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## Introduction

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ONE OF THE defining features of contemporary constitutionalism is that it subjects public power to the discipline of rights. The catalogue of rights can be more or less expansive; rights are not always entrenched or superior to ordinary legislation; and the degree to which rights are enforceable by judicial review also varies considerably. But despite great variety in constitutional substance, a certain image of the polity typically informs contemporary constitutionalism: a consolidated political community of free and equal citizens constituted as such by a system of rights.

Whatever the utility of this model for many established liberal democracies, its implications are more complicated for polities that are fragmented by cleavages of group membership or identification. We will refer to these places here as 'divided societies'; for the most part, we use the term with respect to those polities where ethnic, ethno-national, or national affiliation are politically salient and contested. As we see it, divided societies complicate rights-based constitutionalism for at least two broad reasons.

The first reason concerns the individualistic meaning often ascribed to rights-based constitutionalism. The standard model understands the individual as the foundation of constitutional value; the ultimate purpose of constitutional rights is to protect the individual against the abuse of public power. According to Ronald Dworkin's famous metaphor, rights are 'trumps' that individuals hold against the community: 'Individuals have rights when . . . a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them'.<sup>1</sup> The individual is also at the heart of Robert Alexy's account in which rights are understood as principles requiring that certain interests or values be

<sup>1</sup> R Dworkin, *Taking Rights Seriously* (Cambridge, Harvard University Press, 1978) xi. See also R Dworkin, 'Rights as Trumps' in J Waldron (ed), *Theories of Rights* (Oxford, Oxford University Press, 1984). We agree with Jeremy Waldron's reading of Dworkin – Dworkin's idea of 'trumps' refers to the way rights impose limits on the public reasons that the state can appeal to in its dealings with the individual. See J Waldron, 'Pildes on Dworkin's Theory of Rights' (2000) 29 *Journal of Legal Studies* 301.

optimised to the greatest extent possible.<sup>2</sup> Any interference with the rights of the individual must therefore be justified as being suitable, necessary and proportionate to the realisation of some competing value or interest of comparable importance.<sup>3</sup>

It is not obvious, however, that individualistic rights can effectively address the problems of group-based domination or exclusion that often arise in divided societies. To be sure, the usual catalogue of individual rights provides some protection for minorities against certain kinds of abuses – after all, regardless of group affiliation, everyone is also an individual. However, the worry in divided societies is not only that majority factions will violate the individual rights of minorities (although this is a danger), but also that certain group-specific interests (eg, culture, language, national identity) will be disregarded or marginalised. The problem then is that, from the perspective of the standard model of rights-based constitutionalism, group-based concerns may not even register as matters of principle. If so, the interests of minorities (qua group) will be treated as matters of policy to be determined by majority-rule. For this reason, the circumstances of divided societies test the limits of rights-based constitutionalism to thwart the ‘tyranny’ of perpetual majorities.<sup>4</sup>

The second complication concerns the communitarian meaning of rights-based constitutionalism. Rights are not only matters of significance for the individual; rights often also express or define the nature of a political community – this is what Sujit Choudhry calls the ‘constitutive’ function of rights.<sup>5</sup> The Preamble to the Constitution of the United States, for example, invokes ‘We the People . . .’, imbedding the image of a collective ‘macro-subject’ at the very foundation of the system of rights.<sup>6</sup> To this day, constitutional rights help to define the image of the ‘Popular Sovereign’ that animates the American political imagination.<sup>7</sup> Similarly, Dworkin encourages us to personify the political community and imagine a collective agent whose moral character (or ‘integrity’) is defined by fidelity to certain rights.<sup>8</sup> Perhaps the purest expression of the communitarian meaning of rights is the idea of ‘constitutional patriotism’, the

<sup>2</sup> R Alexy, ‘Constitutional Rights, Balancing, and Rationality’ (2003) 16 *Ratio Juris* 131, 135. See also, R Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002) 47; and Amaya Alvez-Marín’s contribution to the present volume.

<sup>3</sup> Alexy, ‘Constitutional Rights, Balancing, and Rationality’ (n 2) 135–36.

<sup>4</sup> cf J Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 *Yale Law Journal* 1345, 1398.

<sup>5</sup> S Choudhry, ‘Bills of Rights as Instruments of Nation-Building in Multinational States: the Canadian Charter and Quebec Nationalism’ in J Kelly and C Manfredi (eds), *Contested Constitutionalism: Reflections on the Charter of Rights and Freedoms* (Vancouver, University of British Columbia Press, 2009). See also the contributions of Mara Malagodi and Daniel Weinstock to the present volume.

<sup>6</sup> US Constitution, Preamble.

<sup>7</sup> See generally P Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (New Haven CT, Yale University Press, 1997). See also P Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York, Columbia University Press, 2011) 8–17.

<sup>8</sup> R Dworkin, *Law’s Empire* (Cambridge, Harvard University Press, 1986) 167–75, 184–86.

notion that the system of rights (along with democratic procedures) can be the basis for a 'post-national' collective identity.<sup>9</sup>

In divided societies, however, the communitarian meaning of rights-based constitutionalism is more problematic. On the one hand, a common framework of rights might be unifying, a medium for a divided society to articulate a vision for a shared future. On the other hand, a common framework of rights may be in conflict with the recognition of difference. Indeed, the framework of rights may be a source of division in its own right, a relic of a contested constitutional history or the perceived property of one political tradition to the exclusion of others. In the case of national or ethno-national conflicts, for example, the constitutive role of rights may be seen as a kind of domination.<sup>10</sup>

In their different ways, all of the contributions to this collection grapple with the issue of how the circumstances of divided societies complicate or challenge the usual meanings of rights-based constitutionalism. To this end, the various chapters we have brought together touch on a broad but interrelated range of questions: Can individual rights be adapted to accommodate the problems of divided societies or does a common framework of rights impose a false unity and stifle the accommodation of difference? How do the circumstances of divided societies influence the conditions for judicial empowerment and the design and composition of the judiciary? Can group-specific rights ameliorate divisions by helping to constitute a more inclusive model of political community or does the explicit recognition of group difference undermine the viability of constitutional democracy? Can different approaches to rights and pluralism coexist within the same state? What effect might prevailing theories or methodologies of rights-adjudication have on the accommodation or management of divisions?

The first section of contributions to this volume considers the perennial question of the relationship between rights and democracy, albeit from the perspective of divided societies. The section opens on a cautionary note with a contribution from Stephen Tierney. According to Tierney, the apparently tension-free relationship between liberalism and national and cultural pluralism in much contemporary political theory is often contradicted in constitutional practice; while political theory has developed a school of liberal philosophy that is sensitive to the group-specific concerns of culture and nationalism, an unreformed and universalistic brand of liberalism continues to govern in the practical domain of rights. Tierney highlights what he argues are enduring individualistic, homogenising, and ultimately undemocratic tendencies in the practice of liberal constitutionalism. He contends that, at least in the context of nationally divided societies, these tendencies may be exploited by dominant groups to the detriment of minorities. And – pace the contributions from Samuel Issacharoff and Yash Ghai – Tierney's contribution suggests that an emphasis on the structural role of

<sup>9</sup> See J Habermas, 'The European Nation-State' in C Cronin and P De Greiff (eds), *The Inclusion of the Other: Studies in Political Theory* (Cambridge MA, MIT Press, 2000); and JW Müller, *Constitutional Patriotism* (Princeton, Princeton University Press, 2007).

<sup>10</sup> See the contributions of Stephen Tierney and Daniel Weinstock to this volume.

rights may overlook the fundamental importance of collective self-government in the accommodation of national pluralism.

Samuel Issacharoff's contribution goes on to make the case for the structural role of rights and judicial review in limiting the excesses of majoritarian power. He argues that the experience of 'third wave' democracies suggests a viable alternative to formal ethnic power-sharing in divided societies. In such cases, as Issacharoff explains, constitutional courts can play a central role in checking the excesses of majoritarian power, not only through the enforcement of individual rights, but also by safeguarding the structural conditions for competitive democracy; courts can oversee impeachment proceedings, protect the party system, scrutinise election laws and lustration laws, and sometimes even prescribe the structure of government itself.

Yash Ghai continues the theme with further comparative discussion of the 'structural aspects' of rights in divided societies. He argues that the accommodation of ethnic divisions does not necessarily entail a rejection of the universality of human rights in favour of relativism; the 'framework' of rights can be adapted to meet the special needs of ethnically divided societies. To support his argument, Ghai traces the contribution of rights to the practical management of diversity in Canada, Fiji, India and South Africa. Although Ghai stresses the progressive potential of rights in divided societies, he also draws attention to the power struggles that inevitably influence bills of rights in processes of constitutional change.

The next section of the collection considers the role and power of the judiciary. Sujit Choudhry and Richard Stacey focus on the generally neglected theme of the design of apex courts in divided societies. As they explain, there is a tension between the standard constitutional norm of judicial independence and the goal of reforming institutions to make them more representative of relevant ethnic or ethno-national groups. On the one hand, judicial independence requires that judges be insulated from the political factions of their society. On the other hand, the assumption behind ethnic representation in the judiciary is that judges will be especially responsive to the interests of their own group. The danger with the latter approach is that the judiciary will become so politicised that rights adjudication is just one more venue for ethnic conflict to play itself out. In light of this concern, Choudhry and Stacey evaluate how ethnic representation on apex courts has been pursued in different ways in the cases of Bosnia-Herzegovina and Canada. With respect to both these cases, they observe that apex courts have been able, on occasion, to transcend ethnic difference and speak in a single voice. Nevertheless, Choudhry and Stacey suggest that the twin aims of independence and representation in divided societies might be better achieved by facially neutral judicial appointment rules. They look to the example of the German Federal Constitutional Court to explain how this might work.

Alex Schwartz and Colin Harvey address the problem of judicial empowerment in divided societies, with a particular focus on the still unfinished bill of

rights process in Northern Ireland. The chapter considers the explanatory power of theories of judicial empowerment for the context of divided societies. While the leading theories converge on the view that the support of political elites is a necessary condition for any significant transfer of power to the judiciary, they disagree about what factors might motivate elites to support such a transfer. Drawing on the example of the Northern Ireland bill of rights process, Schwartz and Harvey argue that the circumstances of divided societies significantly complicate the problem of winning elite support for judicial empowerment. In a deeply divided society, a would-be bill of rights must secure sufficient support from (at least) two distinct sets of political elites whose attitudes and interests, being shaped by very different experiences, will often pull them in opposing directions. Schwartz and Harvey observe that the same pressures that produce consociational settlements in divided societies may also produce judicial empowerment. Beyond consociational settlements, however, the alignment of background ideational conditions and political triggers needed for judicial empowerment in divided societies is the political equivalent of a lunar eclipse.

The next section of the collection includes two focused case studies: the post-conflict Constitution of Bosnia-Herzegovina and the ongoing process of post-conflict constitutional change in Nepal. David Feldman's contribution provides a critical overview of the place of rights in the Constitution of Bosnia-Herzegovina. As he explains, the Constitution is an eclectic mix of international human rights standards and more contextually sensitive norms assembled in an unsystematic way to meet the exigencies of a divided post-conflict society. Thus, one finds standard individual rights alongside group-specific rights of 'peoples' and 'entities' but no clear relation or hierarchy among them. Moreover, as Feldman points out, there is no codified list of basic rights (as one would find in a formal bill of rights), nor does the Constitution identify specific limiting factors or exhaustively determine remedies for violations. Feldman argues that the lack of a systematic enumeration and classification of rights is partly responsible for some of the major difficulties that have arisen in implementing the Constitution of Bosnia-Herzegovina. In particular, Feldman underlines the tensions between the Constitution's collective guarantees and individual rights and the way in which the former have often hindered the progress of effective and democratic government.

Mara Malagodi's contribution looks at the 'constitutive' role of rights in constitutional reform in Nepal. She charts the changing definition of the Nepali nation, from the 1990 Constitution through to present-day post-conflict negotiations. Malagodi argues that the 1990 Constitution's mix of 'constitutional nationalism' and individual rights was responsible for certain patterns of legal exclusion in Nepal. As she explains, recent constitution-making endeavours have tried to expand the 'traditional' conception of the Nepali nation, in part by making provision for group-based rights and self-government to empower marginalised groups at the local level. However, Malagodi argues that the

emancipatory potential of fundamental individual rights has been unduly discounted by an association with the old constitutional order. She cautions against the over-reliance on legally defined ethnic categories and group-differentiated rights in ways that would undermine democratic stability and equality.

The final section of the collection expands the discussion to consider questions of pluralism beyond ethnic, ethno-national or national divisions. The intention here is to illuminate how legal approaches to different kinds of pluralism interact or have implications for divided societies. Daniel Weinstock opens the section with an examination of the intersection of national pluralism and religious pluralism in Canada. His main concern is the Charter of Rights and Freedoms as the focal point for pan-Canadian unity on the one hand and the accommodation of religious diversity on the other. As Weinstock argues, the Charter continues to be, despite its integrative ambitions, a potential basis for 'a major unity crisis'. The competing national traditions of Canada and Quebec diverge in their approach to the accommodation of religious and cultural diversity. Echoing the concerns raised by Tierney in his contribution, Weinstock argues that the Charter's pan-Canadian approach to religious and cultural pluralism exacerbates tensions with Quebec and may yet resuscitate the now relatively dormant constitutional conflict in Canada.

Ruth Rubio-Marín and Leonardo Álvarez-Álvarez move the discussion beyond nationalist divisions to consider the accommodation of religious pluralism in the multicultural European setting. They show how the theory of rights that underlies the legal approach to pluralism can make a real difference. Specifically, they argue that the theory of rights that informs the prevailing legal approach to religious diversity in the classroom is flawed, reflecting a classic liberal model that is ill-equipped to deal with diverse and divided societies. They argue that rights in the classroom should be informed first and foremost by a democratic theory of education that aims to prepare students to actively participate in the public life of a pluralistic society. The implications of Rubio-Marín and Álvarez-Álvarez's contribution for divided societies are important: the theoretical basis for classic liberal rights can be reinterpreted and given new life in light of the imperatives of peaceful coexistence and cooperation.

The collection concludes with a contribution from Amaya Alvez-Marín. Alvez-Marín expands the discussion further still to consider the relationship between constitutional rights, the problem of deep ideological divisions and the effect of adjudicative methodology. Her specific topic is rights-based constitutionalism in Chile, a society she describes as being governed by a 'forced consensus' that is, in fact, very divided over the interpretation and application of constitutional rights. Alvez-Marín explores the potential for the methodology of proportionality in the adjudication of rights to facilitate a deeper and more democratic engagement between the legislature and the judiciary. The implication of Alvez-Marín's contribution for divided societies more generally is that judicial methodology may be just as important in managing divisions as the content of the catalogue of rights.

It is our hope that this collection of work will stimulate future comparative research and debate on the complex role of rights in divided societies. We hope in particular that the preponderance of legal scholars here will help to stimulate the growth of comparative *legal* scholarship on divided societies. Comparative scholarship in constitutional law has only recently been made aware of its own methodological frailties relative to other social sciences,<sup>11</sup> and comparative legal scholarship on constitutionalism in divided societies is still in its infancy.<sup>12</sup> For the most part, this collection brackets methodological concerns. Our hope is to provide a kind of map of the various points where an increasingly global discourse of rights intersects with the special problems of power and pluralism that arise in divided societies. Subsequent research will prove which normative theories and comparative methodologies are best equipped to traverse this challenging topography.

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<sup>11</sup> See R Hirschl, 'On the Blurred Methodological Matrix of Comparative Constitutional Law' in S Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge, Cambridge University Press, 2006).

<sup>12</sup> See S Choudhry, 'Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design for Divided Societies,' in S Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford, Oxford University Press, 2008).

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