Scientific Background: Subtheme Papers

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Constitution Making and Nation Building

1. Introduction: identity and politics

As the twenty-first century opened, analysts were able to point out that the nature of human conflict had profoundly changed, both in regard to its form and its subject matter. Whereas the previous century opened with inter-state wars – wars between sovereign states – by the 1990s the overwhelming majority of conflicts classified as "major armed conflicts" were intra-state conflicts. Between 1989 and 1996, for example, 95 of the 101 armed conflicts identified in the world were internal, and the vast majority had an "identity" component to them (Harris and Reilly, 1998, 1-10). Identity-driven conflicts are conflicts based on the mobilisation of groups sharing a communal identity trait such as race, ethnicity, tribe, religion, culture, language, regional origin or heritage.[1] While such conflicts may be triggered by or combine with questions of distribution of economic resources or opportunities, their "identity" driven nature has allowed them to be characterised as more intense, intractable, emotionally charged, and persistent (Harris and Reilly, 1998, 10; Stavenhagen 1996, 229). These conflicts are about the very sense of who the protagonists are, and about the survival or recognition of their identity. What is also noticeable is that these contemporary conflicts are, in character with their intensity, more brutal, more cruel and conducted without restraint. Michael Ignatieff has pointed out how these wars are conducted outside of both the

codes of self-imposed military chivalry or internationally accepted humanitarian law (Ignatieff, 1998). The reason he offers for this is that these conflicts are not conducted within a “warrior tradition”. Civilians have become the principal targets of the conflict. At the beginning of the twentieth century, civilians accounted for 5% of the casualties of war (Harris and Reilly, 1998, 14). By the 1990s that figure was 80%. In many instances, children have become both the object and perpetrators of the violence. The numbers of displaced persons and refugees rose dramatically as the twentieth century drew to a close and “ethnic cleansing” entered the lexicon of conflict terminology (Harris and Reilly, 1998, 15).

Self-evidently these conflicts arise when a given national political framework no longer holds the loyalty of a rebellious cultural group (by which we mean a community sharing any one of the identity characteristics referred to above). The nation is no longer a home for one or more of its sub-national communities. Constitutional frameworks, whether inherited or long entrenched, appear incapable of managing the increasing assertiveness of identity politics. At the same time the cost, in both human and economic terms of identity conflict is increasing (Harris and Reilly, 1998, 15). New democracies in particular find that their democracy dividend is squandered on managing divisive social or religious conflict, thereby rendering new governments incapable of improving the lives of their citizens. This has necessitated an increasing focus on methods of managing identity politics, and on constitutional approaches that allow for an inclusive polity embodying a wider national consensus, and to which all citizens share a degree of common loyalty.

It is not only the proliferation of intra-state armed conflict that has drawn attention to the need to examine communal identity considerations, including "multiculturalism". In order to ameliorate the effects of the appropriation of state machinery by one or other dominant cultural community in a multicultural society, and to introduce stable and accountable government, the international community has, in the last two decades of the twentieth century, insisted on the practice of electoral democracy especially in previously authoritarian states in Africa, Asia and Eastern Europe. Paradoxically, it is in societies riven by fault lines of religion, ethnicity or culture, that electoral contests frequently have the unintended consequence of exacerbating volatile inter-group tensions, and eroding national identity. The nation "holds its breath" as these contests provide opportunities for ethnic, religious or other group mobilisation, which may spill over into inter-group violence.

The understandable response by the democracy-monitoring institutes has been to identify the rules of the contest – the electoral arrangements – as a remedy, the means by which the results of the electoral contest will be more readily accepted as an accurate reflection of the political preferences of the nation. To be sure, it is critical in such divided societies that the management of elections is transparent, manifestly free and fair, and yields a demonstrably accurate result. But there is an increasing realisation that the problem of election evidence is caused not only by the rules of the contest, but by the prize itself.[2] Where minorities are consigned to be perpetual losers in a winner-takes-all contest driven by group mobilisation, and where the price of losing the contest carries loss of economic opportunity, the stakes appear too high. We will return to this issue. Suffice it to say that the proper treatment of

nation building, as well as affirming, recognising and managing “difference” is receiving unprecedented constitutional attention at a time when constitution making itself is the subject of renewed interest.[3]

2. Nation building and sub-national identities

The revolutionary, Garibaldi, having succeeded in creating the modern state of Italy at the end of the nineteenth century proclaimed, “We have made Italy, now lets make Italians!” (Fleiner et al., 2002). Garibaldi’s statement draws attention not only to the difference between state making and nation building (or creating a national identity), but it also emphasises the fact that state making does not axiomatically or mechanically lead to the building of a nation. This statement is of particular relevance for practitioners of both constitutional reform and conflict resolution in societies deeply divided along fault lines of religion, language, culture, ethnicity, and regional identity. It reveals that even in a state that could be regarded as homogenous by virtue of its shared history, language and religion, a common national identity cannot be assumed. While nationality can be formally and legally ascribed by a constitution or law, the task of nation building is a more elusive one. National identity is that identity which citizens share with each other, in recognition of their common destiny and their shared values. A national identity must coexist with the competing and different identities those selfsame citizens possess – their religious, cultural, linguistic, as well as family, professional or gender identities, which at different moments of every day shape their emotional reactions and their objective material interests.

Without a broadly shared national identity, the task of nation building, of constructing a nation with a sense of a common destiny and a shared loyalty to the rules by which that destiny is to be determined, is indeed difficult. Whether there is little or no shared concept of the "nation", only the group identities matter. There is no "we", there are only mutually exclusive "others". In societies in which there is "deep rooted conflict",[4] the difficulty in resolving the conflict can in part be attributed to the fact that the ethnic identity overwhelms any sense of national identity. Those whose responsibility it is to derive a shared framework of governance must do so without the tools of a discourse of common values, a discourse based on shared aspirations.

However the task of nation building, of creating a national identity, cannot be discharged at the expense of the equally important issue of recognising and integrating citizens' other senses of belonging, their other identities. Political and constitutional frameworks for determining national destiny in divided societies are in many cases failing to embrace the whole nation. This may have as much to do with the suppression of difference. The failure of particular constitutions or the premises that underlie them, to meet the challenge of reconciling sameness and difference, promoting and integrating both national and sub-national identities is, we argue, manifest in multiplying intra-state conflicts.

The politics of difference needs scrutiny. The perception of "difference" is always a social (or subjective) matter, unrelated to objective physical or cultural difference. Notwithstanding decades of anthropological approaches to tribal identity, people react to difference in a dynamic and changing way. The members of the Hutu and Tutsi groups, with which the author interacted in the

Burundian Peace Process, share more in common with each other (physically and culturally) than residents of a cosmopolitan city do with their neighbours. Ignatieff also comments on the sense of shared identity that citizens of the former Yugoslavia had prior to its dissolution. He observes that the sharpest conflicts often occur between groups who are most similar – what he terms "the narcissism of minor difference" (Ignatieff, 1998). Whether this is true or not, it is clear that ethnic tension arises out of the social meaning, including mythical or fabricated meaning, of perceived difference. In this regard both the Balkan and the central African ethnic massacres compel us to address the fact that the horrible cruelties perpetrated in these identity conflicts were perpetrated by neighbours, neighbours that had once been content to school with, play football with and intermarry with their ethnic enemies.[5] The politics of difference concerns the way in which the political elite manufactures and utilises the social meaning of difference. The Balkans is an example not of the lid being lifted off a pot of steaming ethnic resentment by the collapse of authoritarian regimes, but of the removal of restraints on the promotion and manipulation of identity. Of course discrimination based on identity stereotyping is a powerful and real foundation for generating identity-based resentment and conflict.

Although this article looks at the interrelationship of constitution making and nation building through the prism of sharply divided societies, the issue is of relevance to the more homogeneous or older democracies. Many of the older democracies were founded on assumptions of social solidarity, and forged in a context of inter-state rivalry. Wars make for robust nation building.[6] Sigmund Freud noted that social solidarity is usually at the expense of an "enemy",

although his apt observation was directed at the contribution made by the stigmatisation of Jews to national solidarity in pre-war Germany.[7] The problem that many democracies face is that their earlier constitutional concerns were predominantly directed at the question of national sovereignty in the context of inter-state rivalry.

This is equally true for the first post-colonial constitutions of Africa and Asia. Anti-colonial movements embraced the colonised people as a whole and made assumptions about the social cohesion of their post-colonial society. The constitution makers were themselves captives of the constitutional imagination of their previous colonial powers (such powers being largely homogenous states themselves). Several decades later, many are required to re-examine the social contract which the constitution represented at the point of rupture with their colonial powers, and to judge whether it still reflects their social reality, whether it can still function as a constitutional contract between the members, and between the distinct communities of that society.

Two examples of countries that must now engage with the reformulation of their social contract are Nigeria and Indonesia. Both are populous, both are riven by tribal, religious, and regional identity conflicts, compounded by the perceived exploitation by a national elite of the natural resources in otherwise neglected regions – the Niger Delta and Aceh respectively. [8] In Indonesia's case the constitution – adopted in 1945 – is only a few pages long and was adopted as an interim measure to establish national independence. It is limited with regard to questions of regional governance, cultural rights, and democratic accountability. Nigeria has a constitution bequeathed to it by the last in a succession of military dictatorships. In both cases the terms of the

relationship between the capital and the regions, between national and sectional interests is in dispute. Sporadic inter-group violence which may take a religious form can often express an overlay of identity-based resentments.

The failure to address the inadequate fit of an old constitution to new circumstances, and to do so in a truly inclusive and legitimate way, can lead to contagious civil conflict in societies in which religious, regional or ethnic tensions exist. Some older constitutional democracies also face new claims in respect of self-determination, or in respect of more equitable distribution of resources, or for the recognition of cultural differences. Such claims challenge the premise of social uniformity on which earlier constitutional assumptions rested. Constitutional adaptation to the changing circumstances of the twenty-first century will, this article suggests, be required to meet the claim for recognition and integration of multiple identities into a new more inclusive notion of national identity (Kymlicka, 1995).

3. Democracy and diversity in divided societies

In this presentation it has been observed that electoral democracy in culturally divided societies can serve to erode national identity, exacerbate the fault lines dividing the society and promote inter-group tension and violence. It was suggested that part of the reason for this could be found in the way in which the political system and constitutional arrangements allocate the fruits of victory. This statement needs further explanation. Developing nations, particularly former colonial ones, exhibit an unfortunate confluence of several features. Firstly, many of these societies are divided along the lines of

ethnicity, race, region, religion and language. This in itself is a product of the arbitrary national boundaries imposed by the colonial experience.

Secondly, many of these countries inherited the constitutional models of their former colonial powers, constitutional models that were based upon assumptions of homogeneity, social cohesion and the centralised exercise of power. They also have a winner-takes-all character.[9]

Thirdly, the introduction of multiparty democracy invariably saw the membership of political parties correlate with the fault lines of that society. Through ethnic, tribal or group mobilisation, political preference was commanded via group-based affiliation or ethnic belonging, not through the material or other interests of the individual.

Finally, in many developing countries there are simply no economic sector and no economic opportunities to speak of outside the state itself. The economy is the polity. Winning political power simultaneously ensures a preserve on all or most economic opportunity. The combination of this feature with the winner-takes-all nature of simple majoritarian political systems elevates the stakes in an electoral context to a very high level. When this is combined with the group-based politics of divided societies, the necessary implication is that minorities are destined to be perpetual losers both economically and politically. Not surprisingly, the temptation for such minorities is to choose to opt out of the constitutional framework, and to demand a separate existence within, or secession from, the new state.

The consequence of this confluence of political, economic and demographic features is that many of the new democracies are immediately confronted by

social and political instability and economically ruinous civil wars. To be sure, some of the new states compounded the problem by consciously opting for one-party states, suppressing tribal and ethnic difference, and following "socialist" models which went yet further in the monopolistic and exclusionary appropriation of the state machinery by an ethnic or other group elite.

By the 1990s an appreciation of "stability" as a central element or value in the functioning of a viable democracy had become more widely accepted. Constitutions were increasingly required to address the pre-eminent concern and desire for inter-group harmony and peace. To do so would involve both a reversion to and a departure from the models of liberal democracy they had inherited.

4. The role of the constitution in the management of diversity: the current theory

It would be incorrect to suggest that the intra-state conflicts that have plagued many of the new democracies in multicultural societies can be simply attributed to misconceived constitutional premises. But the political system as a whole is required to address identity politics, and the constitution is the central and pre-eminent instrument in a political system.

In this presentation we view the constitution as a compact, a contract between the citizens of a country in regard to the manner in which they will jointly shape their collective destiny, manage their affairs, and make its rules. Succeeding generations accept that compact or adjust it to bring it into line with new ways in which the citizens view their relationship with each other whether as individuals or as members of distinct regional or ethnic groups. A

constitution can be more than merely the rules of government. It may assemble the nation's aspirations and codify its common values. Constitutions may even address the nation's history.[10] What is clear is that constitutions in multicultural, and especially divided societies, are invited to deal with this feature. It is argued here that even constitutions that do not treat this matter explicitly are informed by constitutional premises which reveal a vision according to which the interaction between national and other identities is to be dealt with.

The constitution in a constitutional state is especially suited to dealing with the legacy of conflict. It is not only that it represents a social contract. It can put minority, including political minority, guarantees and protections beyond the reach of temporary parliamentary majorities. If the compact is firmly founded, the constitution is able to generate a sense of security amongst those that distrust the constancy or even the existence of majoritarian goodwill.

Ways of dealing with multiculturalism, and especially identity-based conflict in multicultural societies, have fallen between two opposing paradigms. The first, drawn from the classical liberal democratic model and its variants, denies constitutional recognition to distinct communities as bearers of rights, but places emphasis on enforceable human rights, including the rights to individually practice one's religious, cultural or linguistic preference in a national democratic framework. The second asserts and constitutionally recognises cultural or community difference, and allocates to such groups a measure of self-government, group autonomy or group protection. In such a system, the citizens can be ascribed an identity, and exercise their rights through their separate communities. There is a third method that emphasises

"inclusivity" in both the benefits of and responsibility for government, without expressly constitutionalising (and hence casting in stone) cultural difference. This approach departs from liberal democratic orthodoxy in ways that ameliorate the winner-takes-all features of such systems and promote stake holding by all communities in the national project.

The classical liberal democratic model, or liberal constitutionalism informs the notion of the modern state. [11] There may be differences in the extent to which cultural diversity is denied, or ethnic or national unity is asserted, but political intercourse in liberal democracies is articulated through individual political preferences in a system that guarantees democratic and civic rights. It is this paradigm that has served as a model in most parts of the world. Of course in the immigrant or settler states, such as the United States, Australia and Canada, the challenge of multiculturalism was encountered earlier. These polyglot states absorbed waves of immigrants, but their essential approach to multiculturalism has been to integrate immigrants into the system.[12] As the older homogenous democracies also begin to experience the challenge of multiculturalism resulting from international population movements, they too are being required to tolerate and even affirm the diversity of the communities in their midst.

The question, however, is not whether the liberal democratic model is meeting the challenge of multiculturalism as it is being experienced in these largely homogenous societies, or societies with a dominant culture and an integrating dynamic. The question is whether such a model can meet the challenge of mediating identity conflicts in deeply divided or segmented societies. Notwithstanding the rising number of incidents of racist or xenophobic

violence in Western democracies, it should be acknowledged that the pluralist, though integrating approach of the liberal democratic model, has been successful on many fronts. It has allowed distinct cultural minorities a degree of social and economic opportunity, while granting civil rights protections and cultural choice. It has allowed national identities to coexist with other identities, and provided a common home for distinct and diverse minorities. It has enabled, even in the pluralist immigrant democracies, a sufficiency of national cohesion and unity of common purpose for citizens to be both different and one. However, the problem lies in identifying the concrete conditions for its successful functioning in multicultural situations, and assessing whether liberal democracy can be effective in the absence of these conditions.

These conditions would include: enforceable rights in a legal system that respects the rule of law; conditions of economic opportunity that allow individual upward mobility regardless of group identity; absence of discrimination or at least a level of cultural and religious tolerance; a national identity that allows entry to members of culturally diverse groups; the practice of interest-based politics.

It is no accident that South Africa, in its constitutional choice of a model by which it could reconcile its racial and ethnic differences and forge a common destiny, opted for a liberal constitutional state. It is notable that the South African compact relies on strong judicial institutions to enforce its terms. Its economy is sufficiently developed to allow economic opportunity outside the state. In its negotiations discourse it could rely on a common language of

patriotism and of national identity. Its ample and full catalogue of fundamental rights was accepted as enforceable and accessible.[13]

By contrast, in Burundi, the state is the overwhelming source of formal employment. Politics is dominated by the claim of ethnic belonging. The legacy of brutal ethnic massacres and counter-massacres limits the possibility of a common discourse based on national unity, and few have faith in the capacity of the courts to protect them or guarantee their personal security.[14]

In short, a standard liberal democratic approach to identity conflict resolution will fail to fulfil its promise of reconciling diverse minorities within an inclusive state, not because of its intrinsic flaws, but because the conditions in many deeply divided societies prevent its actualisation, prevent the integration of diverse identities within a cohesive polity.

The second constitutional paradigm for dealing with ethnic (and similar) conflicts in divided societies is to expressly constitutionalise the distinct communal identities and to establish constitutional structures on the basis of group belonging. Many variations of such techniques are possible, some of which happily coexist in liberal democracies, for example in the form of ad hoc arrangements in respect of vulnerable or indigenous minorities.

In deeply divided societies however, the purpose of constructing a collective pluralism is to politically segment the society along its fault lines. It represents recognition of the absence of common structure, that government or aspects of governance must be performed separately. In its radical form, it is represented by sub-national geographic units in a process of secession or complete separation. This paradigm animates many identity conflicts (Sri

Lanka, Sudan, the ethnic nationalities of Myanmar/Burma, Chechnya, Georgia). Degrees or forms of political segmentation can be found in other societies (Lebanon), where it serves to secure minimum representation by all groups in the central institutions of government. If it is to work, it can do so only within a compact that also acknowledges the whole and integrates the group into the whole. However, the simple allocation of autonomy within a distinct geographical area, and without an integrating principle or mechanism is likely to lead to secession.

In general there has been a reluctance to constitutionalise difference in nation states. There are several reasons for this. Firstly, autonomous geographically distinct entities that are “identity” driven can result in secessionary conflict and civil war. Human rights concerns are also pertinent. Sub-national units in which one cultural community is dominant can, and frequently do, lead to persecution of other minorities within this identity-charged atmosphere. At worst, the result is ethnic cleansing as each territory seeks to establish ethnic homogeneity. The second set of reasons relate to the erosion of national unity and the promotion of ethnic hostility or inter-group rivalry. Apart from escalating ethnic tension such segmentation or separation erodes the limited national identity or sense of common political destiny. Moreover when competitive electoral contests are to be conducted within each ethnic group, this has a tendency to promote extremist ethnic fundamentalism, because those who seek popular support must strive to be the most authentic and “ethnic” of the candidates or parties, and the most resolute in asserting the ethnic interest as against the “others”. Finally, the constitutionalisation of ethnicity entrenches group politics as the engine of political decision making.

Individuals are consigned to their groups, make their political choice and exercise their political rights by virtue of their cultural/ethnic identity. The possibility of being non-ethnic, of being an urban professional with a national outlook is foreclosed. The ethnic/cultural elites ensure that their hold on power – secured precisely through the partition into ethnic blocs – and their share of the ensuing economic resources is guaranteed. A shift or reversion to interest-based politics is difficult and rare.[15] The society is condemned to live within its segregated identities. Furthermore, national decision making may be complex and difficult, requiring consensus politics or the concurrence of several ethnic elites, or it may require super-majorities. Where there is a resulting de facto veto power in the hands of a minority, this can exacerbate inter-ethnic tension, even if it does not produce an undemocratic and ineffective system of governance.

The third method is to promote and develop mechanisms and ways by which the democracy can function in a more inclusive manner, granting greater benefits for minorities, a stake holding and ownership of the system without recourse to the explicit constitutionalisation of ethnic/cultural categories. This modality would accept the de facto overlap of party with the group fault lines. However, by choosing not to constitutionalise an ethnic basis of representation, it allows the society to move towards interest-based politics, and the impact of other cross-cutting identities (e.g. class, region, occupation) to blur the raw ethnic dynamic encouraged by opportunistic elites. This method would not suppress cultural ethnic identity, but would encourage its fullest representation and participation through ethnicity-neutral structures of party, federal unit, institutions of civil society, and would simultaneously strive

for an even distribution of economic opportunity. It is the mix of identity denial with a corresponding mal-distribution of economic resources that provides the explosive combination for intra-community conflict.

There is no blueprint, no universal solution to the constitutional default in promoting inclusivity, joint ownership, and joint stake holding in the constitutional political system. There are, however, emerging shifts in constitutional approaches that indicate best practice (in both the subject matter of the constitution and in the constitution-making process). These emphasise inclusivity in decision-making processes, stake holding in the system, and integrating nation-building mechanisms. Examples of constitutional initiatives from African states, which have had to confront this issue as a pressing nation-building priority, would include those listed below.

- Amending the electoral system from a single member constituency system in order to provide for proportional representation (South Africa, Namibia, and Lesotho). This is intended to facilitate representation in proportion to political preference and, as importantly, to ensure small but distinct political tendencies or cultural communities are represented.
- Requiring public officials, such as the president, to win regionally diverse support not just an overall majority (Nigeria). This ensures breadth of support for the executive, and not merely depth of support as the significant value.
- Allowing the opposition to participate in the executive (cabinet) as of right. This facilitates direct participation by opposition parties, often

representing a minority group, in the task of managing the country (South Africa, Zimbabwe). Integrating the opposition into the government can weaken the traditional liberal role of an adversarial opposition.[16]

- Requiring proportional representation party lists to exhibit a non-ethnic, non-sexist character (Burundi). This blunts the ethnic presentation of political choice and can dissipate ethnic hostility generated by raw ethnic mobilisation, even though it violates the freedom of association.
- Making use of second chambers or sectoral representation (e.g. of women) to establish alternative cross-cutting or complementary forms of representation to those of the ethnically charged political party representation, or to supplement those of the ethnically neutral party representation (Uganda, Burundi).
- Requiring posts in the national public service or the judiciary to be evenly distributed across regional, gender, racial or tribal lines (Nigeria, South Africa). This promotes visible representation of the diversity of the nation in its public appearance and encourages a sense of stake holding by all communities. The appearance of mono-ethnic control or appropriation of the national public service and the military has been the greatest spur to identity conflicts in Africa.
- Protecting and promoting diversity of indigenous language use and custom. Even though it is impractical, in South Africa, a full 11 languages are recognised as official languages. The denial of recognition of a community's language, especially in monolingual

states is another exclusionary practice that fuels secessionary emotions.

- Affording vulnerable or small minorities a guaranteed representation or over-representation in parliament or government, thus pacifying their distrust in majoritarian democracy and giving an incentive to participation (Tanzania in respect of Zanzibar). The caveat to such a device is that the over-representation should never amount to granting a small minority a veto over a larger majority, and that the representational device used takes a geographical form not an ethnic one.[17]

- In line with the adoption of human rights charters in Africa during the 1990s, is the enforcement of the principle of non-discrimination, even in respect of marginal groups. The most contested aspect of the neutrality of the state in matters relating to identity is that relating to religion. The inability to resolve this question at state level in Nigeria is a source of periodic and extreme violence, and in Sudan constitutes one of the barriers to settlement of that country's long-running civil war.

- In line with the concern that political leaders and the cliques around them come to appropriate the state in perpetuity, and the way in which this exacerbates the exclusion of outsider tribes and regions, is an attempt to formalise exit arrangements for such leaders. Typically this is expressed, at least in the Southern Africa context, in constitutional limits on the number of presidential terms that a president can occupy

(South Africa, Zambia, Malawi, Zimbabwe, Namibia, Tanzania, Botswana).

What these initiatives indicate is a concern to promote inclusivity even at the expense of free choice and the adversarial fundamentals of liberal democracy, and yet a reluctance to constitutionally elevate identity segmentation.

5. Federalism and secession

There are many reasons why federalism and decentralisation can assist both in the project of making the national framework more inclusive (enhancing the nation-building project), and in allowing for greater expression of different identities within the national framework. Because of its geographical foundation, federalism does not require that citizens' identity be confined within ethnic tribal categories. It thus avoids the problems of permanently ascribing group belonging to individuals and their descendants. Yet at the same time it may allow for the expression of different identities in different parts of the federation, while not precluding an evolution to interest-based politics within the federation and within the sub-national unit. Most importantly what federalism brings to the table is that it allows losers at the national political level to be winners at the sub-national or local level. As such the national/federal losers can buy into the system as a whole.

Federalism also allows for government that is closer to the people and greater local control over decisions which impact on citizens' daily lives. It allows for policies to be adapted to the particularities, including the cultural, demographic and political particularities, of the region.[18] But if federalism is to offer a viable guarantee of respect for difference it would seem that it should

meet certain ancillary requirements. The powers of the federal units must be protected from arbitrary federal intervention. There must, as far as possible, be equality as to the value of citizenship among all citizens of the federation regardless of the province or state in which they live, and there must simultaneously be respect for the rights of minorities within these federal units. In other words federalism should not be a recipe for discrimination against minorities within a sub-national unit. Finally there must be financial guarantees regarding the adequate provision of resources to the federal units. Without such financial guarantees or arrangements the federal arrangement is hollow, and the individual federal units are subject to potential persecution through the denial of resources.

The controversy that inevitably accompanies constitutional debate on the federal question, frequently arises from the fear of increased ethnic or intra-community tension. In Burma, Sri Lanka and Sudan, three countries riven by enduring conflicts, the federal option is seen as insufficient by national minorities, while it is rejected as a precursor to dissolution and secession by the incumbent government.[19] It is undeniable that federal arrangements animate a certain centrifugal tendency in the national state if only because of the truth that “all politics is local”, and that the democratic politics at a regional level must lead to a competitive assertion of regional interests over national interests or the interests of other regions.[20] It is for this reason that increasing attention is being paid to supplementing the notion of federalism as “autonomy” with the notion of federalism as the co-management of the society at large (cooperative federalism). There is thus a need to find mechanisms by which the regions can be directly drawn into assuming greater responsibility

for the management of the federation as a whole. Institutions such as the Bundesrat (Germany), the National Council of Provinces (South Africa), and inter-governmental committees in Canada are a response to the need for integrating mechanisms within the federal system (Watts, 2001). Such institutions support the nation-building project by requiring each region to take into account the interests of its neighbours. In addition to the integrating mechanism, the constitutional framework should also prescribe truly national institutions (national assembly comprised of representatives of truly national parties), and set out national symbols that are neutral and widely supported.

Federal units do not usually have the right to secede as a matter of conventional practice or even under international law.[21]

Whether secession is a real option in a federal system often has little to do with the constitution itself. The 1937 Soviet constitution recognised a right of secession, but the monopolistic central political machinery denied it. The constitutional right was more mythical than real. On the other hand when a nation state disintegrates it may be pedantic to examine the legality of the disintegration.

Finally it should be noted that who participates, and how they participate in the constitution-making process can have a determinate effect on the federal outcome. It is in this sense that the possibility of a federal solution to an identity conflict needs to be anticipated. Federal arrangements agreed to without regional participation can lead to a subsequent rejection or abuse of the arrangement. Furthermore different parties, regions or communities may be animated by quite different federal considerations. Some parties may want

a federal arrangement out of “self-determination” considerations while others may seek only good governance outcomes. In such a case asymmetrical federalism[22] may be indicated, but not followed because the relevant regional players are absent.

It needs to be emphasised that Federalism is not always an indicated solution. Where the demography is inappropriate, resources and skills unavailable, or the identity conflict is geographically dispersed across the nation, federalism may not bring anything to the table save to allow for more intense persecution of minorities in far flung zones out of reach of the national/federal government.

6. Diversity and the rule of law

Constitutional initiatives to promote inclusivity and to provide guarantees for minorities in multicultural societies usually rely on enforceable rights and a viable independent legal system. The rule of law is a condition for the effective enforcement of constitutional rights both as between individuals and the state, and in regard to respect for the constitutional provisions by institutions of government. Constitutionalism itself is premised on the notion that the constitution is a higher authority than that of the parliament or the executive. Such a schema is not possible unless there is a mechanism – the judiciary – to enforce the provisions of the constitution.

However not all societies have robust legal institutions, or a tradition of independent judicial or other institutions of the kind that can act as the guardian of the constitution against the holders of power. In such societies, guarantees founded on fundamental rights provisions, fidelity to the constitution, or specified conflict resolution mechanisms involving a form of

arbitration, do not serve as a guarantee. The citizens or communities simply have no confidence in the provisions purporting to offer such guarantees. In this regard we would only comment that where no such institutions or traditions exist, the resolution of conflict will rely increasingly on institutional composition, and on balances of power rather than guarantees in the constitution.[23] In the long term however, the rule of law must be promoted as a better guarantee: institutional arrangements will last only as long as it suits the political players. In other words building the capacity of judicial institutions and constitutionally protecting them, is a vital element in providing a constitutional (and hence political) framework for managing ethnic diversity and conflict.

7. Constitution making and nation building

In this presentation we have aimed to illustrate an increasing constitutional sensitivity to the need for stability. Inclusivity in approach, joint stake holding, common ownership of and loyalty to the overall political system promotes that stability. What is true for the substance of the constitution is also true for the constitution-making process. Once again it is necessary to caution that there is no ideal model of constitution making applicable to all societies. It is clear that certain considerations would inform best practice in regard to constitution making in a divided and multicultural society. This is so in as much as the constitution-making process itself has a contribution to make to the building of a culture of democracy, to understanding the need for inter-group tolerance, and to forging a common loyalty to the political framework. It is a rare opportunity for nation building – especially if conducted in a way that elicits

popular participation in a bottom-up manner. There appear to be three important considerations that should inform the constitution-making process in a multicultural society.

Firstly, the process should ensure that the constitution is legitimate and legal. By “legitimate” we mean that the constitution should be popular, and enjoy the endorsement of the majority of the people, either directly or through their representatives. A constitution that does meet the aspirations or reflect the values of the majority is unlikely to survive. Its provisions are not likely to be respected. This requirement should not be under-emphasised, even if it is asserted at the expense of other considerations. It places emphasis on the need for those responsible for making the constitution to have a representative nexus with the population. This condition is met where the constitution is drafted and adopted by elected constitutional assemblies, elected parliaments or approved by popular referendum.[24]

The second consideration to inform good constitution-making practice is that of inclusivity and of respect for diversity. This requirement is met by ensuring that the body consulting, drafting or adopting the constitution allows for the participation of the full diversity of a multicultural society in a meaningful way. This requirement can be met by allowing all political groups, regardless of their size, a significant influence or even a veto over the provisions of the text. This requirement leads to or secures near universal or unanimous consent to the new constitution and provides a basis for the breadth rather than the depth of its support.

There is tension, even contradiction, between the first and second requirements. The first would insist on a majoritarian process, whereas the second places a premium on consensus between a wide diversity of tendencies. The first secures the aspirations of the majority, the second protects the interests of minorities. In South Africa, the sharp and violent conflict between the protagonists of either of these principles was resolved through the mechanism of “constitutional principles”. These constitutional principles enshrined basic guarantees for all groups. A two-stage process was adopted, whereby in the first process emphasis was given to the second requirement. Fundamental constitutional principles were agreed to by “sufficient consensus” between all political tendencies without reference to each party’s support basis. The same multiparty body drafted an interim but democratic constitution which would function during the second phase. The second phase saw a democratically elected constitutional assembly put flesh on the skeleton provided by the constitutional principles. In this second stage majoritarian decision-making processes were followed, although subject to special majorities on selected issues. This second phase was not viewed as the less important step. On the contrary the devil is in the detail, and this phase saw a more engaged and transparent debate on constitutional issues. This two-stage process is in truth quite widespread. Many constitution-making processes involve an initial settlement between adversaries at which guarantees and processes are agreed, and a second stage in which there is popular participation (Namibia, Zimbabwe).

A third consideration in constitution making that is attracting increasing attention, is that of promoting the direct participation of the public in

constitution making. It could be argued that a democratically elected constitutional assembly or constitutional reform commission would meet the requirement of public endorsement of the draft constitution. However direct public participation strengthens the compact which the constitution is expected to represent, and makes use of a unique opportunity to engage, consult and discuss constitutional choices with people directly. This has been done elsewhere using the media, popular consultations in town halls and villages, and by soliciting individual submissions (Canada and South Africa).[25] A further advantage of allowing direct public participation is that it enables multicultural or identity concerns to be expressed through civil society institutions and in public forums in addition to formal involvement in the process.

For all these processes to work, participation should not be seen to be a cosmetic pretence but to involve the actual processing of popular submissions and views. In this way the constitution does not simply "proclaim" democracy, but assists in building a democratic culture, educating all groups on the virtues of tolerance. It will only have a place in the hearts and minds of the citizens if they believe they have participated in creating it, if they support its values, if they can claim ownership of it, if it addresses their concerns and speaks to their hopes. Participation in constitution making is one of the few opportunities in the life of a nation to forge common values and engender respect for the rules by which the democracy will be practised. Such popular support can protect the constitutional values. The public awareness of and participation in constitution-making processes need not be confined to a one-off process. It is possible for it to be continuous. School and public education on its values and

provisions should be ongoing, especially in multicultural societies attempting to ground the constitutional compact on widespread support for cultural tolerance and human rights. The constitution-making process involves drafting or submitting or eliciting initial draft texts or proposals, negotiating the text, and finally procedurally appropriate adoption of the text. The considerations of legitimacy, inclusivity and direct participation can be made to apply at each stage of the process. [26]

A mechanism of constitutional reform that is receiving increasing support in Africa and in Asia is the specially established constitutional reform commission. The popular support such commissions have achieved is not necessarily a reflection of the intrinsic worth of such specifically established institutions, but is a reflection of a popular scepticism towards the parliamentary processes, party politics and the lack of transparency in many orthodox constitutional reform processes (Kenya, Indonesia). In Thailand and the Philippines, popular constitutional reforms have emanated and been adopted following processes driven by representative constitutional reform commissions.[27]

What is apparent from a consideration of constitution-making practice is that the desired outcome of the process should be a common and popular ownership of it. At least part of the lead in such a process should emanate from the negotiators or constitution makers themselves – a willingness to allow the text to reflect provisions, and formulations of provisions, which emanate from the opposition or from anxious minorities. Fidelity to a constitution will increase if all parties see their contribution to it, if they can see that no one party or group can triumphantly claim it as their own,

Another stylistic “best practice” in constitution making that relates to broad ownership, concerns drafting style. The constitution can be drafted in a manner that allows ordinary people to read and understand it even though writing simply is more difficult than writing obscurely. Another method of promoting a national ownership of a constitution is to address the cross-cutting issues of everyday concern to ordinary people regardless of their group belonging. When the constitution addresses the right of access to education, housing, land, potable water, welfare, and a healthy environment, whether in aspirational or other forms, it speaks to everyone’s concerns.

8. Conflict resolution negotiations and constitutional reform

A distinction should be drawn between conflict resolution negotiations for the purpose of agreeing constitutional reform on the one hand, and the constitutional negotiations themselves. The object of the first is to provide a bridge to a constitutional democracy, a transitional dispensation. These transitional arrangements, typically lead to interim governments of national unity as precursors to elections for a new democratic institutions. The variety of methods used in peace negotiations seldom comply with the values and best practices that have been suggested in this paper (Chopra, 1998).

It is suggested here that peace negotiations, and negotiating transitional and then final constitutional arrangements are separate issues requiring separate processes. When the processes are conflated, the constitution-making process is unlikely to be transparent, inclusive or popular. Peace negotiations typically take place between the principal protagonists – government/military junta and insurgent leaders – in secret. They exclude significant players such

as internal opposition parties, or other ethnic nationalities. This poses risks to the long term or broader constitutional acceptability of any arrangements agreed to.[28]

Where a more open process is adopted in a negotiated settlement, a process in which a multiplicity of parties are involved (such as the Congo (DRC) and Burundi, in which 300 and 19 parties respectively are involved), the question arises as to who should attend the talks and how decisions are to be arrived at. This is a critical set of questions that must be determined in advance – not at the table. In an inclusive process a simple majoritarianism is unlikely to be acceptable, as it promotes a numbers game (inducing the parties to swell the number of parties allied to it) and gives no assurance to minorities. On the other hand a strict consensus requirement allows even the most unrepresentative and marginal self-appointed leader a veto right. A formula which was used in South Africa and has been replicated Northern Ireland is that of “sufficient consensus”.

“Sufficient consensus” requires substantial consensus, and consensus amongst the major protagonists, without requiring unanimity. While it is commended for the multiparty (all-inclusive) stage it need not foreclose on a more democratic or majoritarian form of decision making when adopting an enduring constitution. Transitional structures are only required to be a bridge to a process that will ideally be an inclusive one by which the nation will establish its ground rules.

9. The international community and constitutional negotiations

This paper has suggested that the precondition for durable constitutional arrangements in a divided society is the sense of loyalty and ownership that all groups have towards it. The optimal circumstances for this arise when the groups themselves, through their representatives or parties, are responsible for negotiating and implementing it. They regard it as their product. In this sense international mediation or intervention is not usually or ordinarily recommended. But societies experiencing bitter identity conflicts cannot usually be described as “ordinary”. International mediation, conciliation or facilitation is suggested where the legacy of inter-group conflict means that the groups can not speak to each other, let alone compromise with one another; where the power imbalance between the parties is so great that one or both will not negotiate; or where the agreement must be buttressed and supported by international guarantees.

In the first and second cases case the mediator can offer compromises without one or other side losing face, and can convene or chair meetings where the parties are unwilling to grant one of the other parties this authority. In the third case the international community, or friendly states, serve to fix the parties in position in regard to their obligations under the agreement. Like a jigsaw puzzle, the range of tactical or opportunistic manoeuvres by the parties is limited unless the party is prepared to risk international disapproval.

10. Nation building and negotiating the past

One frequent and pre-eminent concern in a transitional process that aims to culminate in the making of a new constitution and the building of a new inclusive political culture, is how that society can break with its past practices of impunity, corruption, and specifically human rights abuses. Related to this is the question of accountability for such abuses, including the massacres perpetuated by one ethnic group on another. These are issues, which cannot be dealt with comprehensively in this presentation, except to say that certain common considerations are receiving increasingly widespread attention. Firstly, it is not possible for a multicultural nation to sweep its skeletons under the carpet, or to ignore past human rights violations. Past injustices cannot be denied or buried (especially where there is a link between victim-hood and ethnic groups). In order to make a fresh start, most countries need to confront their past; otherwise it will re-emerge, possibly in a more ghastly form. In this regard, Truth Commissions have become the preferred instrument to establish the responsibility for past human rights abuses, to identify victims, and consider reparations for those victims. In South Africa the Truth and Reconciliation Commission attempted to balance the considerations of truth, justice and reconciliation.[29] To the extent it was able to do so, it relied on a much bigger nation-building and reconciliation project, led and exemplified by the leaders of formerly antagonist communities.

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[1] In this paper I will refer to ethnic or cultural groups, in place of repeating the full variety of identity traits by which humans distinguish themselves.

[2] An illustrative example of such a situation would be the last elections in Lesotho where in a single member constituency "first-past-the-post" electoral system, the opposition received 40% of the vote but won only 1 out of 80 seats in the national assembly. This situation led to a popular rebellion supported by the opposition. This was not a case of "cultural" exclusion, but the underlying rationale for introducing proportional representation is part of a wider imperative for inclusiveness (including political inclusiveness in political systems) that has obvious application to multicultural societies.

[3] The emergence of new states in Eastern Europe, the democratic constitutional reforms in formerly one-party African states in the 1990s, and the recent civilianisation of former authoritarian states in Latin America and Asia have contributed to a renewed interest in constitutional law and an explosion in the constitutional consultancy industry.

[4] This is the term used in Harris and O' Reilly to refer to identity-driven conflicts in which there is also a perceived imbalance of resources correlating with the identity-related boundaries.

[5] There are numerous recent publications that document the manipulation of identity in these two very different contexts, but see Gourevitch, 1998.

[6] It is no accident that international sporting contests provide one of the most effective means of nation building – calling the nation together. A Nigerian colleague commented that: "there is no such thing as a Nigerian inside Nigeria – we are only members of our groups – except for the two hours that the Super Eagles [the National Football team] are on the field". South Africa, India and Australia too have used sport to promote a national identity. This idea however has less resonance in SE Asia.

[7] Ignatieff, 1998, 61: citing from "Civilization and its Discontents" *In* S. Freud (Pelican Freud Library), Volume 12, 305.

[8] *Democratisation in Indonesia. An Assessment.* International IDEA, Stockholm, 2000; *Democracy in Nigeria: Continuing Dialogues for Nation Building*. International IDEA, Stockholm, 2000.

[9] These constitutional models derive from societies that have undergone decades, even centuries of religious, language or other identity conflicts, which had led to the eradication of difference (France, UK), to the inter-community compacts by which national survival was assured (Switzerland, Belgium), or the removal of historically founded boundaries between persons otherwise sharing a language or culture (Italy, Germany).

[10] Thus for example, the South African Constitution proclaims repeatedly that all South Africans are equal regardless of race, gender or ethnicity. Others may specifically speak of the civilian control of the military (Japan, Germany); many European constitutions insist on religious neutrality, others may address cultural autonomy (Ethiopia).

[11] It is possible to distinguish between the various national forms of the European democratic state according to their original philosophical underpinnings or historical context. They are all premised, however, on the notion of the state as the collectivity of individuals, and assume explicitly or implicitly a national identity and dominant cultural homogeneity even if religious difference is accepted.

[12] Increasingly, this integration dynamic has been contemplated with a constitutionally enshrined entitlement to individual expression of diversity. This variant of liberal democracy does not, however, constitutionalise collective pluralism, and rests, notwithstanding its melting pot image, on the foundation of a powerful monolingual and dominant national culture into which new cultural communities integrate. See Shapiro and Kymlicka, 1996; Ghai, 2000.

[13] The jury may still be out on whether this compact will hold when South Africa confronts the economic disparity between black and white citizens. But the issue here is that for many divided societies the conditions necessary for the South African compact are simply not present.

[14] The dominant, yet minority, Tutsi community had claimed that if they were to let go of their monopoly of political (and military) power in favour of a democratic system they would be consigned to being perpetual economic and political losers at best, at worst, the subject of genocidal retribution – even though it is their control over resources which has generated ever higher levels of ethnic resentment. This observation is based on the author's experience as chair of the Commission responsible for the negotiation of Protocol II of the *Accord d' Arusha Pour La Paix Et Le Reconciliation Au Burundi.*

[15] The Netherlands are an exception, and constitute a successful example of a consociational model that eventually transformed into a unified democratic system in 1967, once religious difference no longer constituted the predominant clearance. Despite religious difference, however, it is not clear that the Netherlands could have been classified as a "deeply divided" society at least by the twentieth century.

[16] The Ugandan experiment with no-party politics is an expression of the same concerns, but judgment has been reserved on whether the resulting impact on political choice weakens the accountability of government. On the other hand, no initiative to quell the Inkatha Freedom Party/African National Congress conflict in South Africa had such an immediate effect as President Mandela's appointment as opposition (IFP) leader, and Dr Buthelezi, as Acting President when he was absent from the country. Allowing the opposition to participate in tasks of governance is often referred to as "power sharing". It should be mentioned that power-sharing arrangements do not always work and can break down. This in turn can lead to a new round of mutual blaming and antagonism (Fiji).

[17] Where ethnic or racial minorities are granted super decision-making powers over the majority as contended for by some white groups in South Africa and some Tutsi parties in Burundi, the result is ethnic/racial tension. Even disadvantaged minorities can be the source of inter-group envy if constitutionally advantaged. The recognition and licensing of religious communities to regulate family law and customary law disputes is not incompatible with state neutrality (Nigeria, South Africa).

[18] The issue of federalism, decentralisation and multicultural societies is dealt with in Theme II, Leading House. It is raised here only as an indicator of the issues to be canvassed in the constitutional choices the constitution makers can engage in, and for its implications for the constitution-making process. See generally Watts, 1999.

[19] The same difference in perception of federalism was noted by former Ontario Premier, Bob Rae, in regard to Spain. Address to Murten Conference on Sri Lanka, April 2002.

[20] This is particularly so in ethnically divided societies. See generally Elazar and Haysom *The Federal-type Solutions in dealing with Multi-ethnicity*. Jerusalem Centre for Public Affairs. Cited in A. Nakaocedce, 2002. *Civil Society, Federalism and Multi ethnic Conflicts,*12.

[21] Nor does the right to self-determination imply the right to secede. However it's worth taking note of the recent Ethiopian experience in constitution making. Because ethnic identity had been suppressed under the Mengisto regime, the constitution makers of the current Ethiopian Constitution founded their federalism on express ethnic considerations. When considering the question of secession the Ethiopian constitution makers opted to provide for such a right at the outset, thereby removing much of the emotion from the constitutional negotiations, and allowing the constitution makers the right to craft a federal but integrated system of government in which the practicality of secession is questionable.

[22] In asymmetrical federalism the possibility exists for different sub-national units (provinces or states) to exercise greater or lesser (rather than uniform) degrees of autonomy and power.

[23] In Burundi, for example, such a guarantee is to be found in the requirements of joint ethnic control and membership of the security forces.

[24] Adopting a constitutional text by way of referendum alone is always unsatisfactory. The population's direct support for a large number of textual changes or provisions cannot be measured by a simple "yes" or "no" answer, a take-it-all or leave-it-all choice.

[25] In South Africa a call for written submissions on issues of constitutional concern led to an astonishing nearly 2 million submissions – many from peasants and wives dealing with issues relating to agriculture, or spousal neglect or abuse. On the face of it these issues seem far removed from grand constitutional questions, but in fact they record important concerns directly related to the constitution – gender equality, responsiveness of government etc. By allowing public input, the process was enriched by a sense of public ownership as well as by the submissions themselves.

[26] What is true for constitution making holds true also for the process of amending the constitution. First principles suggest that special procedures and majorities are required to amend the constitution, firstly to ensure both popular and diverse support for any amendment, and secondly, to ensure that the constitutional compact cannot be easily amended by new majorities. If the compact is to offer meaningful guarantees to minorities, it must be durable.

[27] In Kenya a recent poll suggested the constitutional reform commission under Professor Ghai enjoyed an astonishingly high level of popular support – in comparison to the support expressed for parliament. The legitimacy of these institutions in these circumstances derives from the fact that they are seen as accessible, transparent, and sensitive to the need to reach out to the public and civil society directly. As mentioned above, there is nothing intrinsically legitimate or popular in consigning the constitution-making process to a panel of government-appointed experts. In Zimbabwe the text prepared by an appointed commission was rejected in a popular referendum not least because the commission itself was considered hand picked.

[28] Aspects of this approach have affected the efficacy of peace processes or dialogues in Sri Lanka, Sudan and Burma/Myanmar. While many of these conflicts originated as bi-polar conflicts, in fact there are significantly different groupings within each community.

[29] The question of whether to grant amnesty to perpetrators of human rights violations is a dilemma that confronts most peace settlements. It is constitutionally relevant because the granting of amnesty and the conditions relating to any amnesty will form part of the new social contract. It appears that in most conflict-ridden societies, the granting of amnesty, at least to the military leaders of the protagonists in an intra-state conflict – such as in an inter-state war – is a precondition for peace, for a transition to democracy. But it is worth noting that where amnesty is granted by the perpetrators to themselves, it is seldom respected (Chile, Argentina) even where amnesty has been recognised as a necessary, but expedient confidence-building measure to allow the transition to take place. Secondly, where an amnesty has been negotiated and agreed, even amongst representative negotiators, it has limited applicability outside the country concerned. Outside of these considerations, negotiators will be required to balance the need to build a culture of human rights and eradicate a culture of impunity on the one hand, with ensuring stability and effective management of conflict in a divided society on the other. See the Report of the Truth and Reconciliation Commission, Vols I to IV, TRC, 1999.