

## Work Session Proceedings: Reports

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### Constitution Making and Nation Building

(Work Sessions 5 and 17)

#### 1. Introduction: key questions

Constitution making and nation building in multicultural societies is in fact an 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” (see Fleiner, Kälin, Linder, Saunders, Part C). Given that “state making does not axiomatically or mechanically lead to building of a nation” (see Haysom, Part C), this political compromise has to be reached 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 a constitution may receive an additional role as an instrument that can mediate identity conflicts where major liberal virtues supporting liberty and popular sovereignty – those of tolerance and trust respectively – are not at hand.

In consequence, the interrelationship of constitution and nation building is an area 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 twofold structural challenge to constitutionalism. First, multiculturalism questions the intrinsic premise behind the modern nation state, which is that only a society homogenised in (one) identity can lead to political consensus as democratic consensus. Second, the demand that ethnic, religious, and cultural identities should publicly matter makes an epochal departure from the constitutive principle of modern politics, that of the neutrality of the public sphere against ethnic, cultural and religious group identities.

When translated into demands for minority rights and territorial autonomy, identity politics cast a new light on the citizenship as the principle symbolising universality within a particular nation state. Minorities do not fit into the constitutive principles of modern polity as (through majority defined) democratic polity. In terms of constitution making and nation building, this means that 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: whose is the state?

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

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

## **2. Major points, lessons learned and policy recommendations**

### **2.1. Constitution-Making Process – the cases of Cyprus and Serbia/Montenegro**

#### *2.1.1. Major Points*

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

- Illegitimate *pouvoir constituant* and absence of a democratically constituted nation lie behind the present disputed state and constitutional design.
- The existing constitutional design was also instrumental in creating 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 apparent in terms of key factors causing the conflict, as well as in terms of the assessment of present situation.
- Minority lines of argument (that of Montenegrins and Cypriot Turks respectively) and majority lines 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, neither of which is the case.
- There is international community moderation in both cases, and the “internationalisation” of otherwise nation-state constitution making is taking place.

Nevertheless, significant, and even structural differences were also observed. Given different historical background, the case of Serbia and Montenegro is not a case of bi-communal ethnic conflict. Here the crucial issues of the conflict 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 has generated new “facts”. In consequence,

the conflict dominates all spheres of politics and society within Turkish and Greek communities respectively.

### 2.1.2. *Lessons learned and policy recommendations*

- The minority always tries to get as many “veto points” as possible in order to remain protected from overruling.
- It is 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 sometimes see a “manoeuvring space” to reopen 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.
- It is important that the foundations of commonalities as a road to common identity start with identifying common benefits of “staying together”. This presupposes ceasing to look backwards (turning away from history) and starting to look forwards. In addition, the political will to understand the “other side” is of major importance. In this context, federalism can play a major role. Constitutionally, federalism is not only a device for self-rule, but also a structure for 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 reopened, there is not much space for democratic legitimacy as the only solid basis for nation building.
- Whatever institutional design for the solution of such conflicts is pursued, it is essential that it does not leave space for “reopening” or re-negotiating constitutive foundations of the common state on a 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. Geo-strategic stability in the region, not common identity, is the subject of major concern. An internationally defined/imposed framework for the solutions remains in principle non-negotiable.
- At the same time, interventions from the outside in such cases have not demonstrated major positive effects to date. This is particularly the case if international community intervenes during the nation-building process. Namely, nation-building processes form power relations from the inside, which foreign interventions can only distort. In addition, this is also the reason why foreign pressure usually proves ineffective: power relations are distorted and there remain no reliable actors to respond to the pressure.

## **2.2. Nation and Federal-Unit Building – the cases of Switzerland and South Africa**

### *2.2.1. Major points*

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

Considerable time was devoted 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 in 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. Several points arose during the debate.

- Specific features of the Jura internal secession can be explained only by basic principles of Swiss federal design: 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 is an 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 in the Swiss understanding of minority accommodation.

- Switzerland is a unique case of “strong cantons in a strong federalism”. The constitution combines every mechanism to allow checks and balances. In other words, energy is used to reach consensus, not to build majority.
- The Jura case can be indeed seen as part of the “laboratory of federalism”, since some of the major issues relating to federalism in multiethnic societies have been paradigmatically displayed. Since the French-speaking Catholic minority was not irredentist, the central state could play a role together with the unitary canton of Bern.
- On the other side, unlike Switzerland, South Africa is a case of federalism understood purely as devolution of power, a system of vertical checks and balances in a 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 as in most multiethnic countries, minorities are an “inevitable evil”. There is no paradigm as to what to do with them or how to build up democratic unity based on the pluralist nature of society.
- However, equally important is that nation building in South Africa has relied for almost ten years first upon reconciliation, and then transformation. In consequence, the 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 been part and parcel of the nation-building process since 1999. Paradoxically enough, constitutional safeguards have played a rather ineffective role to date.

### 2.2.2. *Lessons learned and policy recommendations*

- In academic discourse, federalism has been predominantly discussed as a reluctantly adopted solution for multiethnic societies instead of being viewed as an opportunity to reflect on the advantages of federal solutions in terms of good governance.
- There is a misapprehension that multiculturalism is a problem per se. This is empirically wrong. It becomes true only if multicultural properties cumulate into segmentation. This is why examples such as Switzerland are “success stories”.
- Federalism can protect only certain minorities, geographically concentrated on smaller territories.
- When federalism as a system of vertical checks and balances aims at accommodating multicultural pluralism (as in Switzerland), it inevitably builds on vertical power sharing and proportional representation, unlike the Westminster model of horizontal checks and balances.
- Federalism should also be understood in terms of power relations. It is an anti-majoritarian device and one of the major checks-and-balances instruments. This is why in a constitutionalist setting, instruments of

legal control of political power, rule of law, human rights, independent judiciary and the like, are indispensable in order for federalism to work.

- Federalism should not only be related to minority issues, not even in case such as Switzerland. It is equally important as a set of designs for accomplishing devolution and making the subsidiarity principle effective.
- Both history and institutions play major roles. It is the power-sharing institutions that can induce a political culture of compromise and respect for the arguments of others (Swiss case).
- Procedure design is critically important in cases of secession, as the Jura case convincingly demonstrated. The cascade referendum tried to avoid an ethnic foundation for the new canton. It also had a strong democratic line of argument: people, not elites, should decide. Put differently, the Jura case gives an example of 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 a procedure that could discourage and thus prevent secession.
- The question of how federalism can contribute to nation building remains equally relevant for federal-unit building. In this regard, the South African case was most instructive. It showed that the inclusiveness of the constitution-making process in developing 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”).

### **3. Crosscutting issue: legitimacy**

As has already been pointed out, the interrelationship of constitution making and nation building in multicultural societies in fact addresses 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 respect the problem can be taken as a common denominator for the discussion in both work sessions. Violent elections and refusal to accept the outcome of democratic procedure remain one of the major paradoxes of majoritarian democracies in multicultural societies. The “winner takes all” system within pluralist and segmented societies inevitably produces illegitimate group politics.

In consequence, people start to turn away from constitutional designs – the stake is too high! Here, federalism can offer something. The major line of argument in both sessions showed that – when analysed within the context of constitution making and nation building in multicultural societies – federalism gains still more 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 relevant here. 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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