

12-21-2005

Conflict Resolution, Nation-Building & Constitution-Making.

Nicholas Haysom

Follow this and additional works at: <https://scholarworks.umb.edu/nejpp>



Part of the [International and Area Studies Commons](#), [International Relations Commons](#), and the [Peace and Conflict Studies Commons](#)

Recommended Citation

Haysom, Nicholas (2005) "Conflict Resolution, Nation-Building & Constitution-Making.," *New England Journal of Public Policy*. Vol. 19: Iss. 2, Article 11.

Available at: <https://scholarworks.umb.edu/nejpp/vol19/iss2/11>

This Article is brought to you for free and open access by ScholarWorks at UMass Boston. It has been accepted for inclusion in *New England Journal of Public Policy* by an authorized editor of ScholarWorks at UMass Boston. For more information, please contact scholarworks@umb.edu.



Conflict Resolution, Nation-Building & Constitution-Making


Nicholas Haysom

Most of the current and intractable armed conflicts in the world today are intra-state conflicts in societies divided along the fault lines of race, religion, ethnicity, language, and region. These conflicts are overwhelmingly animated by identity. Even where such conflicts do not take on a violent form, they serve to prevent the emergence of interest-based politics in multi-cultural societies. The political systems in such nation-states — and their national constitutions — are required to address the way in which multiple identities can coexist within an inclusive national polity and alongside a national identity. This challenge faces both new democracies and older ones, whose constitutions were fashioned as statements of national sovereignty but no longer reflect the relationships that the nation desires. This is all the more important as the twenty-first century witnesses more strident assertions of identities other than national ones — paradoxically at a time when globalization is asserting universality and uniformity.

Individual pluralism, the solution offered by liberal democracy, is not always an answer to identity conflicts. This is not because of flaws in liberal democracy but because the conditions for the actualization of individual pluralism simply do not exist in many divided societies. At the same time, nation-states have been reluctant to constitutionalize “difference” by segmenting society into its ethnic or cultural groups. One response to the challenge of multi-culturalism in a divided society has been to emphasize greater participation, and hence stakeholding, by minorities in a political system. Federalism is one way of promoting greater stakeholding by minorities because inter alia: it allows ethnically supported parties that are national losers to be regional winners in sub-national units; it provides a basis for regional common interests that are neither national nor ethnic; it facilitates accountable government.

What applies to a constitution also applies to the constitution-making process. While popular endorsement and adoption has long been recognized as a condition for both legitimacy and legality, it does not guarantee stability or adherence to constitutional values. Constitution-making processes should ensure diverse support as well as promote direct public participation at each stage of the constitution-making process.

Nicholas Haysom, former chief legal counsel to President Nelson Mandela, is an international consultant on peace processes. He is a visiting professor at the University of the Witwatersrand.



As the twentieth-first century opened, analysts were able to point out that the “nature of human conflict had profoundly changed — both in form and subject matter. Whereas the previous century had opened with wars between sovereign states, by the 1990s the overwhelming number of conflicts classified as “major armed conflicts” were intra-state conflicts. Between 1989 and 1996, for example, 95 of the 101 armed conflicts in the world were internal, and the vast majority had an “identity” component to them.¹ Identity-driven conflicts are based on the mobilization of groups sharing a communal identity trait such as race, ethnicity, tribe, religion, culture, language, regional origin, and heritage.² While such conflicts may be triggered or may combine with questions of distribution of economic resources or opportunities, their identity-driven nature has allowed them to be characterized as more intense, intractable, emotionally charged and persistent.³ These conflicts are about the very sense of who the protagonists are, 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 and more cruel, and conducted without restraint. Michel Ignatieff has pointed out how these wars are conducted outside of both the codes of self-imposed military chivalry or internationally accepted humanitarian law.⁴ 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 percent of the casualties of war.⁵ By the 1990s that figure was 80 percent. In many instances, children have become both objects 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.⁶

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 of identity conflict is increasing in both human and economic terms.⁷ 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 increasing attention on modalities 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 “multi-culturalism”). In order to ameliorate the effects of the appropriation of state machinery by one or another dominant cultural community in a multi-cultural 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 driven 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 mobilization that 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 — as 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 realization that the problem of election evidence is not only caused by the rules of the contest but by the prize itself.⁸ Where minorities are consigned to be perpetual losers in a winner-takes-all contest driven by group mobilization — and where the price of losing the contest carries loss of economic opportunity — the stakes appear too high. To this issue we will return, but suffice it to say that the proper treatment of nation-building as well as affirming, recognizing, and managing “difference” is receiving unprecedented constitutional attention at a time when constitution-making itself is the subject of renewed interest.⁹

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 let’s make Italians!”¹⁰ Garibaldi’s statement draws attention not only to the difference between state-making and nation-building (or creating a national identity) but it also emphasizes 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 that 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 working 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”¹¹ 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.

But the task of nation-building, of creating a national identity, cannot be discharged at the expense of the equally important issue of recognizing 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, we argue, is 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, in fact, people react to difference in a dynamic and changing way. The members of the Hutu and Tutsi groups the author interacted with in the Burundian Peace Process share more in common with each other (physically and culturally) than residents of a cosmopolitan city apartment block do with their neighbors. Ignatieff also comments on the sense of shared identity that citizens of the former Yugoslavia had prior to its dissolution. The sharpest conflicts often occur between groups who are most similar — what he calls “the narcissism of minor difference.”¹² 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 neighbors, neighbors that had once been content to school with, play football with, and intermarry their ethnic enemies.¹³ The politics of difference concerns the way in which the political elite manufactures and utilizes 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 the removal of restraints on the promotion, and manipulation, of identity and thus the unrestrained mobilization for power by means of ascribing new meanings to imagined or real differences. 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 interstate rivalry. Wars make for robust nation-building.¹⁴ Sigmund Freud noted that social solidarity is usually at the expense of an “enemy” — although his apt observation was directed at the contribution the stigmatization of Jews made to national solidarity in pre-war Germany.¹⁵ 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 interstate rivalry. These concerns are not the ones that now animate intra-states’ tension and violence.

This is equally true for the first post-colonial constitutions of Africa and Asia. Anti-colonial movements embraced the colonized 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-look at the social contract that 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 populous, both driven 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.¹⁶ 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 scant on 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 other 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 or 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, claims that 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.¹⁷

Democracy and Diversity in Divided Societies

In this presentation the observation has been made 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. First, 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.

Second, 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 centralized exercise of power. They were models having an adversarial, a winner-takes-all character.¹⁸ Third, 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 mobilization, political preference was commanded through group-based affiliation or ethnic belonging, not through the material or other interests of the individual.

Finally, in many developing countries there is simply no economic sector or 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 that 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. The 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.

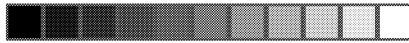
The Role of the Constitution in the Management of Diversity: The Current Theory

It would be incorrect to suggest that the intra-state conflicts, which have plagued many of the new democracies in multi-cultural 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 legal pre-eminent instrument for doing so 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.¹⁹ What is clear is that constitutions in multi-cultural 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 that 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 specially 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 among those who distrust the constancy, or even the existence, of majoritarian goodwill.

Modalities of dealing with multi-culturalism, and especially identity-based conflict in multi-cultural 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 recognizes cultural or community difference and allocates to such groups a measure of self-government or group autonomy or group protection. In such a system, the citizens can be ascribed an identity and can exercise their rights through their separate communities. There is a third modality that emphasizes "inclusivity" in both the benefits of and responsibility for government without expressly constitutionalizing, 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 promotes stake-holding by all communities in the national project.

The classical liberal democratic model, or liberal constitutionalism, informs the notion of the modern state.²⁰ 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 civil 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 multi-culturalism was encountered earlier. These polyglot states absorbed waves of immigrants but the essential approach to multi-culturalism has been to integrate immigrants into the system.²¹ As the older homogenous democracies also begin to experience the challenge of multi-culturalism 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 multi-culturalism 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 needs to 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 co-exist 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, unity of common purpose for citizens to be both different and one. But the problem lies in identifying the concrete conditions for its successful functioning in multi-cultural 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; and the practice of interest-based politics.

It is no accident that South Africa, in making its constitutional choices 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 for 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.²²

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.²³

In short, a standard liberal democratic approach to identity conflict resolution will fail to fulfill 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 actualization, 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 constitutionalize the distinct communal identities, to establish constitutional structures on the basis of group belonging. There are many variations of such techniques that are possible, some of which happily co-exist 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 a 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. The simple allocation of autonomy however, 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 constitutionalize difference in nation states. There are several reasons for this. First, 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 does, lead to persecution of other minorities within this identity-charged atmosphere. At worst, ethnic cleansing is the result 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 intergroup 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 constitutionalization 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 religious or 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.²⁴ 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 require super majorities. Where there is a resulting de facto veto power in the hands of a minority, this can exacerbate inter-ethnic tension, if it does not produce an undemocratic and ineffective system of governance.

The third modality 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 constitutionalization of ethnic/cultural categories. This modality would accept the de facto overlap of party with the group fault lines, but by choosing not to constitutionalize an ethnic basis of representation, it allows the society to move toward interest-based politics, and to allow the impact of other cross-cutting identities (for example, class, region, occupation) to blur the raw ethnic dynamic encouraged by opportunistic elites. This modality 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 and a corresponding maldistribution 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 and joint ownership, 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 emphasize inclusivity in decision-making process, 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 the following:

1. Amending the electoral system from a single member constituency system so as 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 that small but distinct political tendencies or cultural communities are represented.
2. Requiring public officials such as the president, to win regionally diverse support not just an overall majority (Nigeria). This ensures that breadth of support for the executive, not merely depth of support, as the significant value.

3. 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). Implicating the opposition into the government can weaken the traditional liberal role of an adversarial opposition.²⁵
4. 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 mobilization — even though it violates the freedom of association.
5. Making use of second chambers or sectoral representation (for example, of women) to establish alternative cross-cutting or complementary forms of representation to that of the ethnically charged political party representation, or to supplement that of the ethnically neutral party representation (Uganda, Burundi).
6. 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.
7. Protecting and promoting diversity of indigenous language use and custom. Even though impractical, in South Africa a full eleven languages are recognized as official languages. The denial of recognition of a community's language, especially in monolingual states is another exclusionary practice that fuels secessionary emotions.
8. 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.²⁶
9. In line with the adoption and consolidation of human rights approaches in Africa during the 1990s, enforcing the principle of non-discrimination on religious, ethnic, or tribal grounds, 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.

10. 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 formalize 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, although some incumbents have sought to reverse this trend recently).

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.

Federalism and Conflict Resolution

There are many reasons why federalism and decentralization can assist both in the project of making the national framework more inclusive, enhancing the nation-building project, and allowing for greater expression of different identities within the national framework. Because of its geographical foundation, federalism does not require that citizen 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 closer to the people, greater local control over decisions that impact on citizens' daily lives. It allows for policies to be adapted to the particularities, including cultural, demographic, and political particularities, of the region.²⁷ But if federalism is to offer a viable guarantee of respect for difference, it would seem it should meet certain ancillary requirements. The powers of the federal units must be protected from arbitrary federal intervention. As far as possible, there must be equality as to the value of citizenship between 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 of 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 the 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 driven by enduring conflicts, the federal option is seen as insufficient by national minorities while being rejected as a precursor to dissolution and secession by the incumbent government.²⁸ 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"; that the

democratic politics at a regional level must lead to a competitive assertion of regional interests over that of the national interests or the interests of other regions.²⁹ 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 (co-operative federalism). There is thus 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 in Germany, the National Council of Provinces in South Africa, and intergovernmental committees in Canada are a response to the need for integrating mechanisms within the federal system.³⁰ Such institutions support the nation-building project by requiring each region to take into account the interests of its neighbors. In addition to the integrating of such mechanisms, 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 in international law.³¹ Whether secession is a real option in a federal system often has little to do with the constitution itself. The 1937 Soviet Constitution recognized a right of secession, but a 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 determinant 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 or 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 federalism³² may be indicated. In any event, members of the Moro Mindanao community in the Philippines have pointed out to the author that federalism would have no role in resolving the conflict in the Philippines unless it emerged from meaningful discussions with the communities for whose benefit it was intended.

It needs to be emphasized 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.

Diversity and the Rule of Law

Constitutional initiatives to promote inclusivity and to provide guarantees for minorities in multi-cultural 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.

But not all societies have robust legal institutions, or a tradition of an independent judiciary or other institutions of the kind that can act as the guardian of the constitution as against the holders of power. In such societies, guarantees founded on fundamental rights provisions, or 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, on balances of power rather than guarantees in the constitution.³³ 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.

Constitution Making and Nation Building

In this presentation we have been concerned 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 multi-cultural society. This is so in as much as the constitution-making process itself has a contribution to make to building a culture of democracy, to understanding the need for inter-group tolerance, 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 appears to be three important considerations that should inform the constitution-making process in a multi-cultural society. First, 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 not meet the aspirations or reflect the values of the majority is unlikely to survive. Its provisions would not likely be respected. This requirement should not be under-emphasized even if it is asserted at the expense of other considerations. This consideration 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.³⁴

The second consideration to inform good constitution-making practice is that of inclusivity, of respecting 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 multi-cultural 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 a tension, even a 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 view points, was resolved through the mechanism of “constitutional principles.” These constitutional principles were principles that enshrined basic guarantees for all groups. A two-stage process was followed 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 multi-party body drafted an interim but democratic constitution that would function during the second phase of constitution making. 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 details and this phase saw a more engaged and transparent debate on constitutional issues. This two-stage process is 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. But direct public participation strengthens the compact that 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 as in Canada and South Africa, for example. In South Africa a call for written submissions on issues of constitutional concern led to an astonishing nearly two million submissions — many from peasants and wives dealing respectively 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, and the like. By allowing public input, the process was enriched by a sense of public ownership as well as by the submissions themselves.

A further advantage of allowing direct public participation is that it enables multi-cultural 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 the public participation should not be seen as a cosmetic pretence but rather 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 practiced. Such popular support can protect the constitutional values to it. The public awareness of and participation in constitution-making processes need not be confined to a once-off process. It is possible for it to be continuous. School and public education on its values and provisions should be ongoing, especially in multi-cultural societies attempting to ground the constitutional compact on widespread support for cultural tolerance and human rights. The constitution-making process involves: drafting, submitting, or eliciting initial draft texts or proposals; negotiating the final text; and finally the procedurally appropriate adoption of the text. The considerations of legitimacy, inclusivity, and direct participation can be made to apply at each stages of the process.³⁵

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 skepticism toward 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 from and been adopted following processes driven by representative constitutional reform commissions.³⁶

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. First, for example, there should be a willingness to allow the text to reflect provisions, and formulations of provisions, that emanate from one's opponents 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 ethnical political group can triumphantly claim it as their own.

Second, a 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. Third, another consideration in 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.

Conflict Resolution Negotiations and International Intervention and Constitutional Reform

A distinction should be drawn between conflict resolution negotiations for the purpose of 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 is not paradise but a compromised arrangement

whose purpose is to ensure that the journey to paradise is completed; it should necessarily promote broad support for the process and its irreversibility. These transitional arrangements typically lead to interim governments of national unity as a precursor to elections for new democratic institutions. The variety of modalities used in peace negotiations seldom complies with the values and best practices that have been suggested in this paper.³⁷

It is suggested here that peace negotiations, 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.³⁸

This paper has suggested that the pre-condition for durable constitutional arrangements in a divided society is the sense of loyalty and ownership that all groups have toward it. The optimal circumstances for this arise when all the relevant political 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 and can even allow for contending parties to distance themselves from the peace pact claiming that it belongs to the United Nations, Norway, Switzerland, and so forth. 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 cannot speak to each other let alone compromise with one another; the power imbalance between the parties is so great that one or both will not negotiate; where the agreement is required to be buttressed and supported by international guarantees.

In the first 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 second case a mediator serves to partially level the playing field and thus enable the participation of an otherwise unequally placed party. 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 maneuvers by the parties is limited unless the defaulting party is prepared to risk international disapproval.

Nation-Building and Negotiating the Past

Finally, a frequent and pre-eminent concern in a transitional process intended 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 that cannot be dealt with comprehensively in this presentation, save to say that certain common considerations are receiving increasingly widespread attention. First, it is not possible for a multi-cultural nation to sweep its skeletons under the carpet, to ignore past human rights violations. Past



injustices cannot be denied or buried (especially where there is a link between victimhood and ethnic groups). In order to make a fresh start, most countries need to confront their pasts; otherwise those pasts will re-emerge, possibly in more ghastly forms.³⁹

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 — like in an interstate 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 recognized as a necessary but expedient confidence-building measure to allow the transition to take place. Second, 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. 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. That it was able to do so, or 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. ❁

Notes

This is an amended version of a paper presented to the International Conference of Federalism held in Gilon, Switzerland, in August 2000.

1. "Democracy and Deep-rooted Conflict: Options for Negotiators," ed. P. Harris and B. Reilly in *International IDEA*, 1, no. 10 (1998).
2. 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.
3. See also R. Stavauhagen, *Ethnic Conflicts and the Nation State* (New York: St. Martin Press, 1996), 229.
4. Michael Ignatieff, *The Warriors Honour – Ethnic War and the Modern Conscience* (London: Chatto & Windus, 1998).
5. Peter Harris and Ben Reilly, *Democracy and Deep-Rooted Conflict* (Stockholm: International IDEA, 1998), 14.
6. *Ibid.*, 15.
7. *Ibid.*, 15.
8. An example of such a situation is the last election in Lesotho where in a single member constituency, "first-past-the-post" electoral system, the opposition received 40 percent 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 proportional representation — part of a wider imperative for inclusiveness — has obvious application to multicultural societies.
9. The emergence of new states in Eastern Europe, the democratic constitutional reforms in

- formerly one-party African states in the 1990s, and the recent civilianization 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.
10. T. Fleiner, W. Kalin, W. Linder, and C. Saunders, "Federalism, Decentralisation and Conflict Management in Multicultural Societies" concept paper, 2002.
 11. This is the term used by Harris and O'Reilly to refer to identity-driven conflicts in which there is also a perceived imbalance of resources, which correlates with the identity-related boundaries.
 12. Ignatieff, *Warriors*.
 13. See Philip Gourevitch, *We wish to inform you that tomorrow we will be killed with our families* (New York: Picador, 1998).
 14. It is no accident that international sporting contests provide one of the most effective means of nationbuilding — calling the nation together. A Nigerian colleague commented, "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 device, however, has less resonance in S.E. Asia.
 15. Michael Ignatieff, *Warriors*, 61 citing from Freud in *Civilization and its Discontents* (London: Pelican Freud Library, nd): 12, 305.
 16. *Democratization in Indonesia. An Assessment* (Stockholm: International IDEA, 2000); *Democracy in Nigeria: Continuing Dialogues for Nation Building*, (Stockholm: International IDEA, 2000).
 17. See Will Kymlicka, *The Rights of Cultural Minorities* (Oxford: Oxford University Press, 1995).
 18. These constitutional models derive from societies that had undergone decades — even centuries — of religious, language, or other identity conflicts, and which had led to the eradication of difference (France, UK), or to the inter community compacts by which national survival was assured (Switzerland, Belgium), or to the removal of historically founded boundaries between persons otherwise sharing a language or culture (Italy, Germany).
 19. Thus, for example, South Africa's constitution proclaims repeatedly that all South Africans are equal regardless of race, gender, or ethnicity. Others may specifically speak to the civilian control of the military (Japan, Germany), or insist on religious neutrality (European countries), while others may address cultural autonomy (Ethiopia).
 20. 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 collective body of individuals and assume, explicitly or implicitly, a national identity and dominant cultural homogeneity even if religious difference is accepted.
 21. 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, constitutionalize collective pluralism. It rests on the foundation of a powerful mono-lingual and dominant national culture to which new cultural communities integrate. See generally Shapiro and Kymlicka, eds., *Ethnicity and Groups Rights* (New York: New York University Press, 1996); Yash Ghai, ed., *Autonomy and Ethnicity* (Cambridge: Cambridge University Press, 2000).
 22. The jury is still be out on whether this compact will hold when South Africa confronts the economic disparity between black and white citizens. But for many divided societies the conditions that were necessary to the South African pact are not present.
 23. The dominant yet minority Tutsi community had claimed that if they were to let go of their political (and military) monopoly power in favor of a democratic system they would be perpetual economic and political losers at best, and the subject of genocidal retribution at worst, even though it is their control over resources that 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*.
 24. Netherlands is an exception and an example of a consociational model that became 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 by the 20th century.
25. 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 IFP/ANC conflict in South Africa had such an immediate effect as President Mandela's appointment of opposition (IFP) leader, Dr. Buthelezi, as Acting President when Mandela was absent from the country. Allowing the opposition to participate in governance is often referred to as "power sharing." Power sharing arrangements do not always work and can break down. This, in turn, can lead to a new round of mutual blaming and antagonisms.
 26. Where ethnic or racial minorities are granted decision-making power over the majority as some white groups in South Africa and some Tutsi parties in Burundi have contended, the result is ethnic/racial tension. Even disadvantaged minorities can be the source of inter-group envy if they are constitutionally advantaged. The recognition and licensing of religious communities to regulate family law and customary law disputes is not incompatible with state neutrality (as in Nigeria and South Africa).
 27. See generally R. Watts, "Federalism in Fragmented and Segmented Societies" in Kramer and Schneider, eds., *Federalism and Civil Societies*, 1999.
 28. The same difference in the perception of federalism was noted by former Ontario Premier Bob Rae in regard to Spain in his address to Murten Conference in Sri Lanka April 2002.
 29. This is particularly so in ethnically divided societies. See generally J. D. Elazer, "Federal-type Solutions in Dealing with Multi-ethnicity," cited in A Nakaocedce, *Civil Society, Federalism and Multi Ethnic Conflicts* (Jerusalem: Jerusalem Centre for Public Affairs, 2002) 12.
 30. See Ronald Watts "Intergovernmental Relations: Conceptual Issues" and N. Haysom "The Origins of Co-operative Governance" in N. Levy and C. Tapscott, eds., *Intergovernmental Relations in South Africa: The Challenges of Co-operational Government* (Idasa, 2001).
 31. Nor does the right to self-determination imply the right to secede. But 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 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.
 32. 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.
 33. In Burundi, for example, such a guarantee is to be found in the requirements of joint ethnic control and membership of the security forces.
 34. 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.
 35. What is true for constitution making holds true also for the process of amending the constitution.
 36. In Kenya a recent poll suggested the constitutional reform commission under Professor Ghai enjoyed an astonishingly high level of popular support when compared 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.

37. See J. Chopra, ed., *The Politics of Peace Maintenance* (1998) Lynne Reiner
38. 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 originate as bi-polar conflicts, in fact there are significantly different groupings within each community.
39. See the Report of the Truth and Reconciliation Commission Volumes I to IV TRC 1999.