 2014.

religious and linguistic differences that make the legal and constitutional apparatus an enticing conundrum⁴⁶. Thus, the contemporary history of Nepal has increased its complexity, revealing a dynamic state-building process on a transitional background: «(a) from monarchy to republic, (b) from authoritarianism to democracy and human rights, (c) from a hegemonic to a participatory system of governance, (d) from a state underpinned by one dominant religion to secularism, and (e) from a centralised unitary system to decentralisation and autonomy»⁴⁷.

The Nepalese state-building process clearly shows the close relationship between ethnicity and identity, as it is pointed out by the references to ethnic groups in the constitutional text, and the “harmony principle” could play a pivotal role in keeping together different claims and instances. To this extent, the revolutionary instances of participation, representation and power-sharing were the foreseeable consequences of the instrumental use of cultural diversity. As Yash Ghai affirmed in *Ethnicity, Identity, Participation and Social Justice: A Constitution for New Nepal*⁴⁸, the relationship between ethnicity and state structure in multi-ethnic realities leads to the identification of two models: i) *liberal state*, which tends not to recognise diversities, considering people as citizens having the same rights and obligations; ii) *ethnic-based state*, i.e. state based on the political recognition of ethnic groups as *bearers of rights*. The latter group can be further divided into two sub-groups: 1) *the hegemonic state*, in which an ethnic-caste group prevails over the others; 2) *consociational state*, characterized by consensual activity, power-sharing and proportionality in representative offices.

Nepal moved from an *ethnic-based hegemonic state* to a *consociational state* after the entry into force of the Constitution of 2015, emphasising a further shift towards an inclusive approach under liberal standards. The new Constitution tries to ensure the necessary participation in the political process also through positive actions, in order to achieve substantial equality and social justice; accordingly, ethno-caste elements became a prerogative for the identification of categories of subjects.

⁴⁶ For a study on the influence of the cultural features and the state building process see GHAI (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States*, Cambridge, 2000; AMIRANTE, *Lo Stato multiculturale. Contributo alla teoria dello Stato dalla prospettiva dell’Unione Indiana*, Bologna, 2014.

⁴⁷ GHAI, *The old order is dying, the new order is not yet born: Politics of constitution demolishing and constitution building in Nepal*, cit., p. 369 f.

⁴⁸ GHAI, *Ethnicity, Identity, Participation and Social Justice: A Constitution for New Nepal*, in *International Journal on Minority and Group Rights*, 2011, vol. III, 18, p. 309 ff.

7 Conclusion. Semantics and/or Legal Effects? Harmony within Multiculturalism and Interculturalism

The 2009 constitution of Bolivia addresses the concept of harmony in a multidimensional way, stressing the Eurocentric–and colonial–view of “one nation, one State”. Through a bottom-up approach, indigenous claims found their place within the legal framework, fostering an epistemological turn based on native traditions. In doing so, the Bolivian experience is developing interesting features for comparative constitutional law debates: i) an inclusive legal framework, sympathetic towards autochthonous demands; ii) the implementation of pluralistic forms of legitimation, also based on ethnic factors; iii) the establishment of social-rights oriented political institutions, favoring the quest for social justice; iv) the continuous and vibrant dialogue between Western legal concepts and local traditions/values; v) the increasing prominence of the concept of *vivir bien* (*suma qamaña*) and of the “just and harmonious society”; vi) plurinationalism, and vii) intercultural education and dialogue to foster the democratic participation of marginalized groups.

Beyond the question of whether Nepal can be considered a state having a multicultural milieu, and in spite of the process of Hinduisation/Nepalisation and the narrative of a culturally homogeneous society⁴⁹, Nepalese pluralism is still based on linguistic, class, caste, ethnic and religious factors⁵⁰. The existence of differences and minorities also imply the establishment of diverse traditions and customs based on the link with a specific ethnic-cultural group. To this extent, multiculturalism is a feature of the Nepalese society, even if there is extensive religious uniformity. Thus, the constitutional structure is grounded – entirely or in an emergent phase⁵¹ – on a series of political-legal factors: a) the awareness and the attachment to more than one culture; b) the state recognition and support for different cultural identities; c) the *de jure* asymmetric federal system; d) the multi-

49 LOUISE BROWN, *op. cit.*

50 Cf. CENTRAL BUREAU OF STATISTICS, *op. cit.*; LOUISE BROWN, *op. cit.*; HANGEN, *Creating a “New Nepal”: The Ethnic Dimension*, Washington, 2007; BHANDARI, *op. cit.*; GHAI, *The old order is dying, the new order is not yet born: Politics of constitution demolishing and constitution building in Nepal*, cit.; TOBA, TOBA, RAI, *Diversity and Endangerment of Languages in Nepal*, Kathmandu, 2005. See also VIOLA, *Lingua e diritto nella Costituzione nepalese del 15 settembre 2015: “diversità non discordante” e Stato multiculturale*, cit.

51 The adjective “emergent” has been adopted to underline that the Nepalese political-legal system is the result of a revolution that has profoundly changed the state in really recent times. The contemporary change has involved every single aspect of the Nepalese state and society. Thus, constitutional features of the Nepalese state are quite recent, so it is not possible to properly assess their stability and effectiveness. To this extent see BHANDARI, *op. cit.*; JHA, *Battles of the New Republic: A Contemporary History of Nepal*, London, 2015.

party system based on democratic principles; e) the establishment of autonomist political groups that may govern state units – and, at the same time, be part of federal coalitions; f) the multiple but complementary identities; g) the society’s growing ‘empathy’ for institutions⁵². Within this framework, the constitutional provisions dealing with the concept of “harmony” sketch a constitutional principle, addressed to the competent courts in order to guarantee the enforcement of such provisions and fundamental rights. Moreover, such attitude could foster the enforcement of the “harmony principle” in all political-legal activities, whether addressed to the territorial organization, to collective interests’ groups, to private individuals, combining the three concepts of proportion, reasonableness and harmony.

Is there a proper space for “harmony” within multicultural and/or intercultural societies? Whether there could be such space is a political matter in which the constitutional–or legal–field plays a functional role, often balancing the supposed multiculturalism’s illiberality and relativism with the interculturalism’s propensity to foster the protection of individual rights⁵³.

However, despite the aforementioned political approaches, post-modern times stress the crisis of categorization⁵⁴, even leading to paradoxes nurtured by «the paradigmatic couple [...] globalization/multiculturalism»⁵⁵. As Domenico Amirante suggests, «in the era of globalization there is increasing awareness of the fact that multicultural practices are not experiences limited to states that attract major immigration (i.e. United States and, above all, Canada, the cradle of the doctrine of multiculturalism), but a widespread phenomenon, involving many developing countries and Europe (as the place of origin of the modern monocultural nation-state)»⁵⁶. To this extent, as Claude Karnoouh points out, «[t]he notion of interculturality modulating relations among people living in different countries must be complemented by the notion of multiculturalism dealing with new modes

52 STEPAN, LINZ, YADAV, *op. cit.*

53 MEER, MODOOD, *Interculturalism, Multiculturalism or Both?*, in *Political insight*, 2012, vol. III, 1, p. 30 ff. See also PAREKH, *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, London, 2000; TAYLOR, *The politics of recognition*, in GUTMANN (ed.), *Multiculturalism and the Politics of Recognition*, Princeton, 1992, p. 25 ff.; MODOOD, *Multiculturalism: A Civic Idea*, Cambridge, 2007; MEER, *Citizenship, Identity & the Politics of Multiculturalism*, London, 2010.

54 CHIN, *Interculturalism, Postmodernism, Pluralism*, in *Performing Arts Journal*, 1989, vol. XI, 3, p. 163 ff.; LYOTARD, *The Postmodern Condition: A Report on Knowledge*, Minneapolis, 1984.

55 KARNOOUH, *Logos without Ethos: On Interculturalism and Multiculturalism*, in *Telos*, 1998, vol. CX, p. 123.

56 AMIRANTE, *Lo Stato multiculturale. Contributo alla teoria dello Stato dalla prospettiva dell’Unione Indiana*, cit., p. 27.

of socialization at the heart of the most advanced countries»⁵⁷. In this scenario, «national societies are breaking up into various socio-cultural groups co-existing harmoniously. This state of affairs must also be seen as the end of white, European monoculturalism»⁵⁸.

The crisis of European - and Global North - monoculturalism shows the need for a postmodern and critical approach to the general theory of the state, suggesting the theoretical, as well as pragmatic, importance of “new” experiences that are accustomed to deal with pluralism, in which diversity is the founding myth⁵⁹ of the socio-legal arrangement (as in the cases of Bolivia and Nepal). Thus, interculturalism does not dilute multiculturalism, but offers a different paradigm for (re)thinking about the correlations among diversity, society, state and the legal/constitutional fields⁶⁰.

Another key-question is whether multicultural and intercultural approaches contrast with each other or the second one is «merely an ‘updated version’ of multiculturalism»⁶¹. As Meer and Modood highlighted, the reply to this question is a straight “no”, although «advocates of interculturalism wish to emphasise its positive qualities in terms of encouraging communication, recognising dynamic identities, promoting unity and challenging illiberality, each of these qualities already feature (and are on occasion foundational) to multiculturalism too»⁶². Moreover, «until interculturalism as a political discourse is able to offer an original perspective, one that can speak to a variety of concerns emanating from complex identities and matters of equality and diversity in a more persuasive manner than at

57 C. KARNOOUH, *op. cit.*, p. 123.

58 C. KARNOOUH, *op. cit.*, at 123.

59 Cf. VIOLA, *Democrazia, violenza e movimenti rivoluzionari nel Global South*, in *DPCE Online*, 2, 2016, p. pp. 89 ff.

60 Cf. ABDALLAH-PRETCEILLE, *Interculturalism as a paradigm for thinking about diversity*, in *Intercultural Education*, 2006, vol. XVII, 5, p. 482: «This new emerging anthropological paradigm remains paradoxically ignored in favour of a systematic recourse to a cultural anthropology which is often confused with one of its derivatives, that is, culturalism, owing to the excessive attention given to the variable of culture. By abandoning the conceptual paradigm of culture and cultural spheres, it is the fractures, the differences, the hybrids, and the crossings which carry meaning (Abdallah-Pretceille, 1996). Appadurai (1996) suggests: ‘think of the configuration of cultural forms fundamentally as fractals, that is to say, without boundaries, structures or Euclidean regularities’, combining them at once with their overlaps and similarities. The intercultural paradigm is one of these paths attempting hybrid, segmentary and heterogeneous thinking».

61 LENTIN, *Replacing ‘race’, historicizing the ‘culture’ in the multiculturalism*, in *Patterns of Prejudice*, 2005, vol. XXXIX, 4, p. 394; MEER, MODOOD, *How does Interculturalism Contrast with Multiculturalism?*, in *Journal of Intercultural Studies*, 2011, vol. XXX-III, 2, p. 175 ff.

62 MEER, MODOOD, *How does Interculturalism Contrast with Multiculturalism?*, *cit.*, p. 192.

present, it cannot, intellectually at least, eclipse multiculturalism»⁶³.

On plural identity, Ted Cantle suggests that the process of development of such state of facts «is often presented as a threat to notions of community and cultural solidarity. But plural identities do not necessarily entail the weakening of established forms, and can sit alongside each other»⁶⁴, as also many Asian and Latin American experiences demonstrate. According to the same author, «the development of more plural identities – a process which is inherent in globalisation and diversity – should be viewed much more positively, as it greatly increases the possibilities for peace, tolerance and cohesion, by building relationships across many divides»⁶⁵. Issues remain on whether such attitude is currently an effect of (domestic or external) “ethnic implants” that demand for constitutional recognition, especially during state-building phases far from the old-fashioned narrative of the nation-state.

To the aforementioned deductions, we should add that pluralism and autochthony are quite common elements to the concept of the intercultural state. Unlike some Latin American experiences, in Nepal and in other South Asian countries⁶⁶ the creolization of values occurs on different levels. To grasp with these hypothesis, two levels of ‘sociality’ can be distinguished: 1) of the ‘private sphere’ within a specific and modest community, merely based on cultural tradition; 2) of the ‘public sphere’, as a projection towards a wider space, comparable to the state in legal and political terms. In the first case, namely private sociality, the individual follows values, principles and

63 MEER, MODOOD, *How does Interculturalism Contrast with Multiculturalism?*, cit., p. 192. On this account, Geoffrey B. Levey poses a semantic problem of “distinction without a difference”, offering another perspective to think about these two cultural approaches, in fact, «what matters is that the term ‘multiculturalism’ has become so mired in controversy and is so maligned in public debate that its semantic capital, as it were, has been spent», thus leading to a ‘political dynamic’ that is «driving much of the current fascination with interculturalism and post-multiculturalism. Previously, I have suggested that ‘interculturalism’ is just as semantically problematic as multiculturalism, since both terms conjure images of culturalism ruling the roost [...]» (LEVEY, *Interculturalism vs. Multiculturalism: A Distinction without a Difference?*, in *Journal of Intercultural Studies*, 2012, vol. XXXIII, 2, p. 233. On the same aspect, Michel Wieviorka stresses that «multiculturalism is a concept that can and must be re-enchaned, while interculturalism functions at a much less sophisticated level, and a much less political one for us to be able to assert that it can act as a substitute. At the most, it may be possible to envisage it as complementary» (WIEVIORKA, *Multiculturalism: A Concept to be Redefined and Certainly Not Replaced by the Extremely Vague Term of Interculturalism*, in *Journal of Intercultural Studies*, 2012, vol. XXXIII, 2, pp. 225-231). See also TAYLOR, *Interculturalism or multiculturalism?*, in *Philosophy & Social Criticism*, 2012, vol. XXXVIII, p. 413 ff.

64 CANTLE, *National Identity, Plurality and Interculturalism*, in *The Political Quarterly*, 2014, vol. LXXXV, 3, p. 312.

65 *Ibid.*

66 VIOLA, *Costituzionalismo autoctono. Pluralismo culturale e trapianti giuridici nel subcontinente indiano*, cit.

rules established over time and subject to social control. These values, principles and norms are valid and effective because they are legitimized both endogenously and exogenously within a community's territory. In spite of the absence of an extensive bureaucratic organization, the direct legitimation is recognized and enforced by the community itself (due to the subjects' proximity).

The public sphere concerns a wider space than the private one, in which values, principles and rules of the private sphere are "eclipsed" by those of the legal system, finding their form of legitimation mainly through an exogenous imposition.

Cases of public sociality nurture cultural creolization, while in the private one there could be syncretic endeavours dealing with (ancient) traditions. The key-element between these two approaches is based on the failure of a reductionist approach aiming at breaking up the private sociality's cultural core, favouring the public one. Therefore, the cultural amalgam – essential feature of the intercultural state – would appear to be the connotation of a "*Façade Intercultural State*", rather than the common, conscious and genuine product of a single culture that «*se construye a través de la interpretación de los derechos en sentido intercultural, bajo la elección del individuo, prescindiendo de una relación numérica de mayoría-minoría*»⁶⁷.

Although there are currently "really shy" intercultural legal efforts in Nepal and in South Asia, the different forms of constitutionalism developed in Bolivia and in Latin America offer numerous ideas for further comparative inquiries. This exploratory pathway could thus expose additional studies on the correlation between pluralism and autochthony in the light of possible simultaneous identity on the ground of harmonious relations, opening a wide range of epistemological questions regarding multiple identities, as well as multicultural and intercultural arrangements of the states⁶⁸.

⁶⁷ BAGNI, *Estudio introductorio sobre el deslinde conceptual del Estado intercultural*, in BAGNI (coord.), *El Estado intercultural: ¿Una Nueva Eutopía?*, Bologna, 2017, p. 11.

⁶⁸ JACOBSON, *Constitutional Identity*, Cambridge, 2010. See also FRANKENBERG, *Stranger than Paradise: Identity and Politics in Comparative Law*, in *Utah Law Review*, 1997, vol. II, p. 259 ff; ROSENFELD, *Constitutional Identity*, in ROSENFELD, SAJÓ (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, p. 756 ff. For further interdisciplinary approaches see PRADHAN, *Simultaneous identities: ethnicity and nationalism in mother tongue education in Nepal*, in *Nations and Nationalism*, 2019, vol. XXV, 2, p. 718 ff.; PRADHAN, *Simultaneous Identities: Language, Education, and the Nepali Nation*, Cambridge, 2020; cf. BAKHTIN, *The Dialogic Imagination*, Austin, 1981.

