Nation Building and Diversity

Work Session 1: Can Unity and
Diversity be Reconciled?

Work Session 13: Can Deep
Differences be Accommodated?

Lidija R. Basta Fleiner

1. Introduction

John Stuart Mill's conception of liberal democracy was built upon
the assumption that "free institutions are next to impossible in
societies with different nationalities". Since then, the nation state's
evolution from a mono-national into a multicultural state has
become a reality both in the constitutional politics of many states
worldwide, notably multinational federations, and in the largely
embraced scholarship on multicultural citizenship. More impor-
tantly, the same issue already became addressed within interna-
tional settings outside academic debates.[1] The prevailing debates
are now between differing conceptions of multicultural states such
as assimilation model-citizenship without nationalities and civic
state for a majority nationality[2]—and the integration model-
citizenship out of democratically integrated nationalities (pluralistic
democracies).[3] These taken together with identities emerging from
migration, where a "rupture" between territory and cultural identity
occurs, creates a global paradox of two processes running parallel:

"nation-building" on one side, and "breaking of nations", on the other.

In this context, the major questions and arguments outlined in the background readings for this subtheme flagged some of the most important ambiguities related to nation-building in multicultural (multi-ethnic, religious and linguistic) societies. Both work sessions had first and foremost to address the viability of nation-building in multicultural societies, although from different perspectives: those of constitutive principles and institutional set-up of federal politiy respectively.

2. Case Studies, Key Issues and Lessons Learnt

2.1 Reconciling Unity and Diversity: Malaysia, South Africa and India

Discussions at the work session with the presentation of the cases of Malaysia, South Africa and India "did not convince" that unity and diversity could be accommodated by different federal designs. Normative arguments and description prevailed over policy analysis and reflection on why and how more in particular this reconciliation can effectively work. The following key questions remained unaddressed: (a) in what phase of constitution making as a nation-building process diversity has to be built already into unity, and (b) why a given federal design not only accommodates but also further promotes diversity? In particular, the session missed the opportunity to demonstrate the centrality of trust and tolerance as state-making and nation-building values that sustain "federal qualities of the society". This is why it also fell short to identify a critical level of reconciliation between unity and diversity, as a condition sine qua non for nation-building. Nevertheless, the case presentations and the debate did cover some of the pertinent issues, and did provide quite a few relevant lessons learnt.

To start with, the three cases demonstrated commonalities, but also significant differences. In particular all three made a relatively smooth transition from colonial rule to representative democracy during the second half of the twentieth century. The main chal-

lenge for all three states post-democratization was the reconciliation of various divisive forces that the policies of the colonial regimes had created to preserve their own interests. Considerable success has been achieved in making the necessary changes, albeit using different approaches in each state.

2.1.1 *Malaysia: Constitutional Judicial Review Matters*

Malaysian presentation focused on constitutional aspects of reconciling unity and diversity, with respect to the jurisdiction of Sharia Court over non-Muslims. The framers of the Malaysian constitution interpreted the role of Islam more broadly than the colonial government, which confined it to cover personal law. Article 3(1) of the constitution proclaims that "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation." Unlike earlier rulings, which applied Islamic law only to Moslems, the majority, more recent judgements, including those arrived at by the Federal Court, interpret Article 3 as a constitutional basis for the application of Islamic Law to also cover non-Muslims. This "new approach" has become a critical factor in raising religious and communal tensions, thereby undermining respect for religious diversity that character-ized post-colonial Malaysia.

The Malaysian case underscores the paramount role of judiciary in protecting minority rights. The absence of judicial restraint and a growing practice of the Court to use implied-powers doctrine in order to expand the application of what was intended as personal law proved detrimental for intercommunal peace. The role of formal institutions notwithstanding, the Malaysian presentation con-cluded that "fairness of state action and multicultural civil service, including the role of personalities within, can reconcile between unity and diversity". However, a major issue in the Malaysian example appears to be the ambiguous formulation, and indeed paradox, of Article 3(1) of the Constitution, which proclaims Islam as official religion and at the same time guarantees religious freedom. Indeed, this case highlights structural obstacles in recon-ciling unity and diversity where the public sphere remains domi-nated by a majority community.

2.1.2   *South Africa: A Two-Stage Constitution Making Becomes a Stepping-Stone for Nation Building*

The peaceful democratic transformation of South Africa's emerging nation is one of the unique political events of our time. [4] The new Constitution "proclaimed non-discrimination on every page" because of the recent history of apartheid. The challenge posed by racial diversity (paramount amongst other forms of diversity) was defused by emphasizing individualized identity rights and creating a robust constitutional court. In 1996, when the Constitution of South Africa was passed, constitution making, at least, seemed to be the easiest part of nation-building. The more difficult part concerned state organization. For the great majority of the country's black population, federalism was compromised because of its association with apartheid policies—particularly the creation of native 'homelands'. This is why the constitution has no mention of the 'F' word and has strong unitary features. Consequently, federal elements, such as separated lists of competences, shared power and a supremacy clause, were left to the interpretation of the courts. Moreover, the Court has the power to review the compliance with some of the unamendable constitutional principles in the interim Constitution. Not surprisingly, this has allowed courts to play a very active role. Some have criticized the "judicialization of federal claims" in South Africa. In the long run it remains to be seen whether the emphasis on racial diversity precludes the accommodation of other cleavages. Furthermore, the existence of a dominant national party in the form of the ANC makes the functioning National Council of Provinces less effective.

As we have seen in both Malaysia and South Africa, judicial activism has the potential to exacerbate cleavages in multicultural federal states and bring into question the long-term viability of reconciliation between unity and diversity. In addition, both cases illustrate settings in multicultural societies where nation-building takes a form of a "daily plebiscite". This is why both state organizations and their functioning are sensitive elements that sustain or menace the balance between unity and diversity. Striking the balance between unity and diversity is a never-ending process.

The South African two stage model of negotiating an interim constitution and constitutional principles that were binding also

for the freely elected democratic assembly—notably the inclusion of a constitutional court created under the interim constitution in the process of reviewing the final one—is particularly instructive. The South Africans successfully combined the need for a provisional government with the requirement of subjecting this form too to constitutional limitation, The constitutional assembly in South Africa was built on the pluralistic inclusion of the main political forces, publicity and adherence to the rule of law, which was supposed to compensate for the missing principle of democratic legitimacy, since the interim constitution had no link to the will of the electorate.[5] The experience leads to a key question of constitutional politics: How to *democratically* reconcile between unity and diversity? Can the sources of *democratic* unity in a multicultural state remain liberal? The questions are by no means purely academic. They directly affect the chosen nation-building policy in bringing unity and diversity together, as in the case of the Indian constitution.

2.1.3 *India: "A Unique Civilization of Togetherness"*

The largest and most populous multicultural federation worldwide, India, best illustrates that diversity in embracing the values to compose the state human rights policy, is first of all historically and culturally driven. For instance, although United States and India are two federal constitutional democracies that even share the same legal tradition of common law, conceptual settings on policy choices in human rights protection cannot be more different.[6] Whereas in the United States federation individualism and equality of opportunity back an absolute nature of civil and political rights, in India, the logic of constitutional design draws heavily on negotiating the values of citizenship which affirms positive group difference and differential rights of minorities through personal application of laws in a pluralist and historically unequal society. Constitutional and statutory provisions for preferential discrimination in favour of disadvantaged groups are sharply at odds with liberal principles of equality.

In matters of religions, social practices and political philosophies, India always stood against monolithic structures. Historically, the challenge of governance mainly lay in persuading people to live with conflicts by accepting them as facts of life and by iden-

tifying areas of unanimity. Religion has always been a driving force in India. This is why two pillars equally stand for modern India: (a) respect for the inherent spirit of diversity, and (b) the centrality of secularism in creating a sense of unity. A cohesive nation-building out of manifold, complex diversity went hand in hand with extremes of social and economic inequalities. Nevertheless, when compared with most of other post-colonial countries, India's achievements are impressive indeed. In a nutshell, India could be taken as a "classic example that unity and diversity can be reconciled", provided that the system proves to be flexible and adaptable enough to new challenges for unity in diversity. Against the background of globalization and ever growing social and economic disparities, an adequate and effective developmental and social policy is of the utmost importance for keeping unity and diversity together.

It is regrettable that due to lack of time more attention could not be paid to the effects of economic globalization upon federalism and, in consequence, upon national unity in India. This issue has already been for some time on the research agenda in India, and a major question has already been posed: "Does globalization signal the decline, or regeneration of Indian federalism?" Some claim that in India, globalization has augmented disparities among states and produced paradoxical results. The Indian Constitution entrusts the states with the major tasks of development including infrastructural development. Consequently, it has significantly increased the importance of the states. Hence there has developed a fierce competition among the states for benefits. In other words, while globalization has allowed more autonomy of action in favour of the states to reap the benefits of global economy, this has at the same time prepared the long-term basis of crisis in Indian federalism itself. [7] This is why today the All-India services play an important role because they allow for the participation of the states in a centre policy. This can be seen as an institutional chance for a better promotion of inclusive economic and social policies, as a condition sine qua non for a critical level of unity in diversity.

The discussion also raised important questions about the success of the Indian model. Indian civilization dates back 3000 years, with strong liberal values having been carried through each

generation. The process of constitution-making has historically produced widespread problems in India. Little effort is made towards identifying the problems and suggesting systematic strategies to solve these issues, which have consequently become a perpetual problem in India. Founding fathers of India were anxious in keeping and strengthening its unity by means of a secular state. And yet, 60 years after independence India still does not yet have a common civil code, which shows that a significant part of the population does not accept secularism. India's public policy has to be further developed, in order to strike a proper balance between unity and diversity. In this respect grass roots policy becomes especially important. There is not enough unity at micro level, which is at the periphery and feels marginalized.

2.2 Accommodating Deep Differences: Ethiopia, Nigeria and Iraq

Many experts uncritically promote federalism in its various forms as a panacea for multicultural societies with deep community cleavages, notably those coming out of ethnic wars. According to them federal arrangements offer the best option for governance designed to reflect diversity and consociation, in terms of political recognition and representation. However, in multi-ethnic/multi-cultural societies, quality of governance and accommodating diversity depends heavily on a type of democracy within which they function—majoritarian or consensual. It is interesting to note that globally, the power-sharing constitutions combining proportional representation and federalism are relatively few (only 13 out of 191 states). Indeed, empirical evidence suggests that proportional representation based electoral systems, and not federalism or other types of power-sharing arrangements, better allow for democratic inclusion and participation. The implications for policy makers are clear: investing in basic human development is probably a more reliable route to achieve stable democratic governance than constitutional design alone.[8]

Work Session 1, repeatedly underlined the importance of inclusive developmental and social policy both for national unity and for the accommodation and promotion of existing diversities

in one country. Work Session 13 also followed up on this major argument. The effects of federal arrangements in all three countries on accommodating deep community differences were considerably contextualized. Common to all three cases in this session are the problems of poverty, inequality and security, to a certain extent also manipulation with diversities. In all these countries security has the priority over equality and poverty.

2.2.1 *Ethiopia: Can Ethnic Federalism Work?*

One of the consequences of the secession of Eritrea was a new federal design for Ethiopia. Usually known as a paradigm for ethnic federalism, the federation has two unique elements in its constitution: (a) right to secession is constitutionally guaranteed, and (b) the federation is organized on ethnic and not territorial lines. The principal difference with other two federations discussed in this session is that both Nigeria and Iraq are organized on a territorial basis. Ethiopian recognition of both ethnic and territorial identities shows that ethnic federalism too is "looking for its territory", since federation is per se a form of territorial federalism.

The right of people to self-determination based on secession is by its very nature radical. Even more radical is the inclusion of such a right into a constitution of an African state, given that empowered regions are controlled by various ethnic groups. During the discussion a caution was raised against encouraging secession. For example, the Gorkhaland issue in West Bengal, India was at one point secessionist, but the negotiations "convinced them to stay". However, the main condition for such an outcome is that the negotiations in case of the secession demands must start without any conditions. International and internal actors of Kosovo secession on both sides obviously decided to ignore this key rule of conflict-mediation. Besides, Biafra is today still part of Nigeria, albeit it at the cost of civil war.

Two more general lessons followed from the discussion—First, the constitutionalization of the right to ethnic self-determination as the right to secession ("ethics of secession") may be an effective way to discourage secession. Indeed it can enhance stability of the federal order by taking the form of an instrument in constitutional

politics to manage intercommunity conflicts, and a strategy to make the common state legitimate for all its community: hence the centrality of constitutional safeguards against unilateral secession. Second, building on ethnic lines may very well mean ignoring heterogeneity within ethnic groups. Ethnic, multicultural federalism as inherently group-accommodating does bear illiberal challenges to democracy in the sense of individualist equality and liberty.

2.2.2 *Nigeria: Big Cost of Diversity Accommodation*

The cost of accommodating diversity in Nigeria has indeed been big: civil war, continued and endemic civil and ethnic strife, and conflict over oil resources matter more and more, thus becoming a new source of conflicts. How to build a nation was and remained a challenge. The Constitution says "we the people", but "who are the people?" Territorial accommodation has not solved the problems: Nigeria already has 36 states. The courts are audacious in supporting the Constitution—this is how diversity tensions were managed. There is no single state religion, which is important considering the ongoing debate on implementation and applicability of Sharia law. The ongoing debate cuts across the process of re-defining identity politics, inter-confessional conflicts and state legal policy, and is highly politicized. Still, Nigerians have passed a critical threshold of nationhood and agreed to stay together, with the centre getting very strong. On the other hand, Nigeria has to address the problem of new federal arrangements "otherwise it will be reduced to an asset sharing instead of nation-building taking place".

The following lessons of principal importance were drawn from the Nigerian experience: Territoriality alone is certainly a challenge for the indigeneity. When states are building blocks of federalism, rather than ethnic, religious and linguistic groups, identity politics as a way to accommodate differences is put in question since new states formation becomes a leading principle of territorial federalism. The Sharia debate on related practice and policy-based issues is in fact linked to fundamental questions on the relationship between the state and religion, as well as on state's institutional design within multi-religious African context. Such issues will undoub-

tedly have an impact on the secularism of the modern state, the supremacy of the federal constitution, equality before the law and the immanent limits of legal pluralism within a federal state organized as constitutional democracy.

2.2.3 *Iraq: Is Federalism at All a Solution?*

In discussing the case of Iraq there was, paradoxically, no mention of the most important issue related to nation-building: the crisis of democratic legitimacy in a post sovereign state. The sharp polarization over federalism in Iraq today highlights this crisis since the constitution making process is at odds with the process of nation-building and, consequently, against democratic legitimacy. Both nation-building and nation sustainability inherently require democratic legitimation, particularly in the context of building a viable federation. The process of constitution making in Iraq was non-inclusive and did not adequately address concerns of nation-building, nor did it articulate a rationale for national unity. More importantly, the process irreversibly brought into play external actors, particularly the "international community". In other words, Iraq is a telling example for the process and results of a supranational constitutionalism without "constitutional demos".[9]

How else does one understand the key message in the presentation of the case on Iraq: that federalism in Iraq is facing prematurely rejected, since except Kurdistan no region has been formed until now! The fears that federalism will lead to the dissolution of the country, shared by many, demonstrate the lack of democratic federal consensus, which is of foundational importance. To date, Iraq seems to be a contested and manipulated state, where mistrust dominates community conflicts. It almost equally stands for those who embraced federalism as a solution, associated it with liberty and the rule of law; hence their feeling of betrayal. Another important message: "Sunni-Shia conflict is only partly true." The managed constitution-making, like "managed democracy" has "a soft representation and hard manipulation". To put it in a broader perspective: like in democracy's doubles, the distinctive feature of these new constitutional constructs is that they bring "not so much hope but the sense of betrayal".[10]

3. Federalism and Diversity Accommodation: Major Paradox

The issue cutting across both work sessions can be formulated as follows: How, and under what conditions can federalism become conducive to reconciling unity and diversity, by accommodating deep differences? Understandably, this question of the utmost relevance can not have a straightforward answer. On the other side, one of the indisputable conditions sine qua non, recognition and representation of diversities, faced in all six cases the same problem: representing all relevant groups is almost always possible, until one group or another uses its presence in power sharing only to bring down a common state. Does exclusion become legitimate in such cases? Definitely not; it is only here that the issue of striking a viable balance between unity and diversity starts. Federalism cannot be imposed and must remain open for re-negotiations, however far-reaching the outcomes might be in some cases. How to democratically reconcile political and cultural (ethnic, religious, linguistic) pluralism? This is a major issue of multicultural federalism. Consequently, federalism can democratically meet multicultural challenge only if it becomes intrinsic part of democracy, i.e. if not only unity, but also diversity becomes a constitutive principle of democracy. If that is not the case, federalism fails to meet its major challenge: not to radicalize the differences to which it was supposed to be a solution. It means that federalism should address and accommodate structural causes of mistrust and intolerance in a given society (for instance, constitutional conflicts as per se ethnic conflicts). This is why multicultural federalism has an immanently built-in paradox: Multicultural federalism starts with a low level of legitimacy due to the lack of trust and tolerance. Multicultural federalism has in fact to create its own preconditions.

Notes

1. See Parliamentary Assembly Recommendation 1735 (2006) of the Council of Europe.
2. Civic and ethno-civic concepts of nation.
3. The Swiss concept of "Willensnation": Nation as a will to democratically

accommodate and promote traditional language and religious diversities in the country.

4. In South Africa, e.g. the ANC had almost 2/3 of the seats in the constitutional Assembly, and yet it was limited by the 34 constitutional principles and the power of the Constitutional Court, a mere *constitué*. Without analyzing that old distinction in detail, should not democratic legitimacy trump all other forms in the process of building a democracy? Should restrictions insisted on by small groups tied to the oppression of the past, and still having the forces of violence at their disposal, bind the will of the people as the *pouvoir constituant*? The question ultimately has to do with the identity of the people. Cf. A. Arato, supra.

5. See more in A. Arato, 'Post Sovereign Constitution Making and Democratic Legitimacy' in Tine Stein, Hubertus Buchstein, Claus Offe (Hrsg.), *Souveränität, Recht, Moral: Die Grundlagen politischer Gemeinschaft*, Campus Verlag, Frankfurt/New York 2007, pp. 92-105.

6. G. Johnson, 'Human Rights in Divergent Conceptual Settings: How Do Ideas Influence Policy Choices?' in D.L. Cingranelli, *Human Rights. Theory and Measurement*, St. Martin's Press, New York 1988, pp. 41-59.

7. The so-called states' rights may not be as much people's rights assuring. It must not be forgotten that this re-federalization of the Indian polity, or true federalization ever taken place, is market oriented and globalization-friendly! Second, given the growing inter-state and inter-regional disparities in terms of investment, whether by FDI, or otherwise, when placed in the context of the withdrawal of the Central state, there is genuine ground for fear that the situation will accentuate inter-regional tensions and encourage ethnic conflicts, which will affect adversely the sense of national identity. The researchers are already making the distinction between the 'forward states' and 'backward states' in development terms, which have immense ideological and political implications for India's unity and integrity. (H. Bhattacharyya, *Globalization and Indian Federalism: Current Trends*, online publication, www.federalism.ch, 2007)

8. More in P. Norris, *Stable democracy and good governance in divided societies: Do power-sharing institutions work?*, Online publication of the Harvard School of Governance, RWP 05-014, 2005.

9. L.R. Basta Fleiner, 'The International Community and Constitution-Making', in Friedhelm Hufen (Hrsg.), *Verfassungen. Zwischen Recht und Politik*, Nomos Verlagsgesellschaft, Baden-Baden 2008, pp. 491-9.

10. More in I. Krastev, Ivan (2006), 'Democracy's Doubles', *Journal of Democracy*, 17, No. 2, 52-62 (online publication), 2006.