Democratic Constitutionalism and Group Rights

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Robert Post's article is finely argued, densely packed and deftly presented. It is also unusually alive to complexity, variety and particularity. My few comments cannot do it justice, so I won't even try. I will merely focus on one of its parts, and within that, only some of its suggestions.

Post considers three legal strategies for 'promoting cultural diversity': individual rights, group rights and devolution of sovereignty. His concern is to tease out, on the one hand, the ways in which and extent to which these measures are likely to promote such diversity, and, on the other, the potential tensions between them and the conditions of democratic constitutionalism. Of the three vehicles he considers, I will limit my comments to group rights. If not *the* central legal mechanisms Post considers, they are central to his argument and to many other arguments about how to deal with the proliferation of identity- and diversity-based claims that we witness throughout the world today.

I begin with the distinctive 'lawyerly' character of Post's approach, in particular its salutary openness to variety and complexity. I then praise its *political* as distinct from purely moral focus. Thirdly I question whether group rights always stand in potential—*in principle*—conflict with democratic constitutionalism. Are there circumstances where group rights are not merely tolerable but essential for any democratic constitutionalism to be possible? Finally, I ask whether group rights in service of goals other than that on which Post focuses—promotion of diversity—are both more justifiable and perhaps less dangerous to democratic constitutionalism than Post suggests.

I.

Post begins his discussion of group rights by distinguishing his approach from the 'large philosophical literature addressing the question of whether group rights are possible or desirable'. He by contrast begins 'from the practical perspective of a functioning legal system, where such rights are in fact quite commonplace.' The contrast is important but it is not complete. For unlike many philosophers innocent of legal particularity, and lawyers innocent of philosophical principle, Post's discussion ranges easily over and connects both. In this context, that bridging is particularly valuable.

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Writing on group rights commonly occurs on one or other of two quite separate levels. On the one hand, there is a great deal of moral philosophy that seeks to attack or defend such rights on general moral grounds. The discussions are typically theoretical and the issues at stake are usually ones of principle, not of practical implementation. Practical matters might appear as occasional and anecdotal examples, drawn from accidents of a writer's life experience or reading, but rarely as the subjects of deep familiarity or rigorous examination. On the other hand, there is the world of legal practice, where measures are essayed to institutionalise group rights. Those measures are manipulated by people (or their lawyers) concerned to profit from or resist such manipulations. Discussions here are commonly rather of consequences than of principles. They are also often constrained by whatever happens to be available in the jurisdiction. Goals are set elsewhere; here one talks of means.

Between these two levels there is a space, where one might hope to—but rarely does—find what could be called 'theorists of practice', engaged in close-grained and well-informed discussion of practical measures, concerned at the same time with principles and practices, rights and consequences, generalities and particulars, and able to move confidently and competently between these levels, to inform and enrich both. Post is *par excellence* a sophisticated theorist of complex legal practice, neither a philosopher nor a policy-driven bureaucrat or client-driven lawyer, but at ease with the languages and concerns of both. In the discussion of this morally charged and practically complex range of issues, such a theorist is both valuable and not very common.

One value of Post's approach is the range of 'on the ground' variation and complexity it makes apparent. In any legal order group rights come in many forms and have many and varied effects. This is not always noticed by those philosophers who give confident, if varying, general and in principle answers to the deceptively simple question, whether group rights should be legally acknowledged. Post raises a number of general considerations that bear on any answer to that question, but he doesn't give a general and final answer of his own. Instead he insists that we must patiently sift, weigh and measure, since many relevant factors and the ways they play out in the world will be particular and dependent on history, traditions, structures and local circumstance, all of which vary; as do the sorts of groups on which rights are conferred. I think that is the appropriate—and not an evasive—strategy to adopt. I certainly don't have any satisfactory general answer to the philosopher's question. That's partly because the issues are so hard, but, more important, because I think it is one of those general questions which should never be put—and certainly never answered—in general terms. Or if it is put, the answer should always be: it depends! Groups differ, so do the circumstances in which constitutions are contemplated, so do the states which are asked to do the recognition. All these differences matter.

Even if we narrow our focus to rights that 'go to the identity of persons', as Post does, there is no single, simple story. On the one hand, there are scores of examples where recognition of group rights has done nothing good for the groups categorised apart from freezing them when they might, better for all concerned, be

allowed to thaw. Or pretending they are frozen when they have in fact thawed. Or bringing them envious hostility without securing them protections from it; think of the Minority Treaties imposed on Poland after the First World War. Who in particular was helped by them?

Again, examples are plentiful of legal recognition of groups generating little other than leverage for the racketeering of cultural impresarios, or as the Indian anthropologist, Dipankar Gupta describes them, virtuosos.[1] Some group rights might come to *produce* or *recreate* groups which are supposed already to exist and which they are purported merely to defend, groups which—or leading members of which—then have a vested interest in the maintenance of the group's identity and sources of leverage. Protected groups, or protected practices within them might well, as has often been observed, threaten the educational and maybe even the life chances of their members. Moreover the world is full of experience of the sinister face of group ideologies both when it turns outward and also inward. Recent history in the Balkans springs to mind, but of course many other parts of the world share similar experiences.

And, there are vast differences among groups in the sorts of *moral* claims appropriate to their character and condition. Michael Walzer is right, for example, to distinguish,[2] on the one hand, between the 'minorities' who flooded into America (or Australia) as willing, indeed eager immigrants, and on the other indigenous peoples, or just territorially long established nations and groups who have simply been submerged, as if by fate but usually by empire and certainly not by choice, by more powerful invaders or neighbours. Gupta, whom I mentioned above, prefers cultural 'survivors' to 'survivals', but I have to say that I have more sympathy with that preference in relation to the former, the willing immigrants, than to the latter, the subjugated natives.

The situation of the latter is often, in the technical sense of the word, tragic, and even if nothing can be done to make the tragedy disappear, that tragedy is relevant to the policies one might think appropriate to adopt. Not in every context always, but in that one very often, the point that Avishai Margalit and Joseph Raz make about the importance of what they call 'encompassing groups' to individuals is well taken: '[i]Individuals find in [such groups] a culture which shapes to a large degree their tastes and opportunities, and which provides an anchor for their self-identification and the safety of effortless secure belonging'.[3] These are often fragile things, and there are reasons to help people try to preserve them, perhaps even to try to recover elements of them where their anchors have been cast adrift. Members' need for cultural belonging might itself be an intrinsic ground for support, but such support might also figure as a counter-measure to already-existing discrimination and denigration which members of certain groups suffer, whatever

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1 'Citizenship and Cultural Particularlisms: A View from India', paper presented to Workshop: Changing Legal Cultures IV, International Institute for the Sociology of Law, Onati, 24-26 June, 1999.

2 See his 'Pluralism: A Political Perspective', in Will Kymlicka (ed), *The Rights of Minority Cultures,* (Oxford: Oxford University Press, 1995).

3 See their 'National Self-Determination' ibid 86.

they individually are or do, or want to do about it. Members of such groups are commonly victims of non-individualised harms, harms which accrue to them not because of anything they individually have done or can do but simply because they do, or are taken to, belong to the group. Such harms are especially efficient, since they are effortlessly transmissible and can be suffered by members of derided or excluded groups, even in the absence of particular individual dealings or long after the worst of such dealings have ceased or changed. Humiliation, as Margalit has so eloquently reminded us,[4] is such a harm. No one who tries to imagine the range and effects of harms that Australian Aborigines have suffered in the last 200 years should ignore such particular, potent and insidious kinds of wrongs, or their effects. If group rights can be shown to address and redress such wrongs with some chance of success, and of course this is an important 'if' about which Post has a lot of illuminating things to say, that is a powerful but not always decisive, argument in their favour.

II.

One of the reasons that rectification of wrongs is not always decisive relates to another distinctive feature of Post's presentation: its focus on the *political* implications of group rights, in particular their implications for a democratic constitutionalist regime. These implications too are variable, but they are less discussed in the philosophical literature on group rights than they might be. I have in mind in particular his consideration of possible tensions between group rights and the preconditions of a democratic state. Group rights are often defended as rights against the state, but they don't always inhibit the state's capacity to do things harmful to groups (or individuals). Indeed they might extend that capacity, even while limiting the state's ability to be useful. As Post points out, they can give the state basis for leverage and intervention—in defining the group, shaping its procedures and internal structure, fashioning at least the official elements of its agenda, allocating power among group members, establishing conditions of membership and entitlement—in ways that are often problematic. From one point of view, for example, the *Mabo* decision was a great moral and legal victory for Aborigines. From another, it and the attendant legislation which first sought to institutionalise (and later to de-institutionalise) it dictated what Aborigines would have to do, show and be able to gain from what have at last and belatedly been acknowledged to be their long-existing 'rights'. Cast in a language of 'recognition', such acknowledgment is actually fabrication, and members of minority groups do not always have much clout with the fabricators.

Moreover, as Andras Sajó has recently pointed out, group 'rights'—thought of as immunities—might prevent the state insisting on individual safeguards for group members, which might otherwise apply. Thus Sajó cites those Hungarian universities deemed to be denominational, to which not even labour law can now be applied, let alone laws for due process or against discrimination, since that would

4 See *The Decent Society,* (Cambridge, Mass: Harvard University Press, 1996).

interfere with church autonomy.[5] And even when they do limit the state, group rights can be deployed against the individuals who compose them and other individuals too, particularly when the hold of individualism is often weak and that of collective loyalties is, or has again become, strong. Again this is true of east and central Europe but of course not only there. And it is often more difficult to separate the effects at these two levels than Kymlicka, criticised on this point by Post, seems to acknowledge.

Again, it is important to allow for variation here. In a recent paper, Kim Scheppele defends rights of all sorts as the defence of the less against the more powerful, and in this context defends rights for groups against states, but not for states themselves against groups 'for the simple reason that the government can already do whatever it wants to its citizens. With the power government has, rights are superfluous and morally dangerous.'[6] There are places where that may well be true, and Australia might be one of them. Some democratic states are pretty robust creatures with strong democratic institutions, long democratic traditions, well-embedded infrastructure, and economies which can pay for all of the above. They can tolerate a lot that logically seems to contradict their basic principles. So not every in-principle tension of which Post writes is equally tense in every configuration of statehood that one comes across. I would have appreciated some more acknowledgment of this in Post's paper.

But the problem of many states (and again my examples are drawn from the post-communist world but are directed more broadly) is not that they are too strong but that they are too weak. One of the goals that might legitimately be sought of their institutional architecture is to help them to attract citizens' allegiance and support. Particularly if they are, or possibly might become, democratic. In such states it is crucial to heed Post's argument that 'rights protecting group interests intrinsically divide citizens into groups, and they divide groups from each other. For this reason, such rights put far more pressure on the unity required by constitutionalism than do rights protecting individual interests'. There are circumstances where fledgling and weak democratic states might be threatened by legally entrenched and competing group loyalties and structures within. In the context of east Europe, where many states are weak, demands upon them are strong, they are still in the making or re-making, and state-*building* is a precarious and uncompleted project, neither liberty nor democracy might be served by an indiscriminate constitutionalisation of group rights. Even there, in some circumstances, eg, a reconstituted Serbia, it would be lunacy to ask Albanians simply to regard themselves as individuals whose ethnicity is merely a private matter or at least not a matter that demands state respect. In others, the same demand might strengthen states and citizens alike, and only harm virtuosos and their clients. Anyone concerned with the institutionalisation of liberty and legality

5 'Constitutional 'Universalism' as an Element of Pluralism in Post-Communist Law', paper presented to Workshop: Changing Legal Cultures IV, International Institute for the Sociology of Law, Onati, 24-26 June, 1999.

6 'The Problem of Group Rights for National and Ethnic Minorities: The Hungarian Solution', paper presented to Workshop: Changing Legal Cultures IV, International Institute for the Sociology of Law, Onati, 24-26 June, 1999.

in such states should pay heed, though not everywhere the same heed, to Robert Post's cautions.

III.

But these cautions, though welcome, can be overstressed. Sometimes they are in Post's article, in large part because of a particular socio-political assumption about the range of relationships between group rights and democratic constitutionalism. Such an assumption seems to me to underlie Post's argument and to be less open to the variety of the world than is usual in his discussion. For Post assumes as a sociological given that there is necessarily a 'theoretical tension between cultural heterogeneity and democratic constitutionalism,' a tension that is engaged whenever a democratic state seeks to 'promote cultural diversity'. In practice, he concedes, the tension might not be so great, and some measures of recognition might well be compatible with democratic constitutionalism. But the question is always put as though democratic constitutionalism and group rights—more particularly identity-based group rights, are likely to point in different, commonly contradictory, directions. The question always is whether the tension can be accommodated without threat to democratic constitutionalism. What, however, if the relationship is not one of necessary tension but of interdependence and support, perhaps even necessary interdependence and support? And what if there are circumstances where the only chance of a democratic polity is the legal recognition of cultural heterogeneity? These are two possibilities worth considering and I will take them in turn.

Post draws on Durkheim's essay, 'Individualism and the Intellectuals' to support his own insistence that '[i]ndividualism is the modern ideology, *par excellence,* because the only thing we have in common is our status as individuals'. This, famously, is also a central theme of Durkheim's analysis of modernity in his classic first work, *The Division of Labour in Society.* But Durkheim is an uncertain ally on this point. For in later writings, particularly his preface to the second edition of *The Division of Labour* and his posthumously published *Professional Ethics and Civic Morals,*[7] he introduces a deep concern: that modern societies cannot get the normative integration that all societies depend upon from individualism alone. That way lies *anomie.* For Durkheim insisted that the state was too large and the individual too small for either to be effective foci of normative integration. What was necessary was that intermediate bodies exist which are capable of generating and enforcing their own specific ethos, rules and injunctions, and that they be publicly supported in doing so:

> A society made up of an extremely large mass of unorganised individuals, which an overgrown state attempts to limit and restrain, constitutes a veritable sociological monstrosity. For collective activity is always too complex to be capable of finding expression in the one single organ of the state. Moreover, the state is too remote from individuals, its

7 (London: Routledge, 1992).

> connections with them too superficial and irregular, to be able to penetrate the depths of their consciousness and socialise them from within. This is why, when the state constitutes the sole environment in which men can fit themselves for the business of living in common, they inevitably 'contract out', detaching themselves from one another, and thus society disintegrates to a corresponding extent. A nation cannot be maintained unless, between the state and individuals, a whole range of secondary groups are interposed. These must be close enough to the individual to attract him strongly to their activities and, in so doing, to absorb him into the mainstream of social life.[8]

Since the purposes they served were essentially public ones, Durkheim had no compunction in demanding that such groups should receive the backing of law. Of course, Durkheim focuses on professional associations, not cultural groups, as the sorts of mini-societies that can bridge individuals and the wider society. His point can be generalised to other 'intermediary groups' in what it is now modish to call 'civil society', but Post might not worry about the sorts of groups that Durkheim had in mind, arguing that these are not group interests that 'go to the identity of persons'. Yet it is not clear to me that Durkheim would endorse such a limitation, for he does actually seem to envisage professional groups having identity defining roles. He certainly treats as exemplary collegiate *religious* bodies, such as Roman corporations, with their 'common cult, shared banquets and festivities, a cemetery in common'[9] and the 'moral environment' engendered both in Rome and during the Middle Ages by Christian corporations. Where Post characteristically stresses the potential *tensions* between state and group loyalties, Durkheim seems to observe that hybrid loyalties are common, in democracies as elsewhere, and indeed claims they are mutually supportive. Citizens might value the democratic state to which they belong precisely because it allows them to draw nourishment from, perhaps even supports in various ways, the religions, or ethnic groups, let alone professions or universities, to which they also belong.

That might appear fanciful in the case of intense cultural loyalties, and frankly I don't know what Durkheim thought or would have thought about them. But, on the one hand, many loyalties, while important, are not exclusive or desperately intense. Where they are, moreover, there are at least some circumstances where, precisely because of their intensity, legal recognition of them seems to me a more plausible basis for democracy than any other. Not necessarily very plausible, I might add, but more than any other. And this brings me to the second of my observations on this issue.

There is no doubt that identity-defining groups often threaten each other and even more the very possibility of a democratic state. Whatever the ultimate sources of the carnage in former Yugoslavia or Northern Ireland, we all know the basis on which people were killed. And yet, what chance for building democratic

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8 'Preface to the Second Edition' of *The Division of Labor in Society,* trans. WD Halls (New York: The Free Press, 1984), liv.

9 Ibid xl.

constitutionalism in societies composed of such identity-and-vulnerability defining groups? That is a serious project today in Northern Ireland, tomorrow perhaps in Croatia, and one might pray one day in Serbia. Would it be, could it possibly be well served, by refusing to give serious attention to group-based legal rights? Would anyone with that history voluntarily deal within anyone else in those circumstances? One might even say that the *only* chance of *democratic* constitutionalism where identity-based loyalties are intense would involve some sort of legal recognition of such loyalties. It is no simple matter to say what that consideration should issue in, nor is it without risks. But in these far from rare circumstances, no attempt to foster democratic constitutionalism is without risk. And, as the Bulgarian political scientist, Rumyana Kolarova, has observed, in societies irreconcilably divided along ethnic/religious lines, like her own and several other post-communist societies, 'the failure to carefully protect the rights of minority groups greatly jeopardises the integrity of the state and the stability of the democratic process.'[10] Perhaps, over time, when members of previously fighting groups discover that fragile democratic arrangements give former enemies opportunities to lose without losing everything, on condition that winning is not winning everything, allegiance to the democratic polity will grow and the arrangements will become less fragile. Group loyalties might weaken too. Presumably these are among the goals of what is being attempted in Northern Ireland today. At the moment they are merely hopes and they may well prove to have been vain hopes. But is it obvious that the chances of building democracy in circumstances of intense group divisions are better served by a regime of individual rights than by one that takes these sources of division into account?

It might be that devotees of democratic constitutionalism need to acknowledge, as Nathan Glazer once argued, that societies face a difficult but existentially defining choice between two basic alternatives, both potentially compatible with democracy, but radically different in their understanding of the nature of their polity. As Glazer put it:

> If ... the model a society has for itself, today and in the future, is that it is a confederation of groups, that group membership is central and permanent and that the divisions between groups are such that it is unrealistic or unjust to envisage these group identities weakening in time to be replaced by a common citizenship, then it must take the path of determining what the rights of each group shall be.[11]

I must say that, like Post, I would think it a great loss if either of our countries, the United States or Australia, chose to envisage its future in this way, but there are many countries where his and my preferences are simply irrelevant and where, yet, there are many who would prefer them to be constitutional democracies than anything else. I see no reason to believe their hopes are

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10 'Tacit Agreements in the Bulgarian Transition to democracy: Minority Rights and Constitutionalism' (1993) 23 *The University of Chicago Law School Roundtable* 23, 24.

11 'Individual Rights against Group Rights' in Eugene Kamenka and Alice Erh-Soon Tay (eds), *Human Rights* (London: Edward Arnold, 1978) 99.

incoherent.

IV.

Let me conclude, though, with one last observation about this beguiling and persuasive paper, which does apply to countries like Australia and the United States. Post considers potential tensions between constitutional democracy and group rights in the light of one goal that these rights are supposed to serve: the promotion of cultural heterogeneity. He pursues the implications for democracy, of a state deciding 'to promote the greatest degree of cultural diversity that is compatible with its own foundational commitment to democratic constitutionalism'. Elsewhere he asks '*how* a democratic state might promote cultural diversity' and he considers 'the mechanism of group rights as a means for the protection of the value of cultural heterogeneity'. Post takes these formulations from many celebrants of diversity, only to explore their tensions with a commitment to democracy. Since democracy requires a certain unity, a 'shared voice', we seem—quite often it appears—doomed to choose between two overarching society-wide values: democracy and diversity. In such circumstances, as the song tells us, something's gotta give.

Post notes[12] that he does not consider group rights 'insofar as they serve other purposes, such as remedying the effects of past discrimination, or distributive justice, etc.' I would have preferred it had he not made this self-denying ordinance, and said something about how he thought his arguments affected group rights in service of such different goals. For, on the one hand, whatever the purposes for which they are granted, the tensions he notes would seem *prima facie* to apply wherever group rights 'go to the identity of persons', and thus similarly to involve tensions with democratic constitutionalism. If so, that is important to know, and the target of his article might be much wider than he acknowledges, and arguably more important than the one with which he explicitly engages. On the other hand, I think the dilemmas Post presents seem more stark, and reconciliation of goals in tension seems harder than sometimes they might, because of the particular goal he chooses among those that lead people to consider group rights. And so, given the *prima facie* generality of several of the claims he makes, it would be unfortunate—though superficially it might seem quite plausible—for his argument to be taken to have the broader reach that in this footnote he disavows.

This is important for I believe the objective of promoting diversity is intrinsically flawed, and in particular too morally empty to be worth arguing for, particularly in light of some of the dangers that Post suggests lurk in its pursuit. I have to confess that, apart from the aesthetic and culinary attractions of diversity, which are considerable, its promotion *per se* doesn't exercise me much morally. *Promotion* of *diversity* is a cultural theme park justification of group rights. Often, however, neither promotion nor diversity are what really matters. I mentioned earlier such things as concern for vulnerable 'encompassing groups' and the

12 Post, 195 n 43 this volume.

reparation of group harms. Protection of truly endangered cultures, which have members to whom they matter, should, I think, matter to us. That might involve diversity (of course it necessary posits *some* of it), sometimes a lot sometimes a little, but that is of secondary significance.

Here too, of course, the concerns Post raises apply, all the more since they concern precisely those matters that he considers most difficult for democracy to accommodate, 'those that go to the identity of persons.' But the contradiction of purposes in this case is less socially or politically comprehensive. Not every social group is culturally encompassing and not every group suffers from harms for which group rights are even plausibly a solution. This has two implications. First, rights might be apt for such groups not because some large, let alone comprehensive, shoring up of diversity is to be given as of right to any group that claims it, but as legitimate exceptions that a democratic state might be asked to accommodate. Moreover the moral stakes are higher and, one might argue, they should properly be taken to count for more than many other sorts of group diversity, or the diversity of many other sorts of groups, in the balancing that Post recommends.