

## Book Review

Colin Harvey and Alex Schwartz (eds.), *Rights in Divided Societies* (Hart Publishing, Oxford and Portland 2012, 284 pp., £47 (hb) ISBN 1849461007).

This book, edited by Colin Harvey and Alex Scharz, and published in 2012 in Hart's *Human Rights law Series*, is a substantial contribution to the academic discussion on a topic to which little attention has been given: the question of constitutional choices *vis-à-vis* the accommodation of diversity. Adopting an innovative and to a large extent comparative approach, the authors provide an examination of several types of constitutional frameworks of rights, focusing in particular on the case of 'divided' societies, i.e. these societies which are divided both in a time of peace and in post-conflict situation, mainly because of ethno-national conflicts. Oscillating between theory and practice, the authors bring forward legal schemes, judicial patterns and domestic constitutional practices from all over the world in order to find the ultimate solution in managing diversity. Overall, the contributions are well structured and researched and the arguments provided solid, accompanied both by deep theoretical knowledge and practical experience. The authors challenge the traditional theory of rights-based constitutionalism and to a certain extent the traditional liberal democracies practice, with regard to group rights.

The first part of the book, entitled 'divided democracy', provides a solid theoretical basis of discussion of the balancing of values and rights, regarding both legislative choices and judiciary empowerment – without however, omitting to illustrate the debate with concrete examples of domestic constitutional practice. Stephen Tierney challenges the concept of a uniformising 'rights cosmopolitanism' and argues that the values of traditional liberalism, based on the entrenched constitutionalism may not be an appropriate choice for an expanding concept of rights based on the principle of pluralism. He illustrates his rationale by examples from both international and domestic law (the ECtHR *Lautsi* case and the Scotland 1998 Act), in the view of highlighting the way in which 'the rights explosion serves to elevate judges in a position of vital political actors'. (p.26) Right after him, Samuel

Issacharoff provides a legal and political analysis of conflict-management by examining the concept of democratic rule, in the light of the so-called 'consociationalism' – a common scheme of managing diversity in republican democracies, or in other words, 'a formal mechanism of power sharing'. (p.33) He explains how the newly created Constitutional courts of the former Soviet States and post-Communist societies (Hungary, the Czech Republic, Romania, Moldova, the Baltic States, Mongolia, Albania, as well as South Korea), along with Federal States such as Germany, assumed (or, at least, have been forced to assume) a political role in order to manage the representation of ethnic groups and minorities in the law-making and assure the well-being of the newly created political orders. Yash Ghai on his side moves the debate to a non-western perspective of ethnic minorities' accommodation. He examines the interrelation between the concepts of ethnicity on the one hand and competing notions of rights on the other. Drawing from paradigms in the post-colonial South Asia (India, Pakistan), as well in Canada, Fiji and South Africa, he argues that human rights can provide an effective framework for political negotiations that aim at managing diversity. Pointing out that ethnicity is to a large extent melted with religions and beliefs, and that individual rights cannot be separated from group membership, Ghai suggests that minorities' formal recognition and empowerment through affirmative actions are prerequisites for any social reform.

The second part of the book, entitled 'judicial independence and empowerment' is dedicated to the management of diversity of the judiciary, including in post – conflict situations. Sujit Choudhury and Richard Stacey examine in a most vivid way the question of the Apex Courts' design in societies ravaged by ethnic conflict. They argue that the political independence of the Courts should be the substantial concern of any democratic transition in a post- constitutional settlement, both in terms of the structure of these Courts and the appointment of Judges (including international judges at some cases). Choudhury and Stacey provide fruitful analysis of the Court's design and performance in three different contexts: Bosnia – Herzegovina (the authors provide a thoughtful analysis of the Bosnian 'constituent peoples' decision and the 'place names' case), Canada and Germany. According to

them, both the legal framework safeguarding minorities' rights and the Courts' design should be a part of the negotiations agenda, in order to guarantee the Court's empowerment and impartiality. Harvey and Scharz's contribution follows. They argue that a Bill of Rights, which promotes equality norms by being 'broadly exclusive' and susceptible to diversity accommodation (as it has been the cases of the Canadian and the South-African Constitutions) is needed in Northern Ireland. The central part of their analysis consists of explaining how popular participation, i.e. public consultation and civil society participation, along with the elite's support in the drafting of a Bill of Rights, may contribute in reinforcing collective rights and maintain stability. Yet, in the authors' view, this Bill of Rights should be equally subject to the peoples' scrutiny, by means of what they call 'popular participation'-including elite support. (p.125)

The third and fourth parts of the book respectively, entitled 'post-conflict situations' and 'pluralism', draw directly upon domestic examples to point out the problems of constitutional choices with respect to the accommodation of diversity. David Feldman examines the case of Bosnia – Herzegovina. He points out that the consociationalist model of the Constitution of this State after the democratic transition still presents a number of deficiencies. He argues that a more elaborate and explicit guarantee of human rights may avoid conflicts of interests (particularly between individual and group rights) and make the Constitution more effective. Mara Malagodi examines the case of rights and inclusion in Nepal. After a thorough examination of the various constitutional frameworks that Nepal has seen after the long internal war in the country, and the rights guaranteed therein, she focuses on the role of language and national symbols in the strengthening of the Nepali national identity. She demonstrates how the discussions on culture have been crucial for the consolidation of group rights and argues that the preservation of the variety of ethno-linguistic, cultural and religious identities of a number of groups may play a key role in the Nepali context. Daniel Weinstock in his turn takes a different and somehow more realistic stance on accommodation of diversity. Examining the case of the Canadian Charter, he focuses in particular on the demands related to cultural and religious accommodation in Canada. He suggests that the Canadian

'multicultural' model may have been detrimental for Canadian unity, suggesting, somewhat drastically, that the balancing of conflicting concerns should be done at a legislative level rather than a judicial one. Rubio-Marin and Alvarez-Alvarez examine the question of the veil and religious symbols in public spaces in the European context (France, Germany and Turkey), and argue for the need to perceive schools as 'domain of confluence of competing rights' along with the need to crystallise a theory of education that would be based on a liberal democratic theory, but nevertheless, allow different identities to coexist. The last contribution is by Amaya Alvez Marin, who, drawing from the constitutional experience in Chile, demonstrates how constitutional transformation based on a 'democracy of agreements' (p.246) may be able to fulfil a political role in the transitional democracy.

How best should the legislator plan and the judge devise in order to handle competing constitutional interests and rights then? As this book implies, there is no 'ready-made' answer. The only constant of the discourse seems to be the fact that the politically charged atmosphere of divided societies does not allow for any *in abstracto* solutions and is, to a large extent, dependant on the context. In this respect, the book somehow manages to perturb our belief in the classical concept of the separation of powers, and demonstrate that the judiciary can, and in some cases should, assume a much more substantial role than the legislative in the management of diversity. The choice of the national contexts examined may seem somewhat scattered, and the thread among the contributions may be sometimes lost; yet, the book manages to be an inspiring and stimulating attempt to shed light to the question of accommodation of diversity at all levels of the constitutional process. This is precisely where the merit of this book resides. As the editors point out in their introduction, 'it is [their] hope that the work will stimulate future comparative research and debate on the complex role of rights in divided societies' (p. 7).

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