

WILL ONE SIZE FIT TO EVERYONE? ACCOMMODATING DIVIDED SOCIETIES IN A CONSTITUTION: THEORIES AND EXPERIENCES

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INTRODUCTION

Traditionally, Unitary and Federal systems have held position as systems of ruling to strike a balance between the organs of government and citizens of a country. While the concept of ‘self-rule’ gives priority to territorial or personal sub entities of a pluralist nation, ‘shared-rule’ institutionalizes control over the relationship between sub entities and encompassing entity by giving priority to encompassing entity.ⁱ Decentralization of power is often followed by countries which adopt the unitary system in order to maintain balance between self and shared rule. On the other hand, both Pure federalism and Con federalism is used by federal followers to obtain the same result. However, executing one nation’s sovereign power without sacrificing any need of the people is always considered a challenging task for the government, as accommodating various identities under one sovereign power is no easy task.

The term ‘accommodate’ is generally explained in the Oxford Dictionary as “to have enough space for somebodies/somethings, especially for a certain number of people” or “to provide somebodies with a place to stay” or “to do or provide what somebody needs or wants”ⁱⁱ. In simple terms, ‘accommodate’ connotes the provision of a suitable place to persons with different needs by fulfilling their needs. In all means, catering to reasonable facilities of all persons is important to build a good accommodation. Among the nations of the world, there are many which are home to different groups of peoples with different identities. Thus, their needs and expectations differ from each other and from the government. Nevertheless, there is only one Constitution in such nations for all of its citizens, which should accommodate all diversities under one roof. Therefore, a Constitution must be able to recognize all persons of a country as its citizens all the while granting recognition for their distinct identities at the same

time. Therefore, there is a need to know how a Constitution can successfully accommodate all its citizens and how pluralist countries have risen to this challenge in the past years.

This paper endeavours to explain several universally accepted theories of accommodating plural societies and how various constitutional reforms of the recent past have adopted such models in cultivating unity in their respective countries. The first part of this paper addresses the theories of accommodation with examples drawn from notable constitutional provisions with special emphasis on amendments of the recent past. The second part of the paper explains the extent of adopting the principles of such theories as constitutional reforms of selected countries.

THEORIES OF ACCOMMODATING DIVIDED SOCIETIES IN A CONSTITUTION – AN ANALYTICAL STUDY WITH SELECTED CONSTITUTIONAL REFORMS OF THE RECENT PAST

There are a number of theories proposed by various scholars in this area. As per the literature review conducted, scholars who have written on this area are mainly influenced by the following four theories.

1. *Centripetalism*
2. *Multiculturalism*
3. *Consociation*
4. *Territorial pluralism*

These theories are discussed herein supplemented with examples of constitutional reforms of the recent past.

Centripetalism

Centripetalism is the most common theory followed by many countries in the world. It attempts to bring various communities of a country together by giving a primary role to electoral systems. A key notion of the centripetalist claim is the ‘tyrannical properties of majority rule’ which facilitate the election of moderate ethnic politicians, that is, those who are capable of reaching out to other ethnic communities.ⁱⁱⁱ They oppose the Proportional Representation electoral system; especially the party-list proportional representation and Single Transferable

Vote (STV) systems.^{iv} According to them, an election system requires the winning candidates to pool votes from among not one, but different ethnic voter bases^v. In order to realize this, they have advocated two distinct electoral systems. The first of these is the ‘Territorial Distributive System’ which can be applied in the Presidential Election of a country. After 1979, Nigeria follows this system in their Presidential Elections, namely, that the winning candidate of the Nigerian Presidential Election must have at least a quarter of the nineteen state’s plurality of popular votes.^{vi} The second system is the ‘Alternative Vote’ which is often applied in legislative as well as Presidential Elections. In this system, the winning candidate must have the absolute majority of first preference vote or a majority votes after the transfer of lower order preferences from eliminated candidates.^{vii}

The next significant notion supported by Centripetalism is the ‘conciliatory potential of federalism’ which allows for a federation to be a regional federation^{viii}; that is, a self-government or an autonomy. When a Federal State establishes their social values, cultural norms or any identity as distinct from other states, they are allowed to build a self-government for their state. This approach is famously adopted by South Africa in of their Constitution.

Multiculturalism

The fundamental purpose of multiculturalism is to protect and maintain multiple communities both in public and private realms.^{ix} Originally, multiculturalism allows minorities to practice their culture, language and other means without any restrictions. However, the self-styled Western approach to multiculturalism avoids these policies, and it especially avoids the wide application of the multicultural approach towards its immigrants.^x For instance, if pure multiculturalism is to be applied in an English speaking country, an immigrant’s first language must be his/her own mother tongue and English becomes the second language; however, this is not promoted in most Western nations even though they formally adopt multiculturalism. This is an important point which should be further elaborated on.

As mentioned before, multiculturalism does not restrict itself only to public sectors. It also focusses on private realms. Therefore, it is rare to expect multiculturalism to be limited only to the principles of the Constitution. Allowing Muslim school girls to wear headscarves in public schools in England, speaking in minority languages in government hospitals of USA and permitting Sikhs to join the mainstream police of Canada by showing their identities without forcing restrictive policies on them are examples that fall under multiculturalism^{xi}. However,

for the purpose of this research, this paper focusses solely on multiculturalism in Constitutional related matters.

Scholars have identified three different arrangements of multiculturalism practiced in the modern era. These are as follows:

- a) *Some respect for a group's self-government in matters the group defines as important, and some broad appreciation of the principle of proportional representation of all groups in key public institutions^{xii}* – This approach does not necessarily prescribe about a quota system. Rather it tries to ensure that the involvement of different groups is crucial in public institutes. Put in simple terms, it attempts to have a diverse representation in key institutes such as military, police and educational institutions.
- b) *Offer groups a share of public power through consociational arrangements^{xiii}* – This is similar to the autonomy power of minority groups. Further to the autonomy power it also allows mutual veto rights of the members of a group as well.^{xiv}
- c) *Territorially based communities to share public power through pluralist federations or pluralist unions^{xv}* – In following this approach, historical nationality, culture of the community, language or religion will take priority as criteria considered in dividing federal states.

However, it is important to note that all these three mentioned approaches will only be successful with at least a minimum level of public support shown towards them. The reason for this is that multiculturalism, rather than other theories, is directly involved with the emotional beliefs of the public.

Consociation

Arend Lijphart is the pioneer of the 'Theory of Consociation'. This addresses deep antagonisms with executive power sharing and minority vetoes.^{xvi} In these respects it is clearly against the theory of multiculturalism to accommodate minorities' needs in one Constitution. Consociation believes that following a proportionality or autonomy approach to ensure minorities' rights does not entirely safeguard various and significant minorities of a nation. In simple terms, this theory is concerned with the minority community of the minority population of the nation.

According to the Consociation theory, 'Majority Consociation' includes the representatives of each main groups and 'Plurality Consociation' includes the representatives of each significant group of minority.^{xvii} Article V of the Constitution of Bosnia and Herzegovina of 1995 includes a similar representative system in their Presidency.^{xviii} Northern Ireland also follows the same system in their legislative representation, in that, the legislative body of Northern Ireland cannot execute their full functions without plurality consociation.^{xix}

The next significant aspect of Consociation is that it emphasizes the need for group representatives both in elected and unelected political institutes. In this concept, Consociatists suggest a Proportionality Representation system for elected institutes and a list based Proportional Representation (list-PR) for other.^{xx} This is adopted in the Indian Constitution by establishing Lok Sabha through the Proportionality Representation system and Raj Sabha through the list-PR system, although the latter is not guaranteed plurality consociation.

In modern politics, a corporate consociation means the accommodation of groups to ascriptive criteria.^{xxi} That is, that social, cultural and moral identities are fixed and that groups are both internally homogeneous and externally bounded.^{xxii} This is one of the peak points of the theory that reflects Liberalism. Lebanon has now adopted this approach after their reforms in 1989. The earlier fixed six to five ratio (6:5) for Christians and Muslims was changed after the reforms to one to one (1:1).^{xxiii} Furthermore, Article 46 of the Belgium Constitution clearly provides for the equality of the positions among Dutch and French members in Cabinet.^{xxiv}

Territorial pluralism

Communities that are territorially concentrated can be managed through territorial pluralism either in a pluralist Federation or pluralist Union State^{xxv}. A pluralist Federation is involved in Constitutional Federation power and the allocation of fiscal resources.^{xxvi} In this approach a Federal State cannot make its own legislation to govern itself. By this definition, most countries do not fall under Territorial pluralism, including India. Any viable Federation of the European Union can be considered as a pure territorial pluralist country^{xxvii} because they are comprised of states mostly similar in social nature which are only separate for the reason of territory. When dealing with the Constitution of a country, territorial pluralism does not take on a significant role as other theories, as it mostly deals with treaties rather than Constitutions.

RECENT CONSTITUTIONAL REFORMS AND THE APPLICABILITY OF THEORIES OF ACCOMMODATIONS – CRITICAL STUDY WITH THREE SELECT COUNTRIES

In this area, the author endeavours to explain how Constitutional reforms placed in pluralist countries of the world accommodate different needs and identities by utilizing the above mentioned principles. The three countries selected by the author are as follows:

Kenya

Kenya has a mixed system of accommodation of multiculturalism and consociation. There are more than forty tribes in Kenya, and no tribe holds majority over others.^{xxviii} Two main Commissions influenced the Constitutional reform process of Kenya in 2010. The first, held between November 2000 and April 2004, was conducted by the Constitution of Kenya Review Commission (CKRC-known as ‘Bomas’) and the second, held between early 2008 and August 2010, was led by the Committee of Experts (CoE).^{xxix} CKRC’s primary suggestions were regarding the abolition of the ‘Imperial Presidency’, the devolution of some state powers to provinces and Proportional Representation. Apart from the final suggestion, all other recommendations were incorporated in Kenya’s current Constitution. Instead of a system of Proportional Representation, the Constitution introduced the notion of a “referendum” which highly supports multiculturalism.^{xxx}

CoE’s primary concerns which were related to securing democracy and Human rights for all tribes, especially for ‘marginalized’ persons, reflected the theory of consociation. CoE retains aspects such as the Executive Presidency, a largely Centralized State and First Past the Post electoral system.^{xxxi} CKRC rejected consociational solutions such as the political and economic accommodation of ethnic groups under the theme of power sharing, but CoE included this without using the absolute power sharing principle. In this context, CoE recommended a constitutional reform which was partially consociational and partially multicultural.

However, in 2010, the Constitution of Kenya adopted all crucial points highlighted by both Committees, and came with a unique Constitution which ensured rights of almost all different identities. The fundamental principles of the Constitution of Kenya are pluralism, positive recognition of diversity, equality and social justice. This was reflected in its Preamble and Article 10 (2)^{xxxii} as follows:

“PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation” – Preamble

Article 10 (2) – “national values and principles of governance include—

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development”

Article 27 of the Constitution guarantees equality to all without discrimination^{xxxiii}, in general. Also, according to the provisions of the Kenyan Constitution, both the President and county governments bear a duty to protect devolution and promote the interests and rights of minorities and marginalized communities.^{xxxiv} Further, the Constitution grants special importance to areas which were gravely neglected in the past.^{xxxv} In this context the Constitution ensured the primary principles of consociation and multiculturalism, and in light of these theories, it struck a balance between shared and self-rule.

In aspects of language^{xxxvi}, religion^{xxxvii}, and culture^{xxxviii}, the Constitution provides for liberal measures in general as well as adopting protective special mechanisms for marginalized people. The following chart will give a clear picture on these measures:

<i>Matter</i>	<i>Article</i>
Language	<p>7. (1) The national language of the Republic is Kiswahili.</p> <p>(2) The official languages of the Republic are Kiswahili and English.</p> <p>(3) The State shall—</p> <p>(a) promote and protect the diversity of language of the people of Kenya; and</p>

	<p>promote the development and use of indigenous languages, Kenyan Sign language, Braille and other communication formats and technologies accessible to persons with disabilities</p> <p>44. (1) Every person has the right to use the language, and to participate in the cultural life, of the person's choice.</p> <p>(2) A person belonging to a cultural or linguistic community has the right, with other members of that community—</p> <p>(a) to enjoy the person's culture and use the person's language; or</p> <p>(b) to form, join and maintain cultural and linguistic associations and other organs of civil society.</p> <p>(3) A person shall not compel another person to perform, observe or undergo any cultural practice or rite.</p>
Religion	<p>8. There shall be no State religion.</p> <p>32. (1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.</p> <p>(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.</p> <p>(3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.</p> <p>A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.</p>

Culture	<p>11. (1) This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.</p> <p>(2) The State shall—</p> <p>(a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;</p> <p>(b) recognise the role of science and indigenous technologies in the development of the nation; and</p> <p>(c) promote the intellectual property rights of the people of Kenya.</p> <p>(3) Parliament shall enact legislation to—</p> <p>(a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and</p> <p>(b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.</p>
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Another significant feature of the Kenyan Constitution is its heightened focus on minorities' representation in legislation and the role they play in other state bodies and political parties. The Constitution itself has provisions on minority inclusive proportionality in the Executive sphere, starting from the ranks of President to a government employee^{xxxix}. Accordingly, it can be seen that the new Constitution of Kenya accommodates its diverse communities, but certain procedural mechanisms to realize these well emphasized norms of the Constitution still remains a question to be answered. Nevertheless, the success achieved by the new reforms in accommodating various tribes by protecting and promoting their civil, political and socio-cultural needs cannot be ignored.

Syria

Syria is a great example for the implementation of Centripetalism. When briefly observing Syria's background, most Syrians are of Arabic ethnicity, with the Kurds, Armenians, Assyrians, Syriacs, Turkomans, Circassians, and Chechens comprising the minorities^{xi}. It also exhibits religious pluralism as there are many confessional groups such as Sunni Islam, Alawites, Druze, Christians, Jews, and Yezidis residing in the country^{xii}. Thus it is clear that Syria is a pluralist nation comprising of citizens with different identities. However, as mentioned before, the Syrian Constitution is influenced by centripetalism which believes that all citizens must flock under one common value as a nation for reconciliation.

In simple terms, Syria is a centralized state which ignores the idea of fundamental cultural and political rights and diversities of its linguistic and ethnic groups. Especially before 2012, this concept of the centralized state was largely built around their majority ethno-nationalist politics, such as the "Progressive National Front".^{xiii} This particular practice was abolished after the 2012 Reforms to the Syrian Constitution. However, the basic structure of the Syrian Constitution which mostly gives prominence to Arabs and Islam, still remains unchanged. Nevertheless, it does not introduce any discriminative provisions to their minority ethnicities, rather following the principal of equality among all^{xiiii}. In this context it is clear that Syria highly follows centripetalism by all its means. The following phrases taken from the Syrian Constitution explain this approach further.

Article 3 – "The religion of the President of the Republic is Islam; Islamic jurisprudence shall be a major source of legislation; The State shall respect all religions, and ensure the freedom to perform all the rituals that do not prejudice public order; The personal status of religious communities shall be protected and respected"

Article 4 – "The official language of the state is Arabic"

The next significant centripetalism approach of the Syrian Constitution is how the powers of the Executive members are structured and described. The President continues to hold a central role in the Executive body after the reforms. He is entitled to appoint ministers to the Cabinet, appoint civil servants and military personnel, declare war and states of emergency and declare amnesty.^{xliv} Further to this, he has certain special powers regarding the appointment of governors and exercising control over provinces in emergency declared periods^{xlv}.

Syria is often criticized by scholars of Constitutional law and Human Rights activists. Most reputed individuals and organizations suggest a federal system as a solution for the Syrian civil war. However, centripetalism which primarily focuses on electoral systems where there is a major community in a country utilizing centripetalism's 'territorial distributive system' or an 'alternative vote' system which was elaborated earlier under the Nigerian model, can give a peaceful solution without disturbing the current Unitary system of Syria.

Nepal

Similar to India, Nepal is a multi-lingual, multi-ethnic, multi-religious, multi-caste and multi-cultural country in the world. Demands for federalism in Nepal originally arose after its unification in 1978.^{xlvi} Following several attempts of various Committees, Nepal reformed its Constitution in 2015 by establishing a Federal system. The Nepali Constitution clearly indicates it as multiculturalist country. Article 3^{xlvii}, affirms the multicultural approach of Nepal as follows:

“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”

Further, it is also important to note how the Constitution of Nepal delivers its idea on secularism^{xlviii}. ‘Autonomy’ is a fundamental value of the country under Article 5^{xlix}, which comes under the topic of ‘National interest’. However, in dealing with official language policies, both multiculturalism and centripetalism are reflected in the Constitution as follows.¹

Article 6- “All the mother tongues spoken in Nepal shall be the national language”

Article &- (1) The Nepali language written in *Devanagiri* script shall be the language of official business in Nepal.

(2) In addition to Nepali language, a province shall select one or more national language that is spoken by majority of people in that province as the language of official business, as provided for by the provincial law.

- (3) Other matters concerning language shall be as decided by the Government of Nepal on the recommendation of the Language Commission.

According to this provision the general policy on the official language is centripetalism and its exceptions include multiculturalism.

Another significant feature of the Nepali Constitution is its consociational approach in identifying minorities. This can be seen under Article 18^{li} as follows:

“.....Provided that nothing shall be deemed to bar the making of special provisions by law for the protection, empowerment or advancement of the women lagging behind socially and culturally, Dalits, Adibasi, Madhesi, Tharus, Muslims, oppressed class, backward communities, minorities, marginalized groups, peasants, laborers, youths, children, senior citizens, sexual minorities, persons with disability, pregnant, incapacitated and the helpless persons, and of the citizens who belong to backward regions and financially deprived citizens including the Khas Arya.”

Explanation: With reference to this Part and Part 4, “financially deprived” means the person having the income less than prescribed in the Federal law.

- (2) There shall not be any gender discriminations regarding remuneration for the same work and social security.
- (3) There shall be no gender discrimination regarding the right to parental property with regard to all family members.

Furthermore, Article 38-42 gives importance to other kinds of minorities as well. Further to these provisions, the Nepali Constitution, having specially considered its contemptuous issues regarding the caste system that operates within their communities, stepped forward to ignore the ill-treatment of certain communities by Article 24^{lii}. By including this provision Nepal again reflects centripetalism which mostly grants priority to liberalism when compared with other theories of accommodation. Part 5 of the Nepali Constitution restructures the State and the distribution of power of the State and it is structured at the federal, provincial and local levels. Each level’s organizational powers are well emphasized in the schedules.

In brief, the reform of the Constitution of Nepal in 2015 converted the country to a federal state which accommodates all its different identities of people under one Constitution by ensuring their needs and rights in light of the different theories of accommodation.

On a final note, accommodating different identities in one Constitution is not only done by way of theories and governmental legislation, but also by the contribution of each citizen of the country.

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ENDNOTES

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xlviii “For the purpose of this article, 'secular' means protection of religion and culture being practiced since ancient times and religious and cultural freedom” The Constitution of Nepal (2015) Article 4 – Explanation
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