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NATION BUILDING: FAVOURING MULTICULTURALISM THROUGH FEDERALISM?

The paper analyses chances and paradoxes of federalism as a strategy to sustain nation building in multicultural societies, in particular those in post ethnic war situations. The major hypothesis will be that there is no one to one relationship between federalism and communal peace, the latter being a condition sine qua non for nation building. The reasons lie in key challenges and paradoxes of federalism as a conflict management device in the societies coming out of ethnic wars: Mistrust and intolerance intrinsically belong to identity conflicts; on the other hand, federalism as part and parcel of conflict transformation should be instrumental in building up trust and tolerance that are paradoxically a condition sine qua non for effective federal designs. Multicultural federalism can work only if it succeeds in democratically commanding a loyalty that would transcend cultural cleavages, i.e., if it democratically reconciles cultural and political pluralism. Such reconciliation is structurally unfeasible within a consequently liberal democratic set up.

What constitutive principles and institutional set up of the federal polity can sustain the viability of nation building in multicultural societies? How can democratic reconciliation of political and cultural (ethnic, religious, linguistic) pluralism be achieved? These are major issues of multicultural federalism. Consequently, federalism can democratically meet multicultural challenge only if it is not imposed and becomes an 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; notably, to 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.

Key words: *Federalism. Nation Building. Multiculturalism. Post Conflict Transformation.*

1. MAPPING THE CONTEXT AND ISSUES

John Stuart Mill left no doubts about classical liberal understanding of democracy: In order to work, it must build on cultural homogeneity. According to him, “free institutions are next to impossible in societies with different nationalities”. This “catch-all” argument of the coryphaeus of classic liberalism has been firmly imbedded in both civic nations (US and France) and culturally defined “belated nations” (Germany and Italy). In the last two decades, a major shift from a nation-state as mono-national has been taking place both in constitutional politics of many states world-wide, particularly multinational federations, and in the largely embraced communitarian scholarship (the theory of multicultural citizenship). The trend of the nation-state’s evolution into multicultural state has already become an issue addressed within international settings outside academic debates, notably in Council of Europe.

Viewed from the perspective of prevailing liberal nation-concepts, ethnicity influences upon nationhood remained “stretched out” between assimilation-model-citizenship without nationalities and civic state for a majority nationality, on one side (civic and ethno-civic concepts nations), and the integration model of citizenship out of democratically integrated nationalities/ pluralist democracies, on the other (Swiss Willensnation). Last but not least, post-modern identity politics became a critical battle-front in the struggle with a key by-product of the modernisation process itself, migrant ethnic minorities. For them, unlike in the case of national minorities, a “rupture” occurred between territory and cultural identity. All these tendencies take place within a global paradox of two processes running parallel in the post-modern politics: those of “nation-building” and “breaking of nations”.

Equally relevant for the context of our theme is a historical development of federalism understood as a normative political theory. Federalism indeed emerged together with modern-state concepts. However, from the very beginning it offered an alternative to a centralised modern-state concept (Althusius and Pufendorf), and also introduced peace as its objective (Kant). Contemporary debates over federal citizenship in multicultural democracies mean in this sense a come-back to the roots – federalism inherently has a linkage to multicultural societies with identity cleavages.

The stage was set for “political use” of federalism as critical to nation-building in multiethnic societies, particularly those in post-ethnic-war situations. American type of constitutionalist federalism as a form of vertical checks-and-balances cannot fulfil this task. It represents a paradigmatic example of *monistic federalism* and remains “intrinsically suspect” to ethnic, religious, and linguistic group identities. In order to sus-

tain the viability of nation-building in multicultural societies a federal polity embraces different constitutive principles and also a considerably different institutional set-up, those of *pluralist federalism*. This type of federalism is designated to accommodate given multicultural cleavages, be it of ethnic, religious or linguistic nature, and to promote identity politics. Its subtypes – *multicultural* and *ethnic federalism* – differ in terms of the scope and focus in diversity accommodation, constitutional status of the rights of self-determination, and the role which the territory plays in identity politics. For example, Switzerland, India and Canada are multicultural federations, whereas Ethiopia and ex-communist federations represent the cases of ethnic federalism.

Pluralist federalism accepts political recognition and accommodation of existing ethnic, religious, or linguistic group diversities as legitimate, as well as the desirability of maintaining these legitimate diversities. That goes against a modern democratic principle of political liberty as an absolute political equality. It also puts into question majority as a sole legitimate representative expression of popular government. Federalism has at the same time correlated to the modern statehood and remained an immanent challenge to this statehood as that of democratic republic. The very idea of “group liberty” as a value in itself also principally questions individualist underpinning of human rights as another major pillar of liberal constitutional democracy. On the other side, a structural tension between democracy and human rights will remain immanent to modern polity despite a familiar argument that democratic rights are justified only to the extent that they safeguard others, more fundamental rights. C. Offe shows that both individual liberty and democracy are structurally related to two major civic virtues or values – those of tolerance and trust respectively. Together with solidarity, these two moral resources, sometimes referred to as a “political culture”, are viable only against a powerful background of citizenship/nationhood that is constitutive to political community.¹ Also for W. Kymlicka, besides certain virtues needed in virtually any political order (courage and law-abidingness, as well as economic virtues), there are the virtues distinctive to liberal democracy: public spiritedness, sense of justice, civility and tolerance, and a shared sense of solidarity and loyalty.²

Such eminently liberal virtues either do not exist or they are not forceful enough in the cases of segmented multicultural societies. Mis-

¹ Claus Offe, “Political Liberalism, Group Rights, and the Politics of Fear and Trust”, in: *Democratic Transition and Consolidation in Central and Eastern Europe* (ed. Lidija R. Basta Fleiner Edward Swiderski), PIFF and Helbing&Lichenhahn, Basel Geneva Munich 2001, 8–9.

² Will Kymlicka, *Politics in the Vernacular. Nationalism, Multiculturalism and Citizenship*, Oxford University Press, Oxford 2001, 295–296.

trust and intolerance are inherent in identity conflicts; and federalism as part and parcel of conflict transformation should be instrumental in building up trust and tolerance that are a sine qua non for solidarity. In consequence, an important point to investigate is whether federal arrangements at all, and if so, under what conditions (liberal or others), can address structural causes for mistrust and intolerance in a given multicultural environment and thus critically contribute to both state making and nation building?

The paper will address structural causes for the lack of trust and tolerance in the cases where a federal design of some kind is expected to mitigate cultural cleavages, especially as a part of conflict transformation strategy in state-reconstructing and nation-building post-war processes. It will further argue that a major paradox of federalism aimed at accommodating diversities (be it ethnic or multicultural) lies in the fact that it should create trust and tolerance, which in fact are its own preconditions. The experience of all three dissolved ex-communist federations and even of Ethiopia today show that challenges are by far bigger by purely ethnic federalism. (Two major lessons learnt cut across and go beyond the Ethiopian case. First, the constitutionalisation of the right to ethnic self-determination as the right to secession – may be an effective way to discourage secession, and in this sense can further guarantee stability of the federal order. Constitutional secession becomes a constitutional instrument in managing inter-community conflicts, and a strategy to make the common state legitimate for all its community. Hence the centrality of constitutional safeguards against secession in the procedure provided for secession demands. Second, building on ethnic lines may very well mean ignoring heterogeneity within ethnic groups.) Generally, pluralist federalism as such can work only if it succeeds in democratically commanding a loyalty transcending cleavages that caused the conflicts, i.e., if they democratically reconciles cultural and political pluralism as the only feasible strategy to nation-building. Such identity politics remains its major aim and the only strategy to viable communal peace. The paper will also argue that reconciliation as an important part of nation-building is systemically unfeasible within a consequently liberal democratic set up. Last but not least, a new role of key international players in facilitating and brokering constitutional federal arrangements as part of post-war state-reconstructing and nation-building will be discussed, with a view on a pivotal role of constitution-making and territorial accommodation in such cases.

2. FEDERALISM AS A STRATEGY TO SUSTAIN NATION BUILDING IN MULTICULTURAL SOCIETIES

2.1. Civic nationhood challenged – how “inclusive” is democratic citizenship under liberal terms?

A trusting and tolerant citizen and a government that is trustworthy because it is accepted by the majority of its people, and because it effectively protects human rights – this is what liberal democracy is about. So defined, a *sine qua non* testifies of a structural ambivalence within both liberty and democracy. A legally guaranteed liberty of an individual protects an individual from state power, but leaves her/him nonetheless exposed to the liberty of others. She/he is prepared to *tolerate* other’s liberty because the values and identity principles that they all commonly share prevail. On the contrary, if a common denominator does not exist, which is exactly the case with segmented multicultural societies, no tolerance is viable in terms of a major pattern of behaviour. Claus Offe rightly says that “the step from liberty to democratic rights follows the same ambivalence”, which made the entire early history of democratic political thought – from Rousseau to John S. Mill – advocate democracy while at the same time preventing its destructive potentials.³ This immanent tension between desirable and frightening aspects of popular sovereignty is resolved by trust. The fact that majority decisions are principally accepted also by those who disagree, is due to trust in the reasonableness and good intention of fellow citizens. Someone accepts some amount of risk for potential harm in exchange for the benefit of co-operation.

In the end, it is trust which fundamentally matters, since tolerance is also contingent upon the presence of trust. However, trust also has a paradoxical place within democracy, given that politics as such would seem to throw the very conditions of trust into question. *Political* relationships are about conflicts over goods and power. This is why trust complements and supports deliberative resolutions of political conflicts. At the same time a deliberative approach to political conflict can generate trust, among both individuals and among groups, as well as between individuals and groups, and the institutions.⁴

The interrelationship between democracy and trust has altered an “ethos of democratic theory”, moving it away from strictly egalitarian concepts of the responsibilities of individual citizens and towards a “pluralized egalitarianism”. In consequence, trust raises the question as to the means and mechanisms through which such a pluralized concept might become more operative. Another argument of M. Warren is here perti-

³ C. Offe, 9.

⁴ Mark E. Warren, “Democratic Theory and Trust”, in: *Democracy and Trust* (ed. M. Warren), Cambridge University Press, Cambridge 1999, 311–360.

ment: The process of deliberation and opinion formation that precedes voting is critically important for building up trust within multicultural societies. A “vote-centric” majoritarian democracy has proven to be one of the decisive reasons for mistrust between majority and minority, where the cleavages run along ethnic, religious or linguistic lines.⁵ Violent elections and refusal to accept the results coming out of democratic procedure, or even a refusal to take part in the elections, remains one of the major paradoxes of majoritarian democracies in multicultural societies. Without entering into the debate whether a community-driven multiculturalism, once accommodated within public sphere as well, still remains faithful to authentic liberalism, hardly anyone today would doubt a form of consensual democracy as instrumental and supportive of imbibing trust in segmented multicultural societies.

Paradoxically enough, trust can also be broken by federal power-sharing arrangements that provide a veto possibility for each group against policies that it would find particularly harmful for its interest. Impartial institutions, including those to protect minorities without unduly offending majority concepts of fairness, are a necessary but not sufficient condition for the perception of fairness. Consensus-driven democracy is based on a premise that functioning of a given society depends not only on justice of its institutions or constitution, but also on the virtues, identities, and practices of its citizens, including their ability to co-operate, deliberate, and feel solidarity with those who belong to different ethnic and religious groups.⁶

Here, it is worth reminding of what Will Kymlicka sees as major fears about citizenship in the face of minority rights, namely: loss of equal citizenship status, fragmentation or weakening of citizenship identities, erosion of civic virtues and participation, as well as weakening of social cohesion and political unity. He also shows where to look for the reasons.⁷ In fact, these fears Kymlicka convincingly show that the inclusiveness of liberal state relies indeed on a “thin” conception of nationhood. In other words, a normative basis of liberal theory of justice is too “tight” to include minorities as a state building element without at the same time putting into question the promotion of responsible democratic citizenship *under liberal terms*.

This is of course the conclusion Kymlicka himself would never draw out of his own arguments.⁸ I would nonetheless claim that any plau-

⁵ *Ibid.*

⁶ Margaret Levi, *A State of Trust*, European Institute Florence, *Working Paper* RSC 1996/23.

⁷ *Citizenship in Diverse Societies* (ed. W. Kymlicka W. Norman), Oxford University Press, Oxford 2000, 30 41.

⁸ Will Kymlicka, *Multicultural Citizenship, A Liberal Theory of Minority Rights*. Oxford University Press, Oxford 1995.

sible nation building within segmented multicultural societies has to redefine the very fundamentals of liberal nationhood, in order to provide a proper framework for building trust and tolerance. A negative value standing towards ethnic concepts of nationhood is consequently liberal and, as such, immanent.⁹ Although the liberals admit that in terms of logic ethnic nationhood is not causally linked to the phenomenon of intolerance and hatred toward “others”, they nevertheless draw a conclusion that there is much greater probability that a society of a civic nationalist type i.e. “a society anchored in a culture of individual rights and liberties”; even if it ran, for the moment, off the road of tolerance, “is more easily returned to the practice of toleration than one where social allegiance is invested in ethnicity”.¹⁰

Liberal tolerance is that of individual freedom, absolute formal equality and justice as equal distribution of rights. On the other hand, federalism as a conflict management device for multicultural cleavages can work only if tolerance as part of responsible citizenship goes much further, beyond co-existence and even beyond respect, and takes the shape of a value-driven tolerance, which would accept and promote main cultural diversities (ethnic, religious and linguistic) as an intrinsic value.

One of the first and key questions in this context reads as follows: What role pluralist federal arrangements could play in generating tolerance with “so much substance”? At the outset I already said that a major paradox of pluralist federalism lies in the fact that it should create trust and tolerance, which in fact should make this same federal design viable. I also related this paradox to constitutive features of liberal democracy, which have always been challenged by federalism and since two decades have also been challenged by multiculturalism. Now I shall explain how I understand these challenges (2. 2) and what would be major reasons that federal arrangements cannot work as conflict transformation strategy in all those cases where (new) state building and nation making are supposed to take place (2. 3).

2.2. Pluralist federalism: a systemic negation of liberalism

A reminder: federalism puts in question and aims at redefining an absolute political equality as political liberty –the latter being a consequence of the liberal principle of formal equality, which reduces justice to equal distribution of rights. Federalism has always questioned two pillars

⁹ Lidija Basta Fleiner, “Trust and Tolerance as State Making Values in Multicultural Societies”, in: *Sovereignty and Diversity* (ed. M. A. Jovanovic K. Henrard), Eleven International Publishing, Utrecht 2008, 73–84.

¹⁰ Michael Ignatieff, “Nationalism and Toleration”, in: *Europe’s New Nationalism States and Minorities in Conflict* (ed. R. Caplan J. Feffer), Oxford University Press, New York Oxford 1996.

of the modern liberal state – those of democratic sovereignty and procedural legitimacy:

Firstly. Federalism denies to the national majority the claim to be the (only) legitimate expression of the sovereignty of the people. Besides, federation replaces sovereignty with more diffuse sovereign powers of the federal state, on the one hand, and of its constitutive entities, on the other. In other words, by its inherent response to group liberty, federalism redefines democratic sovereignty both as a legitimacy basis and as *suprema potestas*.

Secondly. Pluralist/multicultural federalism also substantialises a modern procedural legitimacy formula in all those cases in which the federal institutional set-up represents a strategy of diversity accommodation through public recognition of the latter within a given multiethnic/multicultural society. Consented procedure is not of itself democratic and thus legitimate. In order to be democratic, the procedure has to guarantee that majority shall not overrule minority on constitutive state-and-nation issues.

A procedural design of secession of three northern Catholic and French speaking districts from the canton of Bern and the creation of the new canton of Jura in 1978 can be indeed invoked as a paradigmatic example for giving substance to the modern procedural legitimacy formula. A cascade system of popular votes within the Jura region, composed of three downward levels – the Jura region, districts, communes – transparently testifies of the basic element to give validity to the Swiss federation: */cultural/ minorities cannot be overruled on constitutive issues, because these affect state legitimacy itself.* Had the procedure been strictly majoritarian, it would have complied with the procedural democracy formula. Under the principles of procedural legitimacy, strictly taken, the separation process would have been valid by the very fact that the Bernese authorities decided first to establish a constitutional framework and the procedure under which the majority – at the level of the whole canton of Bern only! – could have arrived at a consensus. However, the Bernese people did not vote on secession procedure merely to make secession procedurally legitimate, i.e., valid for the majority. The procedure simultaneously took into consideration a founding tenet of Swiss federalist political culture – multiple and decentralised loyalty: minority issue was addressed as the issue of political integration already at the constitutive phase of the new canton. By being given the possibility to decide against majority, *minority also democratically legitimised the creation of the new canton.* The Protestant French speaking population, who wanted to stay within the canton of Bern, were themselves vested with the same right to territorial self-determination as the separatist majority.

Federalism emerged as a possible conflict-management device of inter-ethnic conflicts precisely because of such illiberal underpinnings. In

many cases until now, however, it radicalised the problem to which it was supposed to be a solution. Why? Simply because of its immanent pre-modern elements, which have to “fit in” a liberal paradigm! Because the main problem of multicultural federalism could be summed up as follows: How to provide political solutions to cultural conflicts, which are in liberal terms politically irrelevant? Ethnic, religious, linguistic demands should instead be translated into multicultural civic principles and designs. However, in immanently liberal terms, multicultural citizenship is a contradiction *in adiecto*.

Like federalism, multiculturalism persists as an endemic, anti-liberal challenge to constitutional democracy. Together with federalism, it calls for the revision of the major liberal democratic principle, namely, that majority as such is the legitimate expression of the sovereign will of the people. This has been done in a two-fold manner: *First*. Multiculturalism questions the intrinsic premise behind the modern nation state, namely, that only a society homogenized in (one) identity can lead to political consensus as democratic consensus. *Second*. The communitarian demand that ethnic, religious, cultural identities should *publicly* matter makes an epochal departure from *the* constitutive principle of modern politics, that of neutrality of public sphere against ethnic, cultural and religious group identities. This break-through from the demand of equal individual rights to the rights of peoples to be respected as equal in their diversities is notorious for the communitarian debate. The latter sometimes tries, not always convincingly, to argue with liberal arguments.¹¹ Habermas is right to say that a democratic constitutional state cannot accept identity politics as constitutional politics without abandoning liberalism.¹²

The case multiculturalism makes for positive collective freedom also contests constitutional democracy on the issue of how far the “politics of differences” should be placed on state-building level. Given the individualist and majoritarian underpinning of liberal constitutional democracy, the latter cannot of itself accept the politics of group differences on a state-and-nation-building level and therefore is structurally incapable of meeting multiculturalism claims on the values of diversities and collective rights as such. It remains defensive towards the multiculturalism argument that formal equal rights alone cannot guarantee equality, as long as the rights to be equal in respective differences do not gain constitutional status and in some cases also territorial autonomy. The liberal democratic defence of diversity is based upon a universalistic rather than a

¹¹ Charles Taylor, “The Politics of Recognition”, in: *Multiculturalism* (ed. A. Gutman), Princeton University Press, Princeton NJ 1994, 25–73.

¹² Jürgen Habermas, “Struggles for Recognition in the Democratic Constitutional State”, in: *Multiculturalism* (ed. A. Gutman), Princeton University Press, Princeton NJ 1994, 107–148.

particularistic perspective. This explains why some teleological reinterpretations of modern constitution, which try to re-legitimise a political symbolism of human rights, principally question the very liberal leitmotiv of the French Revolution as (merely) *Liberté – Egalité – Fraternité* (Liberty – Equality – Fraternity), and articulate instead an alternative syntagm of *Securité – Diversité – Solidarité*.¹³

Given that multiculturalism understands equality as the right to diversity, it logically implies that the formalism of the liberal equality, based upon ontological individualism, is to be transcended. To put it in a more straight forward manner: There has emerged a need for *substantialization* of human rights based *also* upon ethnic, religious and cultural diversities. This appears to be a clear-cut consequence of putting forward the thesis that man's dignity has to be regarded as an open concept.¹⁴ As already said, multicultural tolerance cannot be reduced to the receptiveness of diversities merely on the individual level, but has to do with diversities on group level, too. The common good starts to be pursued along co-existence of differences, where also group identity is immanently imbedded into the constitutionally defined nationhood of a given society. When so interpreted, the principle of tolerance renounces "eurocentrism" which underlies modernity as such. At the same time it makes democratic principles of constitution for a given polity more receptive for basically community-driven, as opposed to individualist social organisation and nation-building.

Kymlicka highlights nine differences between liberal and illiberal nation building, and claims these are a matter of "degree", in order to argue that, "what distinguishes liberal nation-building from illiberal nationalism is not the absence of any concern with language, culture, and national identity, but rather the content, scope, and inclusiveness of this national culture, and the modes of incorporation into it".¹⁵ However, there are convincing empirical arguments to claim the differences are not the matter of degree, but of substance instead. An authentically liberal nation-state principally failed to accommodate cultural diversities and proved a fallacy for national minorities, be it constituted upon ethnic or civic understanding of nationhood as citizenship. Modern concepts of nation were precisely *the* attempt to answer the question on the legitimate bearer of the constitution-making power. At the same time, they all, with different underlying principles in mind, tried to cover-up one and the same thing,

¹³ Erhard Denninger, *Menschenrechte und Grundgesetz*, Beltz, Athenäum, Weinheim 1994.

¹⁴ E. Denninger, 33 36.

¹⁵ Will Kymlicka, "Western Political Theory and Ethnic Relations in Eastern Europe", in: *Can Liberal Pluralism be Exported* (ed. W. Kymlicka M. Opalski), Oxford 2001, 13 107.

namely that citizenship, as the major founding principle of the modern state, symbolises the *universality* of a democratic political community within a *particular* nation-state. The problem arises once the given concept of nation is no more inclusive and “universal” for internal minorities but rather exclusive within one and the same nation-state: more in particular, when (ethno)-*nation* and *demos* no more coincide.

Minority rights as (not only) individual but also collective rights have cast a new light on citizenship as the principle to symbolize universality within a particular nation-state. Minorities do not fit in the constitutive principles of modern polity as (through majority defined) democratic polity. The two basically different concepts of nation,¹⁶ which underlie the citizenship of contemporary Western constitutional democracies, could be qualified as those of *democratic civism without/against multiculturalism* (American and French respectively) and *democratic civism out of monoculturalism* (the German model). Both civic and cultural understanding of nation fell short of bringing viable solutions to ethnic, religious, linguistic and the like minorities. In either case minorities *as groups* – principally – have nothing to say on fundamental constitutional issues. In consequence, minorities cannot participate in the citizenship they have not consented to. They have been sending a message that universality of the modern polity does not work for them, since, for them, it is an “exclusive” universality.

A fundamental, indeed systemic ambivalence underlies this problem, as demonstrate the ongoing debates within Council of Europe in the last three years. The PACE Resolution 1735/2006 on multicultural citizenship calls for further developing this element of democratic participatory governance as critically conducive to fundamental, universal nature of minority rights. The Framework Convention on the Protection of National Minorities represents the first formal recognition by international hard-law human-rights document of a political dimension as legitimate in minority demands. Nevertheless, the FCNM still builds on liberal foundations of tolerance, which is eminently that of individual freedom. On the other hand, individual freedom has been simultaneously flagged and challenged – it is the participation rights which should mediate between individual and a group. The “founding fathers” of the FCNM decided to ignore this ambivalence by putting it aside, since no consensus within the international setting seemed feasible in near future. As a consequence, the Explanatory Report draws a clear line, almost in a manner of antinomy, between individual and collective rights. The underpinning complexities and contradictions here are far from being merely scholarly conceptual in terms of a scholarship debate. Minority rights as fundamental do not be-

¹⁶ Roger Brubaker, *Citizenship and Nationhood in France and Germany*, Harvard University Press, Cambridge MA London 1992; Liah Greenfeld, *Nationalism. Five Roads to Modernity*, Harvard University Press, Cambridge MA 1994.

long to the reserved domain of the states. According to the PACE Recommendation 1623 (2003), “the states parties do not have an unconditional rights to decide which groups within their territories qualify as national minorities in the sense of the framework convention”. Nevertheless, states practically remain sovereign in deciding whom they will guarantee minority protection. Why? Minority rights are in most cases conditioned by citizenship. The states jealously keep for themselves the discretion to decide who will be the member of polity. This is a constitutive principle of modern nation-states. Furthermore, if radicalised, minority problem can hardly be accommodated only with a human rights strategy, let alone individual human rights.

No doubt, structural tenets of liberally grounded universality have to be reconsidered and redefined. In terms of constitution making and nation building, this means that the problems of design of *pouvoir constituant* and of citizenship have to be revisited. A new answer is needed for a critical question on legitimacy foundations: *Whose* is the state? A democratic integration of multicultural societies as a new type of corporative societies is a structural pre-condition for the viability of a human rights policy. For example, a communitarian concept of citizenship, which prevails in the new constitutions of Central and Eastern Europe, certainly testifies to a deficit in the identity and homogeneity of the new polities still *in statu nascendi*. The fact that this concept is much more concerned with civic duties turns it into a promising integrative force. However, the major underlying principle, namely, that it is the community which is constitutive of the individual’s identity, ran counter real-existing communities within what is constitutionally laid down, i. e. positivated as a (supposedly one) community. “Ethnification” of polities and politics in Eastern Europe shows that ethnic communitarian concept of citizenship remains an intrinsic obstacle for an authentic communitarianism. Protective state policy vis-à-vis all its citizens surrender to a systematically invasive state policy against certain ethnic groups of citizens.

Accordingly, the major questions are as follows: *What* would be the sources of democratic unity in a multinational state? What role can constitution making/constitutional consensus play in a democratic inclusion of cultural diversities? Is “citizenship out of democratically integrated ethnicities” possible, and if so, within which constitutive and constitutional framework?

Only if pluralist/multicultural federalism succeeds in providing viable answers to these questions it can prove instrumental to building trust and tolerance as state-and-nation-building values. Swiss multicultural federalism is a proof that it is possible, however, at the cost of liberalism. The Swiss federal polity is first of all a democracy of institutionalised cultural differences and its nationhood is that of democratically integrated cultural diversities. Here, federalism has been introduced as a structural

principle of democracy. Whereas United States is a *democratic federation*, Switzerland should be understood as a *federalized democracy*. Here, communal civism has embraced *participatory democracy as a federalist element* to protect interests of historical minorities within a given multicultural society. Swiss consensus-driven democracy has made an abstract principle of people's sovereignty more concrete and operational through traditional Swiss instruments of democratic decentralisation, those of municipal self-government and of direct democracy.

2.3. Federalism and Post-Conflict Nation-Building: International Community as a New "Pouvoir Constituant"

There are hardly better examples to sustain the argument on structural paradoxes of pluralist federalism as a conflict management device than those related to state reconstruction and nation-building after ethnic or religious wars. The involvement of the international community, however legitimate it may be in terms of peace-keeping or even peace-enforcement, opens additional dilemmas, especially in the cases where the international community facilitates constitution-making. The "transfer" of *pouvoir constituant* from a polity *in statu nascendi* to major international players cannot but make a legitimacy paradox of multicultural federalism even more complicated. A post-sovereign constitution making not only demonstrates an absence of a critical level of democratic legitimacy; it instead directly goes against nation building and – in consequence – against democratic legitimacy, since nation building and nation sustainability are inherent in democratic legitimation. We witness at the same time a *come-back of constitution-making and withering away of its democratic nature*. This is how a rupture between constitution-making and nation – building has happened. Suffice to remind that without democratically legitimate constitution-making, pluralist federalism loses one of its critical conditions to effectively contribute to nation-building.

All major federal arrangements in general and federations in particular, share something in common. In order to be legitimate, a consensus underlying such arrangements needs not only a qualified majority or even referendum support, but also a federal consensus. Constitution as a federal compact defines the terms of federal loyalty, i.e., the terms of federal trust embodied in loyalty to a common state. Therefore, the centrality of the interrelationship between constitution making and nation building is notorious: various federal arrangements are always a constitutionally established balance between self-rule and shared rule. Constitutional negotiations and constitutional legitimacy are a critical initial step for a viable pluralist federalism, since only a legitimate federal compact makes majoritarian and con-federal rule function together. Ex-communist multi-ethnic federations inevitably failed after the fall of communism,

since federal trust in particular was missing. Constitution-making became one of main instruments to dissolve a common state. No trust could be viable within constitutive foundations of communist politics. Socialist constitutions were means to simulate legitimacy foundations and provide party decisions with a facade of constitutionality.

Notably in post-conflict situations an absence of tolerance and trust as necessary conditions for peaceful and democratic society is evident already at a symbolic level. A profoundly different reading of key causes of a conflict as well as a fully contradicting assessment of present situation is often at hand. In consequence, it is almost impossible to reach agreement on the constitutive nature of the future common state framework as a stepping stone in a nation-building process. There is not enough political will to understand the other side. The role of the elite becomes in consequence critical. Paradoxically enough, the positions of the elites cannot be democratically verified. International community has to negotiate with elites, which offers the latter a comfortable position in trading constitutional solutions for own political survival. This is how – instead of state building – a real politics in its dirtiest meaning is taking place. There is no better way to effectively destroy democratic nation-building and a positive role that federalism might play in it.

Under such conditions and in cases of accommodation of minorities through territorial autonomy, minorities start focusing on external rights for their territorial entities. This shows that they even take negotiated solutions as somehow “transitory”. In the “internationalisation” of their position they see a “manoeuvring space” to sometimes again open up their issue. Moreover, although territorially based federal solutions would be in many cases desirable, it is exactly the conflict over territory, which makes ethnic demands end up as irreversible and thus categorical. One of crucial problems paradox of federalism as a conflict-management device for multiethnic societies lies in “hidden potentials” of the correlation between territory on one side, and ethnic-driven constitutional solutions in a given multiethnic federation, on the other. The major challenge that any multicultural federalism has to face in such a situation, moreover the “trap” with sometimes-fatal consequences for inner peace remains as to how to avoid that – due to constitutional foundations and established decision-making process at a federal level – every constitutional conflict turns into ethnic conflict. It is indeed a paradox that the ex-communist federations “share” this experience with the decentralisation reform in Macedonia under Ohrid Agreement, mediated by the EU and United States. Re-drawing municipalities’ lines prevailing along ethnic lines was a strategy to accommodate minority. However, for both ethnic Albanians and ethnic Macedonians, another far-reaching message got across: In order to enjoy your rights, one ethnic group has to fully “control “its own” territory!

Equally indispensable is that, whatever institutional designs may be pursued, they do not leave space for “re-opening” and re-negotiating constitutive foundations of the common state on an almost day-to-day basis, when differences occur between the elites representing different communities. Such contested issues directly question the long-term viability of reconciliation between unity and diversity since in multicultural societies nation building takes a form of a “daily plebiscite”. The state organisation and its functioning are a sensitive element to sustain or menace the balance between unity and diversity.

A systemic ambivalence of the involvement of the international community in designing federal solutions as part and parcel of conflict transformation strategy has to do with the following reasons:

First and foremost, there is a principal shift in the objective of constitution making which of itself makes an authentic constitutional consensus obsolete. The international community operates under geo-strategic terms of reference, and these usually have nothing to do with internal viability, i.e., inside legitimacy of the proposed solution. Not common identity, but geo-strategic stability in the region is of major concern, and internationally negotiated, in a way imposed framework for the solutions remains in principle non-negotiable (Bosnia, the former Serbia and Montenegro, Cyprus, East Timor, Iraq...). This is how “putting-together” federalism turned into “enforcing-together” federalism.

Not surprisingly, the results until now have not been very convincing and negative effects for the nation building process have been in some cases dramatic: Iraq, for example. Nation-building processes also form from the inside power relations beyond a toppled regime, which the foreign interventions can only distort. In addition, this is also the reason why foreign pressure usually proves ineffective: power relations are distorted and there are no reliable actors to respond to the pressure. Moreover, internationally facilitated or negotiated constitutional arrangements inevitably fail to fulfil three important conditions for constitution –making and nation-building in multicultural societies: a/ the process should ensure that the constitution is legitimate and legal; b/ it should guarantee inclusion as a proof of the respect for diversity; and c/ the process should promote a direct participation of the public in constitution making.¹⁷

Here additionally lies one of the reasons why “international constitution making” often imposes unviable solutions, and cannot deliver effective guarantees for international rule of law. Federal arrangements in such cases are discredited, since – in the end – federalism *is* about constitutionally defined and respected rules of the game. Western democracies

¹⁷ Nicolas Haysom, “Constitution Making and Nation Building”, in: *Federalism in a Changing World Learning from Each Other* (ed. R. Blindenbacher A. Koller), McGill’s Queen’s University Press, Montreal 2003, 261–298.

build upon an inherent identity between legality and legitimacy. More importantly for democratic constitutionalism, legality as such is immanently legitimate only under two, equally indispensable conditions: a/ that legality relies upon a consensus of those concerned (government by consent), and b/ that it is “universalisable”, i.e. generally applied (legal security and equality before the law). I have tried to show why these conditions have not been and cannot be fulfilled by “international constitution making”.

It is therefore appropriate to caution against too much enthusiasm for constitutional patriotism as a commitment to the values of democratic constitutionalism and human rights, so forcefully argued by J. Habermas as an alternative to (ethno) nationalism in the nineties. Today, poor results of a strong involvement of international community in post-conflict constitution making and nation building are empirically known. One can easily understand why such constitutional settlements hardly found “patriots” among those directly concerned, be it Iraq or Bosnia and Herzegovina of the Dayton Agreement, or the first proposed agreement for Cyprus, or the Union of Serbia and Montenegro. These federal settlements were not directly negotiated by conflicting parties; they were instead accommodating the interests of directly concerned powerful international actors for regional stabilisation. A sharp polarisation over federalism in Iraq today testifies at best that the constitution making process and imposed federal design went against nation building and sustainable democratic state-reconstruction.

To conclude with Weiller, although in a context fundamentally differing from the EU: These are telling examples of a supra-national constitutionalism without “constitutional demos” and federalism without constitutionalism.¹⁸ Managed constitution-making, like “managed democracy”, has “a soft representation and hard manipulation”. 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”.¹⁹

3. CONCLUSION: CONDITIONS THAT FEDERALISM WORKS AS A NATION-BUILDING STRATEGY

The issue cutting across this paper was the following: How, and under what conditions can federalism become conducive to nation-build-

¹⁸ Josef Halewi Horowitz Weiler, “Federalism without Constitutionalism: Europe’s Sonderweg”, in: *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union* (ed. R. Howse K. Nicolaidis), Oxford University Press, Oxford 2001.

¹⁹ Ivan Krastev, “Democracy Doubles”, *Journal of Democracy* 17/2006, 52–62 (muse.jhu.edu/journals/journal_of_democracy/v017/17.2krastev.html).

ing by reconciling unity and diversity and accommodating deep differences? One of undisputable conditions sine qua non faces a fundamental problem: Political and constitutional accommodation of all relevant groups in a given society can be sustainable provided one group or another does not use 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. However, it must possess a critical level of multicultural democratic legitimacy in order to be self-sustaining.

The paper argued that pluralist federalism is not a “magic tool” for nation-building. Nevertheless, pluralist federalism may nonetheless work under the following conditions:

- a) a federal compact makes part and parcel of a multicultural democratic consensus;
- b) common state is across community lines non-negotiable on a day-to-day basis;;
- c) any design for a common state, even with strong con-federal elements can function as long as it is self-sustaining; it means that common bodies can guarantee effective decision-making within a restrictive sphere of their powers;
- d) the international community should play important but constructive role; it should help building trust and tolerance as state-and-nation-building values.

By supporting legitimate constitutional settlements, the international community should prevent that the major paradox of pluralist federalism perpetuates: a necessity to create trust and tolerance, which are also its own preconditions.