Faculty Scholarship

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Editorial's Note

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Constitutionalism in divided societies[1]

How should political communities respond to the opportunities and challenges raised by ethnic, linguistic, religious, and cultural differences, and, through these responses, thereby promote democracy, social justice, peace, and stability? This is one of the most difficult and important issues of contemporary politics. Even the most casual review of the popular media drives the question home. In a wide range of instances, spanning several continents, in both the developed and developing worlds—for example, Northern Ireland, Bosnia-Herzegovina, Kosovo, Cyprus, Iraq, Afghanistan, Nigeria, Sudan, India, Sri Lanka, Indonesia, Nepal, Canada, Spain, and Belgium, to name but a few—it is arguably the central issue of political life.

In this symposium, we term these cases, collectively, "divided societies." As a category of political and constitutional analysis, this term does not refer to just those societies that are ethnically, linguistically, religiously, or culturally diverse. What particularly identifies a divided society is that these differences are politically salient—that is, they are persistent markers of political identity as well as bases for political mobilization. Political claims are refracted through the lens of identity, and, thus, political conflict can become synonymous with conflict among ethnocultural groups.

Much is at stake in how divided societies respond to the challenges raised by the equation of ethnocultural identity and political interest. The extreme consequences of a failure to address these challenges properly are well known: discrimination and exclusion, civil war and ethnic cleansing, forced assimilation and, at the worst, genocide. But even in the absence of violence, in states

where the rule of law and respect for fundamental human rights prevail—consider Spain, Belgium, and Canada—the failure to address these challenges can lead to situations where ordinary political debates about routine questions of public policy can quickly escalate into political dramas of respect and recognition.

How divided societies cope with these challenges is of the highest practical importance. It is conceptually challenging, as well. Here, constitutional design bears a particularly heavy burden. In a divided society, given a history of conflict or conspicuous lack of shared existence, the constitution is often the principal vehicle for arriving at a common political identity, which, in turn, is necessary to make a constitutional regime work. Although comparative experience must figure centrally in constitutional politics, particularly when it comes to framing constitutional settlements, comparative constitutional law as a scholarly discipline has largely been missing in action, with some distinguished exceptions.[2] The field has focused, largely, on comparative approaches to the protection of universal human rights—the "rights revolution." Although the protection of human rights is an important issue for constitutional politics in divided societies, it is far from the only one on the table. To be relevant to the other pressing problems of modern constitutionalism, comparative constitutional law must expand its intellectual agenda.

This symposium is an important step in that direction. For many years, the study of divided societies has been a central preoccupation of comparative politics and political theory. Out of those disciplines and their respective bodies of literature have emerged two divergent schools of thought on how constitutional design should manage ethnic, linguistic, religious, and cultural differences through constitutional design.[3] On the one hand, "accommodationists" argue for the need to recognize and institutionalize differences, which are thus empowered; on the other hand, "integrationists" argue that such practices may entrench and exacerbate the very divisions they are designed to manage. As an alternative, they propose a range of strategies that transcend and blur or crosscut differences. This fundamental difference in outlook plays itself out in competing options along a number of different dimensions of constitutional design. These various areas of concern range from symbolic issues, such as the wording of preambles, to the choice of official languages; to the existence and character of internal political boundaries; the nature of the electoral system used to elect the legislature; the selection process, composition, and powers of the political executive, the bureaucracy, and the judiciary; the rules governing

[2] See, e.g., AUTONOMY AND ETHNICITY (Yash Ghai ed., Cambridge Univ. Press 2000); STEPHEN TIERNEY, CONSTITUTIONAL LAW AND NATIONAL PLURALISM (Oxford Univ. Press 2004); DONALD HOROWITZ, ETHNIC GROUPS IN CONFLICT (2d ed., Univ. Calif. Press 2000) (1985).

[3] See John McGarry, Brendan O'Leary & Richard Simeon, The Integration-Accommodation Debate: An Outline, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES, supra note 1.

the formation of political parties; and the relationship between religious institutions and the state.

Because legal scholars hitherto have not been central figures in the debate between accommodationists and integrationists, this symposium is interdisciplinary, presenting contributions from leading scholars of comparative constitutional law and comparative politics. Moreover, is it organized around a series of case studies: Canada, Fiji, Indonesia, Iraq, Scotland (in its relationship to the United Kingdom), and South Africa. The use of concrete examples serves important functions. It helps to clarify and sharpen our understanding of the sometimes abstract debate between integrationists and accommodationists. In addition, by exploring how these competing constitutional strategies evolve in practice, it is possible to acquire some grasp of the costs and benefits associated with each one. Finally, sustained and theoretically informed reflection on constitutional practice may force us to reconsider the cogency of the theories themselves. As some of the papers suggest, the dichotomy between accommodation and integration may be insufficiently nuanced to describe accurately the function of the actual constitutional provisions in divided societies.

The symposium seeks to bring the debate regarding accommodation and integration into the ongoing dialogue of mainstream comparative constitutional law. It is hoped that other scholars will continue this conversation.

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