

# **CONSTITUTION MAKING AND NATION BUILDING**

**(Scientific summary of sessions 5 and 17 based on case-studies of Cyprus, Serbia and Montenegro, South Africa and Switzerland)**

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## **I – Introduction: Key Questions**

Constitution making and nation building in multicultural societies is in fact the issue of state building. The authors of the Theme II Paper rightly say that the critical challenge can be defined as “finding a political compromise between two sources that results in an institutional equilibrium” (Fleiner, Kälin, Linder, Saunders, 2002). Given that “state making does not axiomatically or mechanically lead to building of a nation” (Haysom, 2002), this political compromise has to be reached already at a constitutive, state building level. The nature and even viability of *pouvoir constituant* for multiethnic societies is a major stake. The constitutions in this case also have to “reconcile sameness and difference” by addressing identity politics. This objective implies that constitution may receive additional role of an instrument that can mediate identity conflicts since major liberal virtues backing liberty and popular sovereignty - those of tolerance and trust respectively - are not at hand.

In consequence, the interrelationship of constitution and nation building is the topic where major policy recommendations necessarily have to flow almost directly from basic conceptual considerations about constitutive particularities of multiethnic societies.

Together with federalism, multiculturalism calls for revision of the major liberal democratic principle, namely, that majority as such is the legitimate expression of the sovereign will of the people. One can indeed talk of a two-fold structural challenge to constitutionalism: First. Multiculturalism questions the intrinsic premise behind the modern nation state, which is that only a society homogenized in (one) identity can lead to political consensus as democratic consensus. Second. The demand that ethnic, religious, cultural identities should *publicly* matter makes an epochal departure from the constitutive principle of modern politics, that of neutrality of public sphere against ethnic, cultural and religious group identities.

When translated into demands for minority rights and territorial autonomy, identity politics casts a new light on the citizenship as the principle to symbolize universality within a particular nation-state. Minorities do not fit in the constitutive principles of modern polity as (through majority defined) democratic polity. In terms of constitution making and nation building, this means that the following two major problems have to be revisited: that of design of *pouvoir constituant* and that of citizenship as the principle defining members of a polity. Put differently, a new answer is needed for the critical question on legitimacy foundations : *Whose is the state?*

To ensure that the work sessions provide the vital link between the conceptual and the empirical, the following key questions made a leitmotif in case statements:

1. Does the promotion of a common, national identity complement or erode the existence of ethnic or sub national identities in a multi cultural society? What are the conditions for a positive inter-relationship?
2. In what circumstances, and how should the Constitution itself expressly address, and codify identity divisions in a multi cultural society?
3. How and in what circumstances can the federal model reduce (or assist in managing) ethnic conflict in a multi cultural society? How and in what circumstances it exacerbates such a conflict?
4. Can the design of a constitutional reform process yield a constitution more likely to address and manage identity-based divisions in a multi cultural society?

## **II – Major Points, Lessons Learned and Policy Recommendations**

### ***II.1. Work Session 5: Constitution Making Process (Cyprus and Serbia/Montenegro)***

#### **II.1.1. Major Points:**

To start with, the two cases indeed demonstrated quite a few commonalities:

- Illegitimate *pouvoir constituant* and absence of democratically constituted nation lie behind present, disputed state and constitutional design.
- The existing constitutional design was also instrumental for the political impasse and confrontation between elites.
- Absence of tolerance and trust as necessary conditions for peaceful and democratic society is evident. In the case Cyprus this seems likely to be irreversible, since a profoundly different perception was demonstrated in terms of key factors that have caused the conflict, as well as in terms of the assessment of present situation.
- Minority line of argument (that of Montenegrins and Cypriot Turks respectively) and majority line of argument (that of Cypriot Greeks and Serbs respectively) are similar among themselves. In both cases, the two correlating sides of the conflict are producing analogous “simulations”: Turks and Montenegrins “simulate” that the two independent states already exist; Yugoslav and Serbian Government and the Government of the Republic of Cyprus “simulate” the existence of democratic legitimacy for the whole, which is neither the case.
- Finally, international community moderates in both cases. The “internationalisation” of otherwise nation-state constitution making is taking place.

Nevertheless, significant, even structural differences were also demonstrated:

- Given different historical background, the case of Serbia and Montenegro is not the case of bi-communal ethnic conflict. Here the crucial issues of the conflict, which was initiated by political elites, are *crosscutting through* Serbia and Montenegro.

- In Cyprus, the long-lasting conflict seems to have irreversibly radicalised the situation and in the last decades in fact generated new “facts”. In consequence, the conflict dominates across all spheres of politics and society *within Turkish and Greek communities respectively*.

### **II.1.2. Lessons learned and policy recommendations:**

- Minority always tries to get as many as possible “veto points” in order to remain protected from overruling.
- It is again minorities that focus on external rights for their territorial entities. This shows that they take negotiated solutions as somehow “transitory”. In the “internationalisation” of their position they see a “manoeuvring space” to sometimes again open up their issue.
- The categorical nature of ethnic conflicts inevitably leads to different readings even of the causes of the conflict. In this situation it is almost impossible to reach agreement on the constitutive nature of future common state framework.
- This is why it is important that the foundations of commonalities, as a road to common identity, start with identifying common benefits for “staying together”. This presupposes to stop looking backwards (turning away from history) and to start looking forwards. In addition, the political will to understand the other side is of major relevance.
- In this context, federalism can play a major role. Constitutionally taken, federalism is not only the device of self-rule, but also the structure of shared rule, and this shared rule structure is equally important for commonalities.
- The role of the elite is critical, and the paradox of the situation lies in the fact that the positions of the elites cannot be democratically verified.
- Democracy is possible only when the state exists. If the state issue has not been solved, or has been re-opened, there is not much space for democratic legitimacy as the only solid basis for the feasibility of nation building.
- Whatever institutional design for the solution of such conflicts may be pursued, it is indispensable that it does not leave space for “re-opening” and re-negotiating constitutive foundations of the common state on almost day-to-day basis, when differences occur between the elites representing different communities.
- The paradox of the involvement of the international community lies in the fact that it operates under geo-strategic terms of reference, and these usually have nothing to do with internal viability, i.e., inside legitimacy of the proposed solution. Not common identity, but geo-strategic stability in the region is the matter of major concern. Internationally defined/imposed major framework for the solutions remains in principle non-negotiable.
- At the same time, interventions from the outside in such cases have not until now demonstrated major positive effects. This is in particular the case if international community intervenes in the time of nation building. Namely, nation-building processes form power relations from the inside, which the foreign interventions can only distort. In addition, this is also the reason why foreign pressure usually

proves as ineffective: power relations are distorted and there remain no reliable actors to respond to the pressure.

## ***II. 2. Work Session 17: Nation and Federal Unit Building (Switzerland and South Africa)***

### **II.2.1. Major Points:**

Given profoundly different historical background, hardly any commonalities between Switzerland and South Africa were identified in the debate. Instead, significant comparative differences were addressed.

Much more time was dedicated to the case of internal secession of the canton of Jura from the canton of Bern because the discussion on Jura case was primarily pertinent to the interrelationship between nation building and federal unit building. On the other side, the South African Case proved critical in displaying the role which constitution making can play for nation building. Last but not least, the debate on these two cases clearly mapped two structurally different types of federalism. The difference affects not only institutional design, but also underlying structural tenets and the role assigned to federal instruments in each of the two cases respectively.

Here some of the major points in the debate:

- Specific features of the Jura internal secession can be explained only by basic principles of Swiss federal design: those of political pragmatism, long historical evolution, participative nature of Swiss issue driven half-direct democracy, and the understanding of diversity as a virtue to be accommodated and further promoted through federalism. This, quite untypical understanding of cultural diversity makes inherent part of the common Swiss identity. Swiss “Willensnation”, i.e., political concept of nation is built upon democratic integration of cultural diversities. This explains why over-proportional representation of minorities remains immanent to the Swiss understanding of minority accommodation.
- Switzerland is a unique case of “strong cantons in a strong federalism”. The Constitution combines all mechanisms of checks and balances. In other words, energy has to be used to reach consensus, not to build majority.
- Jura case can be indeed taken as the “laboratory of federalism”, since some of the major issues relating to federalism in multiethnic societies have been here paradigmatically displayed. Since French speaking Catholic minority was not irredentist, the central state could play the role together with the unitary canton of Bern.
- On the other side, unlike Switzerland, South Africa is the case of federalism understood purely as devolution of power, system of vertical check-and-balances in constitutionalist sense of power control. Whereas in Switzerland asymmetric federal design accommodates national cohesion that relies upon maximal accommodation of sub-national identities, in South Africa like in most multiethnic countries, minorities are “inevitable evil”. There is no paradigm what to do with them and how to build up democratic unity based on a pluralist nature of society.

- However, equally important is that nation building in South Africa relied in the past almost ten years first upon reconciliation, and then transformation. In consequence, South African case demonstrated a specific, inclusive nature of the constitution-making process that gave people the feeling of “ownership” of the constitution. Politically controlled devolution as a process, and federalism as institutional design have made part and parcel of the nation building process since 1999. Paradoxically enough, the constitutional safeguards played until now a rather ineffective role.

## II. 2. 1. Lessons Learned and Policy Recommendations:

- In academic discourse, federalism has been predominantly discussed as a reluctant solution to multiethnic societies instead as the opportunity to reflect on the advantages of federal solutions in terms of good governance.
- There is a misunderstanding that multiculturalism is a problem *per se*. That is empirically wrong. That becomes true only if multicultural properties cumulate into segmentation. This is why the cases of crosscutting cleavages like Switzerland are “success stories”.
- Federalism can protect only certain minorities, those who are geographically concentrated on smaller territories.
- When federalism as a system of vertical checks and balances aims at accommodating multicultural pluralism (Switzerland), it inevitably builds on vertical power sharing and proportional representation, unlike Westminster model of horizontal checks and balances.
- Federalism should be understood also in terms of power relations. Federalism is an anti-majoritarian device and one of the major checks-and-balances instruments. This is why constitutionalist setting – instruments of legal control of political power, rule of law, human rights, independent judiciary and the like, are indispensable in order to have federalism work.
- Federalism should not only be related to minority issue, not even in the case of Switzerland. It is equally important as a set of designs to accomplish devolution and make subsidiarity principle effective.
- Both history and institutions play major role. It is the power-sharing institutions that can induce political culture of compromise and respect for the arguments of others (Swiss case).
- The design of procedure is critically important in case of secession, as the Jura case convincingly demonstrated. The cascade referendum tried to avoid ethnic foundation of the new canton. It also had a strong democratic line of argument behind: people, not elites should decide. Put differently, the Jura case gives an example how a civic answer can be provided for cultural and ethnic divisions.
- The role of the procedure in a case of secession is of key importance in another sense, too. As the cases of Quebec and Jura showed, it is necessary to design the procedure, which could discourage and thus prevent secession.
- The question as to how federalism can contribute to nation building remains equally relevant for the federal unit building. In this regard, South African case was most

instructive. It showed that the inclusiveness of the constitution-making process towards a constitutional compact (involvement of the people through public debates, “representativeness” of the constitution-making body) is decisive for the development of common identity to underlie nation building (“sense of building constitutional institutions”).

### III – Crosscutting Issue: Legitimacy

As already pointed out in the beginning, the interrelationship of constitution making and nation building in multicultural societies addresses in fact the issue of state building. Democratic integration of multicultural societies remains a major challenge, not only as an objective, but also as a strategy. In this latter respect the problem can be taken as a common denominator for the discussion in both work sessions. Violent elections and refusal to accept the results coming out of democratic procedure, remains one of the major paradoxes of majoritarian democracies in multicultural societies. The “winner takes all” system within pluralist and segmented societies inevitable produces illegitimate, group politics.

In consequence, one starts escaping constitutional designing – the stake is too high! Here, federalism can offer something. The major line of argumentation in both sessions showed that - when analysed within the context of constitution making and nation building in multicultural societies - federalism receives additional, major relevance, that of a legitimacy model. It is federal design organised as a structural link to consensus-driven democracy within a given nation-state, which becomes here relevant. Put differently: It is *federalised democracy* both as an objective and as a strategy of constitution making, which can critically contribute to nation building in multicultural societies.

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### Abstract

The interrelationship of constitution and nation building is the topic where major policy recommendations necessarily have to flow almost directly from basic conceptual considerations about constitutive particularities of multiethnic societies. When translated into demands for minority rights and territorial autonomy, identity politics casts a new light on the citizenship as the principle to symbolize universality within a particular nation-state. Minorities do not fit in the constitutive principles of modern polity as (through majority defined) democratic polity. In terms of constitution making and nation building, this means that the following two major problems have to be revisited: that of design of *pouvoir constituant* and that of citizenship as the principle defining members of a polity. Put differently, a new answer is needed for the critical question on legitimacy foundations: *Whose* is the state?

Democratic integration of multicultural societies remains a major challenge, not only as an objective, but also as a strategy. In this latter respect the problem can be taken as a common denominator for the discussion in both work sessions. Violent elections and refusal to accept the results coming out of democratic procedure, remains one of the major paradoxes of majoritarian democracies in multicultural societies. The “winner takes all” system within pluralist and segmented societies inevitable produces illegitimate, group politics.

In consequence, one starts escaping constitutional designing – the stake is too high! Here, federalism can offer something. The major line of argumentation in both sessions showed that - when analysed within the context of constitution making and nation building in multicultural societies - federalism receives additional, major relevance, that of a legitimacy model. It is federal design organised as a structural link to consensus-driven democracy within a given nation-state, which becomes here relevant. Put differently: It is *federalised democracy* both as an objective and as a strategy of constitution making, which can critically contribute to nation building in multicultural societies.