INTERNATIONAL IDEA
INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE

REPORT

The Role of State Constitutions in Protecting Minority Rights under Federalism: Dialogues in Support of a Democratic Transition in Burma

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Executive Summary

This report is based on the proceedings of two workshops jointly organized by the International Institute for Democracy and Electoral Assistance (IDEA) and National Reconciliation Program (NRP) in New Delhi, India, and Chiang Mai, Thailand, from November 1–5, 2002.on *The Role of State Constitutions in Protecting Nationality and Minority Rights Under Federalism: Dialogues in support of a democratic transition in Burma,*

International IDEA has facilitated this process of dialogues in support of a democratic transition in Burma, by sharing comparative experiences from South Africa on negotiating political settlements and the experiences of women's groups proactive in peace talks – drawing on experiences in Sri Lanka, South Africa, Guatemala and Northern Ireland.

The National Reconciliation Program (NRP) is committed to supporting a democratic transition that is based on respect for the rights of ethnic nationalities. This commitment has directed the NRP to hold intra-ethnic and inter-ethnic dialogues to secure these rights within a united and democratic Burma.

The aims of the IDEA/NRP workshop were to provide information to the Burmese participants on:

- The basic principles of power relations between federal government, state governments, and local governments.
- The different federal systems (Indian, Australian and Nigerian), their constitutional histories and experiences in protecting minority rights, and
- Create a forum at which Burmese participants could reflect on these experiences and draw their own conclusions on what may be relevant to their own aspirations.

The specific themes explored at the workshops include:

- The rationale for federalism:
  - Is it affordable?
  - Will it exacerbate religious and ethnic conflict, and be an impetus for secession?

- The structure of the federal unit :
  - Should it be determined on the basis of historical boundaries or ethnic / linguistic or religious criteria?
  - The advantages and disadvantages of using historical boundaries, ethnic or religious criteria in determining boundaries, or the creative drafting of new boundaries;
  - How federalism and decentralization can ensure ethnic rights?

- Conceptualizing state constitutions
  - Should they be uniform, contain core features, or represent the unique features, history and aspirations of the state?
- Powers and functions of the Central government and State government:
  - What subject matters should be under the control of Central government and State governments;
  - How is power to be shared between State and Federal governments;
  - What is the role of National and State Institutions (e.g. .Planning commissions, Ombudsman, Auditors, Central Bank).

- Resolution of challenging issues
  - Fiscal powers (taxation),
  - Role of the police,
  - Role of the judiciary,
  - Land rights.

Sharing comparative experiences from India, Australia and Nigeria

The International IDEA and NRP identified the country experiences of the Australia, India and Nigeria as being of special interest to Burma. Although Australia is a wealthy, developed and industrialized country, it has a history of strong protections for State rights. The federation has held despite this history of autonomy and there are lessons to be learned from this. India and Nigeria have addressed the challenges of maintaining the federation in a context of limited resources for public administration, and where governance has been undermined by poverty, ethnic and religious conflicts. Nigeria is further challenged by its history of military rule and the need to re-build its democratic institutions.

The invited speakers were Mr.Yogendra Yadev from India (Center for Studies on Developing Societies – CSDS), Professor Cheryl Saunders from Australia (University of Melbourne), Shan scholar Dr. Choa Tzang Yawngwhe from the National Reconciliation Program and Chin scholar Dr. Salai Lian Hmung Sakhong from United Nationalities League for Democracy and Mr. Otive Igbuzor from Nigeria who could not attend the seminar in person but sent his paper *Nigeria's experience in managing challenges of ethnic and religious diversity through constitutional provisions.* The International IDEA was represented by Dr. Sakuntala Kadirgamar-Rajasingham, Ms. Leena Rikkilä and Mr. Manmohan Malhoutra in India.

Contextualizing federalism for Burma

Dr. Chao Tzang Yawngwhe, from the National Reconciliation Programme presented an overview of the challenges facing Burma, the status of the ethnic nationalities and made a case for introducing federalism to Burma.

He stressed the need for Burmese to develop a proper understanding of federalism – specifically, whether a federation is a union of territories or a union of ethnic segments. Secondly, he pointed out that the ethnic nationalities and political actors in Burma will have to look at ways to accommodate the aspirations for ethnic equality, bearing in mind that no constituent state in Burma is ethnically homogenous. Each state is multi-ethnic. Furthermore, Chao-Tzang Yawnghe discussed the *politics of ethnicity* – how the concept of ethnicity has been used by successive military rulers, and by the ethnic nationalities leaders and resistance movements when articulating the aspirations of their respective ethnic groups.

The need to argue for the democratic decentralization as the way forward for Burma

He introduced an alternative discourse, referring to the need to argue for democratic decentralization as the way forward for Burma, focusing on the possibilities of government through a federal system assured by state constitutions, or on the basis of highly autonomous local governments under a union constitution.

The Indian experience of accommodating diversity: the salad bowl approach

Yogendra Yadav from the CSDS argued that even though many countries have recently become democracies in name, in practice, real democratic norms and practices are declining in many democracies. He stressed the importance of institutional innovation, with different countries having to develop institutions to adapt to their own experiences. He compared the experience to sewing shirts in different styles and sizes in accordance with the needs of a particular individual. He was hesitant to export lessons from India. He pointed out that there are mixed lessons – both successes and failures. India's experiences are encouraging compared to some countries such as Pakistan, Sri Lanka, Yugoslavia, and the former USSR. However, continued bloodshed in some of India's states is rather discouraging. Nevertheless, India enjoys a minimum level of achievement in that the federation "holds-together". India has been able to create a space in which different ethnic groups can generally work out their conflicts through non-violent means.

minority rights are safeguarded by four main components

• the bill of rights, • federal division of power, • a system of protections for special areas and • constitutional watchdog bodies.

While Yadev elaborated on the design of the Indian constitution, he argued that the nature of the society and civilization and the nature of political practices were more important in understanding the whole federal picture in India. While India has a federal constitution, it does not have state constitutions which safeguard ethnic equality or protection. India's federal constitution was written in a political era when differences were viewed as a threat. However, minority rights are safeguarded by four main components of the federal constitution – 1) the bill of rights, 2) federal division of power, 3) a system of protections for special areas and 4) constitutional watchdog bodies. All fundamental rights are preserved in the constitution (under the bill of rights) and cannot be changed since they are guaranteed by Supreme Court. These include rights to equality, freedom, religious freedom, culture and education.

Since the federal constitution allows the re-arrangement of the federal distribution of power, there have been a number of reorganizations of states along linguistic lines. This has helped fulfill local needs and protect linguistic minorities. For instance, Punjab state was split up into Punjab, Haryana and the Union territory of Chandigar in 1966. Similarly, the states of Chhattisgarh, Jharkhand and Uttaranchal were carved out in 2000. The Union of India, which now has 28 states, divides its power between the union and the states in terms of executive, legislative and financial matters. However, judicial power is not divided and there is only one judicial system for both the Union and the states. The Union's exclusive legislative rights cover defense, foreign affairs, banking, insurance, currency and coinage, Union duties and taxes, while the state legislatures have exclusive authority over public order and police, local government, public health, sanitation, agriculture, forests, fisheries, state taxes and duties. Concurrent powers between the union and the states cover 52 items – including criminal law and procedure, civil procedure, marriage, contracts, torts, trusts, welfare of labor, eco-social and social planning and education. If there are overlapping powers, the union's right to exercise that power prevails.

The Indian constitution provides a large number of exceptional arrangements ...of particular interest for Burma. Some states have certain exceptional rights and certain autonomous areas have been designated within states ...providing additional protections for minorities.

The Indian constitution provides a large number of exceptional arrangements for specific states and areas. Two of them may be of particular interest for Burma. Some states have certain exceptional rights and certain autonomous areas have been designated within states. Autonomous regions and districts allow self-rule to minorities within a state, providing additional protections for minorities.

Yadav explained that interestingly there has been no special electoral status for any minority group, except for Scheduled castes and Scheduled tribes who were marginalized before independence. India has been using the First-Pass-The-Post electoral system (FPTP) rather than the Proportional Representation system (PR) since independence. As a result, the Muslims who are distributed thinly throughout the country cannot vote as a bloc and their overall representation is low. Sikhs who are concentrated territorially in the Punjab have a higher representation than those Sikhs spread thinly all over the country. Nevertheless, he claimed that the FPTP system has a unique advantage in helping make Indian society socially cohesive. The FPTP system encourages political parties to be more representative, because they must speak to many groups to obtain power. To win elections under the FPTP system, political parties in practice feel compelled to integrate a variety of groups and interests. In this sense, India's *Congress* I party attempts to forge a social coalition and represents various social groups, different ideas, and different states. Another practice that helps to deepen the democratic federation is the excellent work of regional political parties which promote decentralization.

Reflecting on the nature of society and civilization, Yadav disagreed with the often advanced theory that Hinduism per se promotes a culture of tolerance and accommodation that helps make federalism work in such a diverse society. Instead, he pointed to the crosscutting social cleavages as the main factor in

nurturing accommodations. These crosscutting cleavages make all groups feel that they are neither in the majority or the minority. For example, Hindus are the largest religious bloc, yet they are sub-divided into many different language groups. Only 18% of the Hindus speak Hindi. Demographic distribution and different political affiliations further increase the cleavages. So, while Hindus may appear to be the majority but they are split into numerous sub-groups.

Indian society is like a salad bowl, in contrast to the melting pot model of the United States.

...significant differences in India are maintained and yet accommodated in a creative way

According to Yadav, what makes the democratic federation work is that the different ethnic groups feel both scared and confident at the same time. Since there is no hegemonic group, different groups understand that they have to work together, share power and respect both unity and diversity. Indian society is like a salad bowl, in contrast to the melting pot model of the United States. By saying this he meant that significant differences in India are maintained and yet accommodated in a creative way by amending the constitution and changing political practices over time.

The Australian approach to federalism: An integrationist experience

The Australian constitutional experience… a "coming together" model.

Cheryl Saunders explained the background to the Australian Constitution and described the constitutional experience as a "coming together" model. Australia was formed as a country by six former British colonies which already had their own constitutions and governments (with three branches – executive, legislative and judiciary), coming together as states. They did so mostly for economic reasons, rather than for reasons of securing ethnic equality or minority protection. Although the Australian federal constitution together with its state constitutions, have a limited role in protecting minority rights, over the last 100 years, the federation has been successful in balancing national unity and the states' autonomy.

…diversity is protected by policies of multiculturalism and non-discrimination rather than by constitutional safeguards.

When the federal constitution was written, the society was largely homogenous, with only a small population of indigenous people. The indigenous people were excluded from constitution making, and the constitution did not give them adequate protection. Over time, new waves of immigrants made Australia's population diverse, and today this diversity is protected by policies of multiculturalism and non-discrimination rather than by constitutional safeguards.

There were considerable differences of opinion when drafting the federal constitution. The conflict was particularly on how to divide power and money between the federal union or national level government (also referred to as The Commonwealth government) and the state governments. After negotiations, the upper house giving an equal number of seats to each of the states was created. All executive, legislative and judicial power is divided between the union and the states and many powers are concurrent. The only exclusive powers given to the

union are customs duties, defense, commercial regulations (banking, insurance, copy right, interstate and overseas trade.) and a few social powers (marriage, divorce, some social welfare schemes). Other powers including health, education, transport and housing remain in the states. However, giving the High Court the role of final appeal, even for state court cases, favors union supremacy over the states in the exercise of judicial power. Likewise, giving the union the right to redistribute tax money favors the union to expand its financial power and capacity to influence the states. Therefore it is important for the states to clearly pre-determine which powers they would like to maintain and which powers they are willing to give away to the union. When ambiguities or overlaps arise, the union is likely to gain more control over time.

In Australia constitutional amendments cannot be made only by a majority vote at the national level parliament. Majority parliamentary votes at both the national and state levels are required. This goes a long way in protecting the rights and powers of the states.

Saunders made several other points regarding the distribution of power between the Union and the states. She emphasized that simply putting the rights of the states in the state constitution is not enough and they should be written into the federal constitution as well and some form of coordination should be established. In Australia, state boundaries are protected by the federal constitution. There are some self-governing territories and local governments under the state constitutions. The northern territory, where there is the largest concentration of indigenous people, will better serve indigenous people if it becomes a state in the future. Now, there is an ongoing debate on whether local governments set up under the state constitution should also be recognized in the federal constitution, in order to protect them from being arbitrary dismantled by the state.

Although the Australian constitution has no provision for coordination between the union and the states, in Australia a federal culture enables a coordination arrangement outside the constitution since there are many overlapping arrangements in terms of the division of executive, legislative and judiciary power. However, it is safer to put the coordination mechanism in the constitution, especially if there is no federal culture. Saunders emphasized that shared values on democracy, Bill of Rights, minority rights, powers of local government, indigenous lands rights should be recognized and reinforced in both the national and state constitutions.

Federalism provides a better framework to handle a society already damaged by conflicts.

... a federal culture needs commitment to both unity and diversity, a respect for differences and a willingness to share power.

Saunders stressed that federalism is more complicated and costly than a unitary system that works well. But, federalism provides a better framework to handle a society already damaged by conflicts. Still, the challenge is to nurture a federal culture and to make the written constitution and formal institutions of the federation work. She pointed out that a federal culture needs commitment to both unity and diversity, a respect for differences and a willingness to share power.

Nigeria's history of constitution making Experience in Managing the Challenges of Ethnic and Religious Diversity through Constitutional Provisions

… in Nigeria the people have never really participated in the making of the constitution, and therefore do not relate to it as their own document.

Otive Igbuzor reflected on the Nigerian experience in managing the challenges of ethnic and religious diversity. Nigeria has a long constitutional history and there have been ten attempts to draft constitutions for the Nigeria. The experience of constitution making in Nigeria shows that the people have never really participated in the making of the constitution, and therefore do not relate to it as their own document.

Resource allocation, ... power between the federation and the states and has been a contested issue.

Resource allocation, especially those of oil revenues is critical in the division of power between the federation and the states and has been a contested issue.

The ethnic orientations of the political parties are one of the main reasons for the failure of the State after the long years of authoritarian rule.

The ethnic orientations of the political parties are attributed as one of the main reasons for the failure of the State after the long years of authoritarian rule. Therefore, instead of emphasizing the protection for the minority groupings, the Nigerian constitution restricts the forming of religious or ethnic based parties. It encourages parties with the outlook, programs and mobilization strategies that are national.

Summary of the discussions

"While democratization is spreading, it seems that our imagination on democracy is shrinking"
– Yogendra Yadev

Burma requires innovative measures, which are appropriate and realistic for its specific needs. One should keep in mind for instance that the best institutional practices in West were born out of experimentation and innovations, not by following tailored checklists. Nevertheless, it was also recognized that there is a genuine need to understand the processes and experiences of other countries, get information on experiences from elsewhere and make informed choices.

The peoples of Burma must develop a federal culture through education and practice

The peoples of Burma must develop a federal culture through education and practice, even during the struggle, in order to create a stable and peaceful country. Ethnic and religious divisions are not in themselves inherently problematic. There are healthy divisions as well as destructive divisions. When drafting the constitutions, one should always first build up a consensus on guiding principles for the making of the constitution.

When drafting the state and national constitutions, the processes have to be coordinated. Provisions should be made to secure the rights of women,

minorities, the independence of the watchdog institutions, taxation rights, and overall control of the army, law and order in the federal system and at the state level, regulating relations in between "settlers" and locals, and the overall divisions of power between the national and state level. Even contentious issues such as the right to secession should be addressed.

Exile groups were encouraged to use the time of waiting, creatively; training themselves for the political bargaining, art of compromise that is necessary in transitions. The drafting of a constitution is a political act and when negotiating political deals one needs to be ready for a compromise. It should be borne in mind that everybody will be losers if a civil war is the price to pay for non–compromise. It is worth noting that the African National Congress (ANC) made many compromises and settled for much less than they expected or which their political power base could have secured.

Constitution-making is both the moment and the process in which to improve women's political participation. It is more difficult to secure this later. One should also think of other ways to improve women's participation instead of depending only on reservations in the parliament.

When determining the legal status and rights of minorities, it is wise to be as generous as one can be towards settlers and for your own minorities within a state. They are, after all, citizens of Burma and in any event minorities within a state should be entitled to the rights that minorities within the Union can claim.

The choice of an electoral system is an important and significant one. Again, there is no "best choice" that can be applied. The electoral system must be suited to national conditions and must aim at ensuring broad representation and stable government.

Questions posed to the panelists included:

Should the right to secession be in the constitution or not?

There are no simple answers. If secession is outlawed it can lead to agitation and there is fear that if it is included as a right in the constitution it can lead to fragmentation. This should be considered carefully to determine the full implications otherwise it can lead to mistrust which could be detrimental.

Is a symmetrical Upper House a good model?

If the Upper House is only dealing with the protection of minority rights, a symmetrical Upper House may be appropriate. But, if it is going deal with other broader issues, it should focus on enabling democratic nation-building and it may be more appropriate for it to be asymmetrical.

Is a census important?

A proper census is important to constitute electoral rolls and for planning and resource allocation. But in some countries such as Nigeria, Pakistan and Bangladesh the census is a contested issue and elections have been held even though the census is not broadly accepted.

Should the states have their own armies?

While State police forces are necessary to deal with internal security issues, state armies can be controversial. Usually the military is under federal control.

Who should have more power – the states or the central government?

There is no fixed rule as to what constitutes an appropriate balance of power, but there should be good coordination between the states and the central government, and the states should be clear about what they can and cannot do. There must be political accommodation. An effective relationship depends on the level of trust between the states and the Central government and their desire to work together.

Should the demands of the Burmese military be considered in the states' constitutional drafting process?

Yes. It's important that the constitutions are realistic and reflect the power realities in the country. Otherwise, they will end up as mere written documents that can't be implemented.

Explain the advantages between Proportional Representation (PR) Single Transferable vote (STV) and First-Past-the-Post (FPTP) electoral systems?

Both have advantages and disadvantages. FPTP is simple in vote counting, but PR is complicated. But, PR is good for geographically separated minorities and ensures for them representation in proportion to their population. FPTP has the best advantage in making society cohesive. This has been the experience in India. A combination of PR and FPTP is practiced with good effect in Germany.

PR is better for minority presentation including women's representation. In Australia, an advance form of PR, i.e. single transferable vote (STV), is used. It has an advantage as it gives people the right to list their preferences in a ranking order, rather than voting for only one person.

What minority rights should be guaranteed within the state?

An ethnic minority shouldn't ask for its rights in a state if it can't guarantee other minorities their rights within the state where they are in a majority. Where there are mixed populations in the states– for example the Kachin state has 25% Burman population – political deals must be made. It is best to be as generous as you can, thinking in term of harmony for 100 years!

Which social divisions are constructive for society and which are destructive?

A society can be divided in terms of the ideas and opinions it holds, interests and class lines, ethnicity, religion, and tribal lines. These divisions in themselves do not cause social and political problems and are not inherently unhealthy. They are compatible with democracy if they are not articulated in exclusive terms and are politically negotiable.

The real challenge here is not social division but how these social divisions were dealt with. The issue is whether the divisions are used to affirm identity or to exclude some groups through violent or non-violent means and to ensure that the excluded groups have no political space. Where this happens, the divisions become unhealthy.

Another important factor is whether the social divisions are crosscutting or overlapping between the ethnic divide. Nigeria stands in contrast to the Indian model where social cleavages are crosscutting. In Nigeria, the two ethnic groups (Hausa and Fulani) that dominate northern part of Nigeria are Muslims, speak Arabic and are poor. The two other large ethnic groups (Yoruba and Igbo), that dominate southern part of Nigeria are Christian, speak other languages and are relatively more developed. In India, there are cross cutting cleavages along language and religious lines. Among Hindus, there are 18 different languages spoken and they are subdivided further as they follow different religious ceremonies.

For Burma, people might be over-conscious of the starkness of ethnic differences at this given moment in their struggle against oppressive military rule, but these perceptions can be changed over time when military rule is withdrawn. There can be new divisions within each ethnic divide in the future, under competitive political forces. For example, if there is an election in Chin state, there will be at least two parties competing and a minority organization or party might appear. It's important for democracies to have an effective mechanism to deal with not only current divisions, but also to make hidden divisions come to the surface and be able to deal with them through the political process without resorting to violence. Democracy at its best is a system that enables different groups to contest and compete legally for power without using violence.

Is a Women's ministry important to secure women's rights and participation?

It's important to be clear what you want to accomplish. If the issue of securing women's rights is left only to the women's ministry, it is not enough. To increase women's political participation, South Africa's political party system required that 50% of the candidates for election must be women. This was very progressive. Even though there is no special provision in Finland's constitution, they have a situation where women secure 43% of the seats in parliament. This has come about because women have had a longer history of education, employment in

senior positions and this has helped. In Australia, the Australian Labor Party, which has strong participation by women, has agreed to pre-select 1/3 of the winnable seats for women. This was done despite considerable internal resistance. Meanwhile, other rival parties claim that they have also set this up as a goal. But they assert that it is more important to look at the result of increasing woman participation than to set such a quota system

Ensuring greater participation by women should be focused on when devising the political party law. For instance, South Africa has constitutionally sanctioned 50% representation of women in the political party law.

In India, there has been a growing demand for increasing women's participation in parliament over the last 5 years. Historical records showed 8–10% of the seats in the Indian federal parliament went to women and 5% in state assemblies. The success of one state in securing one third of its assembly seats for women inspired other women to demand 33% representation in the federal parliament. However, since the Indian constitution has already allowed 22% of the seats to be reserved for special cases it will be difficult to reserve 33% more of the seats.

What should constitute the rights of visitors coming to the states?

They should be considered as re-settlers and should be given voting rights which they should enjoy as citizens. However, this is a sensitive issue because the local population may in fact lose significant voting power to the new settlers over time. The rights of the local population can be secured through property rights including land rights, economic rights, and entitlements to government jobs, instead of disfranchising the new settlers. Fixed quotas for local representation can be put in the constitution. An alien migration cut-off point (for example, since 1948 or 1962 or 1990) for citizenship could also be used.

In India, a person can vote shortly after moving to a new state. Australia also has no disfranchisement for newcomers. They can vote anywhere. If disfranchisement is done against someone because of his or her membership in an ethnic or religious group, it amounts to discrimination and exclusion.

Should the federal and state constitutional drafting process in Burma be done separately or coordinated?

They should be coordinated. The process should start with agreement on basic principles and then drafters can go on to details.

How can a coup be prevented?

Well-drafted constitutions in themselves do not prevent coups. It depends on the effectiveness of the civilian leadership in managing conflicts and developing the country rather than the constitution. Both Bangladesh and Pakistan's constitution did not allow coups, but coups took place anyway. In India, the political leadership is powerful, considered to be legitimate, credible and is trusted. The popular perception is that the military is not well educated enough to lead the

country. Civilian supremacy over the military is the best way to ensure that coups do not take place. Some countries sentence coup plotters to capital punishment.

Recent events in Fiji suggest another type of lesson to prevent a coup. There was a failed coup attempt since not all the military leaders thought that staging a coup was appropriate. Customs and conventions, a democratic mindset in the military, acceptance of democratic ally elected civilian government exercising control over the military, and an appropriate code of conduct and role for the military in a democracy are important in ensuring that coups do not take place.

BURMA: STATE CONSTITUTIONS AND THE CHALLENGES FACING THE ETHNIC NATIONALITIES

Chao Tzang Yawnghwe

Introduction: The Politics of Ethnicity

The impression persists that Burma is a country torn by ethnic conflict and violence, and therefore there is a great danger of the country breaking up into fragments like the former Yugoslavia, or facing inter-ethnic strife and bloodshed as in Bosnia.

This was the justification put forward by the military when it seized power in 1962 and has been the rationale for military rule ever since then. The military claimed that they had to take over power because there was a secession plot by the leaders of the ethnic nationalities (or the "national races", the term used by the present regime)[1] . They further claim that without a strong military presence, there will be secession and inter ethnic violence. This is the justification for military rule in perpetuity.

The leadership of the ethnic nationalities and resistance movements has focused on ethnicity. They articulate the aspirations of their respective groups for rights and equality in terms of ethnicity. For example, they speak of a need to secure a "genuine federal union of equal ethnic nations (or nationalities). The aspiration of the ethnic groups is not to be dominated by and imposed upon by another or other ethnic groups, and to have the right to promote and protect their culture and environment, including land[2].

The aspirations of Burma's ethnic nationalities[3] are no different to that of ethnic groups and minorities (and indigenous peoples) elsewhere, who feel endangered, marginalized and discriminated against by the state. However, in another sense, the Burma context differs from other countries. The Union of Burma was formed by an accord signed at Panglong in 1947, one year prior to the emergence of Burma as an independent, post-colonial state (in 1948). The accord was between the leaders who represented the different territorial entities of what became the Union of Burma. In this sense, both historically and conceptually, the ethnic

1) The term used here is "ethnic nationalities" rather than "national minorities" to denote the ethnic groups of the country. Burma is a multi-ethnic country. The major groups are the Burman, Shan, Karen, Kachin, Chin, Rakhine, Mon, and Karenni. There is indeed much confusion as regard the majority-minority equation. There exists a perception that the Burmans are the majority, in the absolute sense, and that the rest are ethnic minorities. While the Burmans do indeed constitute an overall majority (perhaps about 50 percent plus), they are a minority in several states, e.g. the Shan State, the Chin (etc.) states. The equation becomes more complicated when the constituent states are themselves multi-ethnic, despite the names: the Shan State, the Karen State, etc. However, in the Burmese language, a distinction is made between minorities and ethnic national groups (nationalities) – *Lu-Ne-Zu*, denoting minorities, and *Lu-Myo-Zu* for ethnic nationalities.
2) In the passages that follow, "ethnic equality" will be in reference to this definition.
3) The non-Burmans are ethnic segments that do not speak Burmese as their mother tongue like, for example, the Shan, Mon, Karen, etc. The Burmans are ethnic Burmese, speaking the Burmese language. Apart from the eight major segments, there are numerous other ethnic groups like the Ta-Ang or Palaung, PaO, Lahu, Wa, Akha, Kayan. As well, there are Chin, Burman, Kachin (etc.) dialect groups.

nationalities are the founding nations of the Union of Burma, and the 1947 Panglong Accord – was not one between ethnic segments but between founding nations.

Burma's conflict is more aptly described as a political conflict against the ruling military rather than a conflict between warring ethnic groups.

Burma's so-called ethnic conflict is more aptly described as a political conflict against the ruling military rather than a conflict between warring ethnic groups. The conflict is primarily a conflict between the ruling military exercising a monopolistic control of the state in Burma and the ethnic nationalities. It is a vertical conflict between the state and various ethnically defined societies. It is a conflict about how the state is to be constituted and how the relation between the constituent components of society and the state are to be ordered. It is not the case of ethnic segments feuding with and killing each other, nor is it driven by the secessionist impulses. Looking at Burma's history since 1948, a long-standing and seriously dysfunctional relationship between the state and broader society can be observed and it has been exacerbated by four decades of monopolistic military rule.

The Panglong Accord of 1947 and the Constitutional Problem

"Modern" or present-day Burma is founded on the 1947 Panglong Accord, an accord between Ministerial Burma (or Burma Proper) and other territories which were not part of Ministerial Burma – i.e., the Frontier Areas, including the Federated Shan States. It was signed by U Aung San, the head of the interim executive council of Ministerial Burma, and Shan princes, Kachin and Chin chiefs, and the representatives of the people of those areas. The Karen, Mon, Rakhine and Karenni leaders were present at Panglong as observers.

The Panglong Accord is then, in essence, an agreement among the leaders of former British possessions of "further India", to join together and obtain independence from Britain. There was also an understanding that all constituent territories would be equal and no territory would occupy a super-ordinate or "superior" position, *vis-a-vis* the rest. By the same token, no constituent state was to be subordinated to any other territorial entities or units. This was the core, and spirit of the 1947 Panglong Accord.

However, it transpired that the 1947 Union Constitution was drawn up in haste – in four months – in a very unstable and traumatic period after U Aung San and most members of the interim Executive Council, were assassinated in July 1947. The communists were denouncing the negotiated independence as a sell out, and were threatening to wage an armed revolution to obtain genuine independence[4]. Internationally too, the world was being divided into two camps, the "free world" and the communist-socialist world.

4) The communist unleashed an armed revolution right after independence, plunging the country into a civil war. To complicate matter, the Karen also took up arms against what they viewed as an attempt by Burman leaders to eliminate them. This mistrust and hostility has its root in the period when the Japanese drove the British out during the Second World War. The Karens were loyal to the British and resisted the Japanese. Burman nationalists and leaders allied themselves with the victorious Japanese. There were several massacres of the Karen during the war, perpetrated by Burman militias. Attempts were made after the war by both Karen and Burman leaders to heal old wounds, but they were not successful. Thus began the Karen armed resistance against what they regarded as the Burman-dominated state informed by an agenda to destroy them as a people.

The 1947 Union Constitution, which was proclaimed in September 1947, provided for a semi-unitary state: Ministerial Burma occupied the position of a Mother unit – the Pyi-Ma, in Burmese. There were in addition, four subordinated units or states[5]: the Chin Special Division, the Kachin State, the Shan State, and the Karenni State, which had their own executive and legislative bodies, but no constitution of their own. Their power or responsibilities and autonomy were defined or provided for in sections of the Union constitution – which was practically the constitution of the *Pyi-Ma* (or the Mother state). In effect, the constituent states of the union were subordinates of the Mother state (or Burma Proper)[6].

Remarkably, although the Union was in effect semi-unitary, there was included a constitutional clause that permitted secession[7]. The Kachin State government in fact renounced the state in the mid-1950s and claiming the right of secession provision became a thorn in the side of the military. It provided the military leadership and General Ne Win with a cause: a duty to prevent secession and the break up of the Union at all cost.

Although the 1947 Union Constitution was not in line with letter or spirit of the Panglong Accord signed in February 1947, it was understood that it could be amended in the future. Thus, in the early 1960s, the constituent states led by Sao Shwe Thaike[8], initiated a move to amend the 1947 Union constitution, to make it "genuinely federal". In response, General Ne Win staged a coup, claiming that the military had to step in to foil a secessionist plot, and to "clean up the mess" made by incompetent, spineless, and corrupt politicians.

Under Ne Win and successor ruling generals, the meaning of federalism has been grossly distorted. Federalism has been equated with secession and the fragmentation of the country. This is so despite the continued celebration of February 12th – the day the Panglong Accord was signed – as Union Day, and despite the rhetoric and slogans about the equality of "national races". It is remarkable that federalism should be equated with secession when the term "Union" in Burmese (the language of the Burman) – *Pyidaung-zu* – is unambiguous. *"Pyidaung-zu"* means the coming together of different national states.

Federalism and Ethnic Equality and Rights

There has been an agreement among ethnic-based resistance organizations since the early 1970s to adhere to the idea of federalism, and to live together under one flag, within a genuinely federal framework. In the early 1990s, there was an

5) There were originally only four constituent states (including the Chin Special Division). In the 1950s, the Karen State was created and added, and paradoxically, the Mon and Rakhine State was created by Ne Win, or during his rule.
6) This arrangement was similar to that which prevailed between England, Scotland, Wales, and Ireland with England occupying the dominant position as a mother state until constitutional changes were enacted recently.
7) The secession clause was inserted in the constitution because the late U Aung San, Burma's independence hero, stated that the Union was voluntary and that member states could opt out after ten years of living together under one flag.
8) He was a senior Shan prince, the First Union President (1948-1952), twice Speaker of the Upper House (Chamber of Nationalities).

agreement among all forces within the democracy movement that federalism was the common goal[9].

It can be said that apart from the military, there is currently a broad consensus among political actors in Burma with regard to the spirit of the Panglong Accord and a consensus to rebuild the country as a democratic, federal Union.

Although there is a broad consensus regarding the future Union of Burma as a federal state, the ethnic nationalities faces the challenge, firstly, of understanding federalism – specifically, whether a federation is a union of territories or a union of ethnic segments. It remains ambiguous and there is currently widespread confusion in this regard.

The answer, based on the Panglong Accord, would be that federation in Burma is about the union of territories, not of ethnic societies or segments. Furthermore, a federation or federalism is a system of sharing power and dividing jurisdiction between and among territorial components making up the union or federation. In other words, a federation is about how different territorial entities will relate to one another within a larger nation-state configuration.

The essence of federation or federalism is the equality of constituent members, one where there is no Mother State dominating and controlling other member states. And also, it is one where the national or federal government and legislature is not biased or weighted in favor of one member state, but is formed to promote the welfare and security of the union or the federation as a whole and by extension, the people as a whole. The national or federal government does not "possess" a specific piece of territory – to which and for which it is mainly responsible.

This leads to the challenge: How to define ethnic equality and rights in the context of federalism? Do they have a place in federalism?

These questions are important for the ethnic nationalities because no constituent state in Burma is ethnically homogenous. They are all multi-ethnic. Even in the most ethnically homogeneous state – the Chin and the Karenni State – there are to be found dialect groups that are quite different from one another in varying degrees.

Furthermore, the aspiration for ethnic equality has been unleashed in the course of events that transpired. The resistance to state where the military monopolized power has come from ethnic-based constituent states and the language of ethnicity has been widely employed by ethnic-based resistance movements to rally followers and legitimize the cause. The demand for ethnic equality will therefore have to be dealt with by the ethnic nationalities leaders and other political actors in Burma.

9) This refers to the 1990 Bo Aung Gyaw Street Declaration between the NLD (National League for Democracy) and the UNLD (United Nationalities League for Democracy) to establish a democratic federal Union, and the 1991 Manerplaw Agreement between the NCGUB (National Coalition Government of the Union of Burma) and ethnic nationalities armed resistance organizations.

It may not be enough therefore to agree on principles of federalism, i.e., on how power is to be shared among and between territorial components composing the federation or the union, and between the federal center and the constituent states. The ethnic nationalities and political actors in Burma will have to look at ways to accommodate the aspirations for ethnic equality in practical terms and ensure that no ethnic groups is dominated by another ethnic group.

The challenge is to ensure ethnic equality and rights both within a federation and within the multi-ethnic member states of the Union.

The challenge therefore is how to ensure ethnic equality and rights both within a federation and within the multi-ethnic member states of the Union.

It is clear that state constitutions hold the key to this problem. How different ethnic (or dialect) groups living within the territorial boundary of a constituent or member state should relate to each other as equals, is a question that state constitutions should deal with and provide solutions. The state constitutions are the sites where a framework to provide for ethnic equality and rights, have to be worked out.

State Constitutions and Ethnic Equality

Thus it becomes clear that the ethnic nationalities are faced with two very important challenges.

One, is to establish a genuinely federal union where all the member states are equal, and where there is no Mother State (or a *Pyi-Ma*) – as envisioned by the founding leaders at Panglong in 1947. It may rightly be said that an arrangement where one member state is powerful equal than others cannot be defined as a federation or a Union.

Second is the challenge of ensuring ethnic equality and rights, specifically within a multi-ethnic member state, so that smaller groups are not dominated and marginalized by a major ethnic group within a given state.

democratic de-centralization should be advanced by ethnic nationalities' leadership and political actors when drafting the state constitutions.

It is here suggested that democratic de-centralization should be advanced by ethnic nationalities' leadership and political actors when drafting the state constitutions.

The idea of empowering local communities defined in terms of ethnicity or otherwise, through the system of local governments and councils elected and run by local people, should be explored. This is all the more so necessary because there has been no experience in Burma of democratic decentralization at any level. Local governments in the past have been established from the top – an arrangement where administrative officers are appointed from the center and sent down to administer localities.

The system of de-centralized administration, if adopted, would provide ethnic

communities with the opportunity and power to manage their own affairs through the democratic control of autonomous local governments. Thus, the aspiration of an ethnic group for equality and the right to determine its own fate would, to a very large extent be fulfilled.

For example, in a locality, such as the Shan State, where many ethnic groups such as the PaO (or Lahu), Palaung, Akha reside, the local government would be one run and managed by the PaO (or Lahu). Thus, in the Shan State, there would be at least one, if not several local governments that are ethnically defined (as PaO, or Lahu, Palaung, Akha, etc, in townships and other areas). This would be the pattern in every constituent state if a system of democratic de-centralization or autonomous local government is put in place or adopted in the state constitutions.

Another advantage of establishing a system of local governments where power is democratically de-centralized is that local governments would have to accommodate the aspirations of minority ethnic groups within their jurisdiction. Democratic local governments do not possess the power to coerce or marginalize minority groups. Elected local governments must be responsive to the aspirations of minorities as well.

The State government and the State legislature would (as would the federal government and the federal parliament) operate at another level with different powers and functions. They would not be responsible for any specific local government function or a particular community issue. State-level officials and law-makers will be responsible only for, and to, the whole state and all its citizens, not to particular ethnic communities or any local governments.

The relationship between the state government and local governments -should be based on accommodation, consultation, cooperation, and the division and sharing of power and responsibility as well and not be a top-down process.

Democratic Decentralization

One alternative to a system of democratic de-centralization based on highly autonomous local governments as suggested here is an arrangement whereby a higher authority or a national convention or a constitutional assembly, creates autonomous regions or special areas for ethnic minorities. Such an arrangement is currently in place in China, and was included in the constitution of the now defunct Soviet Union. Theoretically, such an arrangement will provide ethnic minorities with self-government and autonomy, and ethnic equality as well.

Another alternative is to ensure through the constitution a certain number of seats in the national parliament be reserved for ethnic minorities – i.e., a system of ethnic quotas. The British in Burma did put in place such an arrangement where

the Karen and other minorities were provided with a number of seats in the legislative assembly of Burma Proper. Such an arrangement would, at the very least, ensure the representation for minorities at the national level, and as well provide them with a vehicle to preserve their identity and values.

the ethnic conflict in Burma can be managed through constitutional means: by the adoption of a federal framework at the national level and putting in place at the state level, a system of democratic de-centralized local governments that empower and are responsible to local communities.

Thus it is conceivable that the ethnic conflict in Burma can be managed through constitutional means, through the adoption of a federal framework at the national level and putting in place at the state level, a system of democratic de-centralized local governments that empower and are responsible to local communities.

Concluding Thoughts on the Challenges ahead

Given, however, Burma's turbulent political history, and the lack of experience of the people and leaders alike with the system of democratic de-centralization or autonomous local governments, and as well unfamiliarity with federalism, the challenges facing ethnic nationalities leaders and political actors will be formidable. But these challenges cannot be avoided and must be faced squarely and the difficulties could be overcome.

Federalism and the system of democratic local government must be well understood and studied by ethnic nationalities leaders and political actors whose task it is to bring about constructive political dialogue for change and to build a better future for the people in Burma.

The restoration of democracy or democratic politics is essential. But democracy alone will not be sufficient because the aspiration for ethnic equality and rights and for a genuinely federal union must be secured. They have been an integral and fundamental part of political discourse in Burma since 1948.

FEDERALISM, DIVERSITY AND MINORITY RIGHTS: WHAT CAN WE LEARN FROM INDIA?

Yogendra Yadav

Introduction

Two general remarks on what lessons can the experience of Indian federalism yield for the lawmakers in a neighboring country like Burma for the purposes of ensuring diversity and protection of minority rights.

First a point about comparisons and what they can yield. There was a time in the discipline of Political Science and Law that people under-emphasized how much could be learnt from comparative constitutions. The pendulum has swung to the other extreme by now and I think there is a real danger of over-doing the comparative constitutions, especially since the business of designing democracies has turned global of late. With a check list model of democracy dominating the democratic imagination, there is an all round search for "best practices". I am not sure it is a very happy development for democratic imagination. While democracy is expanding all over the world (and I really hope it comes sooner than later in Burma), our notion of what it means to be a democracy it actually shrinking. I fear that sometimes comparisons contribute to this tendency. There is of course very little to be said in favor of re-inventing the wheel. To that extent it is desirable and essential to look around at available models and practices so that one can orient one's search more clearly. At the same time, it is essential to remember that most successful democracies made institutional innovations. If there is one lesson of comparative politics to carry it is the uniqueness of each place and the need to tailor the constitutional-legal frame to fit the specificities of each place.

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...most successful democracies made institutional innovations. If there is one lesson of comparative politics to carry it is the uniqueness of each place and the need to tailor the constitutional-legal frame to fit the specificities of each place.

It is necessary to be reminded of some basics about any constitution.

- There is no pure or true or genuine form of any institution like federalism or democracy. The worth of the any constitutional design must be judged solely by how it addresses the specific requirements of the people it is meant to serve, and not by how well it follows an original design.
- A constitution is embedded into a social structure with its cultural pattern. The same institutional design can yield one set of results in a society and quite different in another, one set of results in one period and quite different in another. Unfortunately the current drive for global recipes for democratization often forgets this basic lesson of history.
- Institutions work depending on how they are made to work by the political force. Politics is all about bending and stretching the rules of the game. Every legal-constitutional provision has political consequences. The

exact outcome is determined by the dynamics of the interaction between the rules of the game and the players themselves.

- In designing political institutions therefore one must ask the following question: what are the likely political consequences of the proposed design? What kind of behavior would it encourages or discourage?

Indian experience of federalism: a success story or a cautionary tale?

Year 2002 is a particularly inopportune time to foreground the strength of the Indian system with regards to the minorities. The massacre of nearly 2000 Muslims early this year in the state of Gujarat right under the nose of the state government (under its benign silence or active connivance, depending on which version you believe in) has left sensitive Indians rather shamefaced in talking too loudly about the virtues of Indian democracy. It has served to remind everyone that the performance of Indian system in political accommodation of social diversities has left a lot to be desired. But one must not allow the recent happenings in Gujarat to determine the overall impression of the last fifty years. The examples from India's neighbors show that we could have done worse.

No doubt Gujarat is not the only exception in the last fifty years. There are areas like the state of Jammu and Kashmir and hill states like Nagaland and till recently Mizoram in the North-East where the principle of democratic governance and the spirit of tolerance for expressions of diversity were not extended. There were periods (Mrs. Gandhi's second regime from 1980 to 1984 or the current NDA government since 1998) which constitute an exception to the general trend. And there are episodes like the anti-Sikh riots in 1984, the demolition of *Babri Masjid* in 1992 and the Gujarat massacre of 2002 that are a blot on the record of Indian democracy.

On balance, however, the Indian elite have stuck to the "salad bow" rather than the "melting pot" model of integration of diversities. That is to say, various communities and aspiring nationalities have not been forced to give up their identity as a pre-condition of joining the Indian enterprise. They have been accepted as distinct and different ingredient in the Indian mix of multi-culturalism. And, again on balance, it has worked: legitimate political articulation of social and regional diversities and the mediation of competing claims through mechanisms of political accommodation has achieved what consociational arrangements for power sharing among different social groups do in other societies. There have been more than one instances of majoritarian excess, but democratic politics seems to have evolved mechanisms of self-correction in this respect (the 1997 elections in Punjab and the politics of Uttra Pradesh since 1992 could illustrate that). In retrospect, effective political accommodation of visible diversities might look like one of the outstanding achievements of Indian democracy in the last fifty years.

But by its very nature, it is an inherently fragile achievement, ever contingent on the skills of the political actors in working out the power sharing arrangements or in allowing the mechanisms of self-correction to work themselves out. This is a lesson well worth remembering as India confronts the most organized challenge to the politics of diversities in the form of the right wing Hindutva government at the centre. The most serious challenge to the survival of diversities comes from forces which are less organized, less visible and may not even be considered political in the ordinary sense: forces of cultural homogenization, the monoculture of modernity and the ideology of nation-state. While there is – something to be said for the capacity of democratic politics to deal with the more obvious and political challenges to diversity, it has proved a very weak ally in the struggle against these deeper threats from within.

In other words it is not an unmixed record, but on balance something of a success. Now, what accounts for this success (to the extent to which it is so)? Those who study Indian democracy have offered three accounts of this success. Schematically, the explanation could reside one of the following:

- The nature of Indian society and civilization
- The provisions of the Indian constitution
- The nature of competitive politics in India since independence

While there is a lot to be said in favor of the first two explanations, in the last instance, the Indian enterprise has worked because of the third factor. This is something that tends to be ignored in studies of constitutional law and political institutions. Given the mandate of this workshop, it is useful to focus on the constitutional provisions, even if that is not the principle locus of explanation. The social context is worth mentioning before turning to a detailed analysis of the institutional-constitutional features and concluding on a note on the political dynamics.

The societal context

It is often said that the nature of the Indian society and culture is uniquely suited to the success of the federal enterprise of safeguarding the interest of the minorities. The argument involves reference to India's traditions of religious tolerance, the open-ended nature of the Hindu religion. While there is an element of truth in this, this may not guide us in the right direction. It is not clear if the Indian traditions are unique in religious tolerance or particularly resistant to the modern forces of homogenization. As for the nature of Hindu religion, at least the modern version of political Hinduism has been as bigoted and intolerant as anything else seen in modern world.

There is something else about the Indian society that does help growth of federalism and democracy. The nature of multiple and cross-cutting social

divisions in India is such that it does not permit any permanent or safe majority for any community. No single social cleavage has such salience that it overrides everything else. The demographic distribution (or its political articulation?) is such that every community feels like a minority. This shared feeling of being in minority has contributed to Indian federalism.

The constitutional framework

The framers of the Indian constitution were acutely aware of the challenge of protecting minority rights. It could not be otherwise, for the partition of India dominated their mind. The Indian national movement was committed to the idea of a secular India. It should be noted that India does not have separate constitution for the states. There is a common constitution for the entire country that spells out the institutional set up of state government at length. The Indian constitution provided for four sets of provisions to safeguard the minorities:

- It provided some guarantees in the forms of Fundamental Rights
- Federal structure of the constitution coupled with the linguistic reorganization of states protected the rights of linguistic minorities
- It incorporated many special provisions meant to safeguard special anxieties and concerns of different minorities or states.
- Finally, it also provided for independent constitutional watchdogs to ensure that the rights provided in the constitution were enjoyed in practice.

Listing these features one by one it is important to notice what the framers of the constitution did not do. They did not provide for any special representation for religious minorities in the parliament and state assemblies. Given the experience of partition, there was a strong sentiment against separate system of elections introduced by the British. The only groups that enjoy special political representation are:

- Schedule Castes (formerly known as Untouchables) have constituencies reserved for them in proportion to their share in the population
- Scheduled Tribes or the indigenous people also have the same protection
- The President of India can nominate two Anglo-Indians to the parliament if they are not sufficiently represented.

It needs to be remembered that the first two groups were given special representation not on the ground of being a minority but for being deprived and oppressed. This system has worked well in the last fifty years and has ensured due representation to these groups and thus fostered a rise in political leadership. It should also be noted that the lack of any special measure to ensure representation for the Muslims, the biggest religious minority that is thinly spread all over the country, has meant that they have always been under-represented in the assemblies.

Basic guarantees

The basic guarantees offered by the constitution include:

- Preamble to the constitution
- Right to Equality
- Right to Freedom
- Right to religious freedom
- Cultural and educational rights for the minorities

The secular objective of the State has been specifically expressed by inserting the word 'secular' in the Preamble by the Constitution (42nd Amendment) Act, 1976. There is no provision in the Constitution making any religion the 'established Church' as some other Constitutions do. The provisions of the Indian Constitution for the protection of the minorities are exhaustively enumerated in Articles 25–30 and allied provisions of the Indian Constitution. The minorities in consideration here are the religious and linguistic minorities in India. On the other hand, the liberty of 'belief, faith and worship' promised in the Preamble is implemented by incorporating the fundamental rights of all citizens relating to 'freedom of religion' in Arts. 25–29, which guarantee to each individual freedom to profess, practice and propagate religion, assure strict impartiality on the part of the State and its institutions towards all religions. Though the provisions guaranteeing religious freedom to every individual cannot, strictly speaking, be said to be specific safeguard in favor of the minorities, they do protect the religious minorities.

Any section of the citizens of India having a distinct language, script or culture of its own shall have the fundamental right to conserve the same [Art. 29(1)]. This means that if there is a cultural minority which wants to preserve its own language and culture, the State would not by law impose upon it any other culture belonging to the majority of the locality. This provision, thus, gives protection not only to religious minorities but also to linguistic minorities. The promotion of Hindi as the national language or the introduction of compulsory primary education cannot be used as a device to take away the linguistic safeguard of a minority community as guaranteed by Arts. 29–30.

No citizen shall be denied admission into any educational institution maintained by the State or receiving State aid, on grounds only of religion, race, caste, language or any of them [Art. 29 (2)]. This means that there shall be no discrimination against any citizen on the grounds of religion, race, caste, or language, in the matter of admission into educational institutions maintained or aided by the State. It is a very wide provision intended for the protection not only of religious minorities but also of 'local' or linguistic minorities, and the provision is attracted as soon as the discrimination is immediately based only on the ground of religion, race, caste, language or any of them.

All minorities, whether based on religion or language, shall have the fundamental right to establish and administer education institutions of their choice [Art. 30(1)]. While Art. 29(1) enables them to run their own educational institution, so that the State cannot compel them to attend any other institutions, not to their liking. By the 1978 amendment, favorable treatment has been accorded to such minority educational institutions in the matter of compensation for compulsory acquisition of property by the State. By reason of the appeal of Art. 31, all persons have lost their constitutional right to compensation for acquisition of their property by the State. However, educational institutions established by a minority community lie entrenched in this behalf. Their property cannot be acquired by the state without payment of such compensation as would safeguard their right to exist, as is guaranteed by Art. 30 (1A).

The State shall not, discriminate in granting aid to educational institutions on the ground that it is under the management of a minority, whether based on religion or language [Art. 30 (2)].

The ambit of the above educational safeguards of all minority communities, whether religious, linguistic, or otherwise, can be understood only if we notice the propositions evolved by the Supreme Court of the above guarantees:

(a) Every minority community has the right not only to establish its own educational institutions, but also to impart instruction to the children of its own community in its own language.

(b) Even though Hindi is the national language of India and Art. 351 provides a special directive upon the State to promote the spread of Hindi, nevertheless, the object cannot be achieved by any means, which contravenes the rights guaranteed by Art. 29 0r 30.

(c) In making primary education compulsory [Art. 45], the State cannot compel that such education must take place only in the schools owned, aided or recognized by the State so as to defeat the guarantee that a person belonging to a linguistic minority has the right to attend institutions run by the community, to the exclusion of any other school.

(d) Even though there is no constitutional right to receive State aid, if the State does in fact grant aid to educational institutions, it cannot impose such conditions upon the right to receive such aid as would virtually deprive the members of a religious or linguistic community of their right under Art. 30 (1). While the State has the right to impose reasonable conditions, it cannot impose such conditions as will substantially deprive the minority community of its rights guaranteed by Art. 30 (1). Surrender of fundamental rights cannot be exacted as the price of aid doled out by the state. Thus, the State cannot prescribe that if an institution, including one entitled to the protection of Art. 30 (1), seek to receive state aid, it must subject itself to the condition that the State may take over the management of the institution or to acquire it on its subjective satisfaction as of certain matters, – for such condition would completely destroy the right of the community to administer the institution.

(e) Similarly, in the matter of the right to establish an institution in relation by the State, though there is no constitutional or other right for an institution to receive State recognition and though the State is entitled to impose reasonable conditions for receiving state recognition, e.g., as to qualifications, it cannot impose conditions for acceptance of which would virtually deprive a minority community of their right guaranteed by Art. 30 (1). Where, therefore, the state regulations debar scholars of unrecognized educational institutions from receiving higher education or from entering into public services, the right to establish an institution under Art. 30(1) cannot be effectively exercised without obtaining State recognition that the institution must not receive any fees tuition fees in the primary classes. For, if there is no provision in the State law or regulation as to how this financial loss is to be recouped, institutions solely or primarily dependent upon the fees charged in the primary classes cannot exist at all.

(f) Minority institutions protected under Art. 30(1) are however, subject to regulation by the educational authorities of the State to prevent mal-administration and to ensure a proper standard of education. But such regulation cannot go to the extent of virtually annihilating the right guaranteed by Art. 30 (1).

Furthermore, the constitution directs every State to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups and empowers the President to issue proper direction to any State in this behalf [Art. 350 A].

Federal division of power

India is a union of states, where the territories of the units of the federation may be altered or redistributed if the Union Executive and Legislature so desire. In practice this has been used to reorganize the states on linguistic lines. So, in effect, the federal design serves as a way to safeguard the interest of linguistic minorities. Since the commencement of the Constitution, this power has been used by the Parliament to enact various acts for reorganization of states. Initially, we notice major reorganization of the boundaries of the different States of India in the 1950s' by The States Reorganization Act, 1956, in order to meet local and linguistic demands. The reorganization of States continued and the next major change was introduced by the Punjab Reorganization Act, 1966, by which the State of Punjab was split up into State of Punjab and Haryana and the Union territory of Chandigarh. The recent reorganization of States and carving out of the states of Chhattisgarh, Jharkhand and Uttaranchal in the year 2000 is a step further in this direction.

The Indian constitution introduces a federal system as the basic structure of government of the country, though there is a strong admixture of unitary bias and

the exceptions from the traditional federal scheme are many. The Union of India is composed of 28 states and both the Union and the States derive their authority from the Constitution, which divides all powers, legislative, executive and financial, as between them. The judicial powers are not divided and there is a common Judiciary for the Union and the States. The result is that the states are not delegates of the Union. Though there are agencies and devices for Union control over the States in many matters, – subject to such exceptions, the States are autonomous within their own spheres as allotted by the Constitution. Both the union and the states are equally subject to limitations imposed by the Constitution. For instance, the exercise of legislative powers is limited by Fundamental Rights. As regards the subject of legislation, the constitution adopts from the government of India Act, 1935, a threefold distribution of legislative powers between the Union and the States. They are as follows:

1) List I or the Union List includes 99 subjects over which the Union shall have exclusive power of legislation. These include defense, foreign affairs, banking, insurance, currency and coinage, union duties and taxes.
2) List II or the State List comprises 61 items or entries over which the State Legislature shall have exclusive power of legislation, such as public order and police, local government, public health and sanitation, agriculture, forests, fisheries, State taxes and duties.
3) List III gives concurrent powers to the Union and the State Legislatures over 52 items, such as Criminal law and procedure, Civil procedure, marriage, contracts, torts, trusts, welfare of labor, economic and social planning and education.

In case of overlapping of a matter as between the three Lists, predominance has been given to Union Legislature. Thus, the power of the State Legislature to legislate with respect to matters enumerated in the State List has been subject to the power of Union Parliament to legislate in respect of matters enumerated in the Union and Concurrent lists, and the entries in the State List have to be interpreted accordingly. In the concurrent sphere, in case of repugnancy between a Union and a State law relating to the same subject, the former prevails.

Constitutional Watchdogs

The constitution provided for agencies or mechanisms for ensuring that the rights offered in the constitution can actually be enjoyed by the people.

- The foremost of these is of course the Supreme Court of India, the apex of a unified judiciary that has the power to enforce the fundamental rights and to review legislation if they do not conform to them.
- The Constitution provided for a Commissioner of Scheduled Castes and Tribes to report on their conditions and to give advise on improvement in their conditions
- A Special Officer for linguistic minorities shall be appointed by the President to investigate all matters relating to the safeguards provided for linguistic minorities under the Constitution and report to the President [Art. 350 B].

After the adoption of the constitution, two more bodies have been added to the list of watchdogs:

- National Commission for Minorities: Constituted by the government of India in 1978. The National Commission for Minorities, a statutory body, was set up under The National Commission for Minorities Act, 1992.
- National Human Rights Commission: Constituted under The Protection of Human Rights Act, 1993, an Act to provide for the constitution of a National Human Rights Commission.

Special provisions for different areas/states

The Indian constitution is full of special provisions for special areas. Of these two merit special attention:

The constitution allows for the formation of Autonomous Councils to protect the rights of the minorities within the state. This provision has been used extensively in the north eastern parts of the country and has provided modicum of self-rule to these communities.

Furthermore, there are many provisions in the constitution exempting some area or the other from the application of central laws. The most famous of these is the Article 370 that exempts the state of Jammu and Kashmir from the ambit of federal laws. It says:

(a) the power of Parliament to make laws for the said State shall be limited to-
(i) those matters in the Union list and the Concurrent list which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of accession of the State to the Dominion Legislature may make laws for that State; and
(ii) such other matters in the said Lists, as, with the concurrence of the Government of the State, the President may by order specify."

It needs to be reiterated that there are similar provisions in the constitution for a number of other states.

To conclude it is worth emphasizing that beyond constitutional design and institutional interplay, politics has played a role as the unifying force. For instance, the Indian National Congress created a broad social coalition. The politicization of social cleavages has had an impact on federalism as has the regional parties in deepening federalism. India has adopted the salad bowl versus the melting pot model of national unity and it is a model that has served it well.

AUSTRALIAN FEDERALISM, STATE CONSTITUTIONS AND THE PROTECTION OF MINORITY RIGHTS

Cheryl Saunders

Introduction

This paper is written for workshops on the role of State Constitutions in the protection of National and Minority Rights under Federalism, with particular reference to issues that might be relevant to a democratic transition in Burma.

In order to decide what is relevant and what is not, it is necessary to make some preliminary points about the context of Australian federalism.

First, in many ways Australia is very different to Burma. It is a prosperous and peaceful country, a long way away from the world's centers of conflict. It has a robust form of majoritarian democracy, which is so well established that it is taken for granted. It has a small population, of only 19 million people. The population is culturally diverse, but largely as a result of relatively recent immigration. With the very important exception of the indigenous people, there is no minority culture with deep roots in the country. Ethnicity is not a significant factor in the design of the constitutional system.

There are some potential similarities as well, however, around which this paper has been developed. The Australian federation is the result of a compromise between six, distinct colonial communities, which saw some mutual advantage in unity, but which also wanted to retain considerable autonomy. Those colonies (now the Australian States) varied in size and wealth. Despite the absence of cultural cleavages, they had very different interests, and there were traditional suspicions between them. Nevertheless, by astonishingly democratic means, they managed to agree on a form of federal union. The essential elements of that union are still intact, despite much grumbling, one serious attempt at secession and a widespread but probably minority view that Australia should have a unitary form of government. The original colonies are now the States and their variety persists. If anything, federation has provided an institutional framework through which their differences can democratically be expressed.

Particular aspects of the Australian experience that may be of interest to Burma include the following. The first is the way in which, and the process by which, the Australian Constitution originally accommodated the conflicting interests of the constituent parts of the federation. A second is the strengths and weaknesses of the manner in which the balance was struck between central, or Commonwealth, and State power in Australia, including the significance of State Constitutions. The third is the way in which cultural minorities have fared under the Australian federation; in particular, the indigenous people of Australia.

Overview of the Australian federation

Rationale for federation in Australia

Australia became a federation largely for reasons of history and geography. The six Australian colonies were established by Britain towards the end of the 18th century and in the first half of the 19th century, around the edge of a very large land mass and on the island of Tasmania. They were a long way apart from each other. By the time a movement for union seriously began, each colony had its own Constitution and its own institutions of government: Parliament, executive government and courts. The only form of union that was politically acceptable in these circumstances was federalism. Federalism enabled united action on matters of mutual benefit, while leaving each of the colonies, now to become States, with considerable autonomy to govern themselves.

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Even now, more than 100 years later, there is a rationale for federalism in Australia. Most obviously, it has the advantage of being the established system of government, around which institutions, expectations and interests have been built. But it meets other purposes as well. It deepens democracy, in the sense that it provides two levels of government at which people can express their democratic preferences, one of which is physically more accessible. Federalism also operates as a check and balance; an important consideration in a system that otherwise relies heavily on majoritarian parliamentary government, and has resisted constitutional protection of rights.

How Australia became a federation

The federation movement began in the mid 19th century, but became more intense in the decade of the 1890s. The principal motivating factors were the economic advantages of a common tariff policy and a common market and the need for co-ordination in defense and immigration. The process that was followed to achieve federation in the later stages involved a Constitutional Convention with an equal number of delegates from each participating colony.[10] All but one of the colonies sent delegates directly elected for the purpose by the voters of the colony. In the case of South Australia, the voters included both men and women, the latter having been enfranchised in 1894. No woman delegate was elected, however. Western Australia sent a delegation appointed by the Parliament.

The Australasian Federal Convention began its task by agreeing on a set of principles on which the draft Constitution would be based. They were limited, by modern standards; this nevertheless was an important starting point for the Convention's work. In more recent times, the use of agreed principles as a basis for writing a Constitution has become considerably more sophisticated. The 34 constitutional principles on which the South African Constitution was based offer an excellent example of what such principles might look like although, of course, the principles themselves must reflect the consensus that can be reached on what is appropriate for the community concerned.

10) One colony, Queensland, was not a participant at the Convention but joined the movement later.

Once the draft Australian federal Constitution was approved by the Convention it was put to referendum in each colony. Each colony had a veto, in the sense that it would not join the federation unless its voters had approved the Constitution. After a somewhat tortuous process, the Constitution was approved by all six colonies and was sent to Britain, as the colonial power, for enactment.

The issues that divided the colonies

Some of the Australian colonies were more enthusiastic about federation than others. Queensland was too preoccupied with its own affairs to participate in the Convention of 1897–98 and therefore played almost no role in shaping the final form of the Constitution. The voters of the largest colony, New South Wales, voted against the Constitution in the first referendum, possibly because the balance had swung too far towards the interests of the smaller colonies. Federation was impracticable without New South Wales, and some changes were made to the draft to ensure that the referendum succeeded on the next attempt. Western Australia hesitated about joining the federation until the last moment. It was induced to do so in part by a special concession in the Constitution, applicable for the first 10 years of federation, that gave it some power to continue to impose its own duties of customs, despite the exclusive Commonwealth power over duties of customs.

There was basic agreement between most delegates on a number of key points. These included federation as an appropriate form of government for the united Australian colonies; the broad lines of the federal division of power; the need for guarantees of interstate mobility and of a common market; the creation of a Senate, as an upper House of the Commonwealth Parliament, to represent the States; and the establishment of one single court (the High Court) as the final court of appeal within Australia in all matters, as an alternative to appeals to the Imperial Privy Council. They also agreed that the Constitution in which these arrangements would be set down should be relatively hard to change.

But the delegates were deeply divided on many matters as well. Some of the differences were ideological. Thus there were the usual divisions between progressives and conservatives, which were given a particular focus over particular issues, such as votes for women. There was another important division between delegates who supported free trade and those who advocated tariff protection. Some of the most important divisions, however, reflected State interests. These were a response to geography, economic development and, above all, population size and resultant wealth. In addition, there was at least one issue that united most of the Australian delegates on one side, against the British government on the other. This was the jurisdiction of the Privy Council.

Some of the main areas of disagreement concerned the Senate. As a generalization, the less populous States wanted a powerful Senate in which the States were equally represented. The larger States, and in particular New South Wales, preferred representation in the Senate that reflected population size in some way. If equal

representation was accepted, however, the larger States tended to favor a weaker, rather than a stronger Senate. In the end, this difficult issue ended in compromise. The original States would be equally represented in the Senate. The Senate would have almost co-equal power with the House of Representatives. It would not, however, be able to initiate tax or appropriation bills, nor amend bills imposing taxation or the key appropriation bills. The voters of each State, acting as a single electorate, would also directly elect the Senators for the State.

A second, very difficult issue was the fiscal settlement. It was accepted that both levels of government would have their own taxing powers. It was also accepted, however, that the Commonwealth would have exclusive power to impose duties of customs. This was an important taxation source for the colonies. If it were transferred to the Commonwealth, it would be necessary for some revenue to be redistributed regularly by the Commonwealth to the States. The disagreement was over the basis on which redistribution should occur. More customs revenue was collected in some colonies than in others. These colonies took the view that the moneys should be redistributed in proportion to collections. Other colonies, understandably, preferred another basis for redistribution; population numbers was the obvious alternative. In the end, there was another compromise. Revenue would be distributed initially on the basis of collections. After a short initial period in which this was guaranteed, however, distribution would be made on whatever basis the Commonwealth Parliament deemed "fair".

There was some conflict between the interests of the various colonies over the procedure for constitutional change as well. A referendum was the obvious procedure, given the means by which the Constitution would be approved in the first place. But should the people vote nationally, which would give the larger States greater influence, or within States, giving the smaller States more of a say? The result was to require both: a national majority and a majority in a majority of States to approve a referendum. In addition, certain parts of the Constitution of particular importance to the States, such as their proportionate representation in the Parliament, and the protection for State boundaries, could be altered only with the approval of voters in the States that were concerned.

For the most part, the British Parliament simply enacted the Constitution approved in Australia. There was, however, conflict between the British government and the colonists over appeals to the Privy Council, which had been greatly restricted by the Australian draft. Without compromise, enactment of the Constitution was threatened, at least in the form that the Australians had agreed. The restrictions on appeals were relaxed, a little, while still preserving exclusively for Australian courts the sensitive constitutional issue of the boundary of power between the Commonwealth and the States.

These are old battles. Upper Houses and fiscal federalism are issues in federations everywhere, but the detail of these struggles in Australia is not relevant for Burma. They are noted here as examples of conflicts between State interests, in forming a

federation, and of the accommodations that in this case were made to resolve them. Another point may be of interest as well: while the particular compromises served to achieve federation, none worked out precisely as expected. The Senate votes on political party lines. It has done relatively little to protect State interests, beyond increasing the representation of the smaller States in the Commonwealth Parliament well beyond that to which they would otherwise have been entitled. Neither of the two alternatives for revenue redistribution over which the framers of the Constitution fought were serious contenders for long. Rather, revenue redistribution now occurs on the basis of the principles of fiscal equalization, through a system in which the population of each State is weighted by a factor that takes into account State revenue raising abilities and expenditure needs. The Commonwealth Constitution has proved very difficult to change and, in most cases, even national majorities reject referendum proposals. Predictably, appeals to the Privy Council became irrelevant, with Australian independence. Arguably, however, the focus on the Privy Council prevented the States from perceiving how important the High Court would become, in interpreting the Constitution and from recognizing the potential significance of the fact that the Commonwealth government alone would appoint that Court.

State Constitutions

The constituent parts of the Australian federation are the six original States. Australia also has some territories, some of which are "self-governing" but which lack the constitutional autonomy of the States. One of these, the Northern Territory aspires to become a State. The potential relevance of this for indigenous Australians will be considered in that context, below.

Each of the Australian States has its own Constitution. Each State Constitution dates back to the colonial period. Each was drafted by the State (then colonial) Parliament, relying on authority granted by the British Parliament. The State Constitutions are broadly similar, because they derived from the same colonial model. They are not identical, however and they have become increasingly dissimilar over time, as changes have occurred.

The main purpose of each State Constitution is to establish the governing institutions of the State. Thus a State Constitution typically establishes the State Parliament and confers power on it to, for example, make laws for the "peace order and good government" of the State. The High Court has held that this power is territorially limited; in other words, within a federation, there are limits on the power of State Parliaments to legislate for matters outside their territorial boundaries.

Australian State Constitutions also deal with the executive government and, in most cases, the State court system. In addition, as a result of increasing pressure to acknowledge the significance of local government, most State Constitutions

now also recognize local government as well. Some parts of most State Constitutions are protected from being changed in the same way as ordinary law, so as to give them the status of higher law. Sometimes the special amending procedure requires special parliamentary majorities. Sometimes it requires the people of the State, voting in a referendum, to approve a proposal for change.

In Australia, neither the national Constitution nor the State Constitutions provide protection for rights. Partly as a result, and partly because of their age, State Constitutions tend to be rather dry documents, which do not attract much interest or attention from the people of the State. They thus do nothing to enhance a sense of State political community. One lesson from the Australian experience with State Constitutions may be to treat them more seriously, as instruments that provide the fundamental law for a sub-national political community, subject only to the national Constitution.

The Australian experience also raises some interesting questions about the relationship between State Constitutions and the national, Commonwealth Constitution.

The first is the legal relationship between the two. The Commonwealth Constitution was superimposed on the existing colonies, which would become States in the new federated Australia. It became the highest Australian law, with which the State Constitutions must comply. Necessarily, it took some power away from State governments, Parliaments and courts. Otherwise, however, it "saved" State Constitutions; in other words, it provided that State Constitutions should "continue" unless altered in accordance with their own procedures.

There is a question about what this means for the way in which State Constitutions can be changed. Of course, it means that if a State wishes to alter its own Constitution it can do so, by following the alteration procedure laid down in the Constitution. The more sensitive question is whether changes to the Commonwealth Constitution can effectively change a State Constitution. The answer almost certainly is that they can. The procedure for alteration of the Commonwealth Constitution is complex. It requires the Commonwealth Parliament to pass a bill, which must then be accepted at referendum by a national majority and by a majority of people voting in a majority of States. It is therefore theoretically possible for a State Constitution to be changed by an alteration to the national Constitution that is not approved by a majority of people in the State concerned.

In fact, despite this theoretical possibility, there is very little in the Commonwealth Constitution to control the structure and standard of government at the State level. The real question that arises from this aspect of the Australian experience is whether this is appropriate. Most federations provide some common standards for governance in the national Constitution in relation to, for example, democracy, the rule of law and protection of individual and

minority rights. The Australian federation is an exception, which has been able to continue only because each State in fact has broadly common standards, and there has so far been no cause for real concern.

Division of power

The federal division of power is set out in the Commonwealth Constitution. The principle on which the framers of that Constitution worked was as follows. Each colony, soon to become a State, already had full powers of self-government, within its own territory. In order to establish a federation, the States must lose some powers to the new national government, the Commonwealth. Only the powers that were considered necessary for the Commonwealth, however, should be transferred in this way. This principle was given effect both in the model for the division of powers between the Commonwealth and the States and in the particular powers that were conferred on the Commonwealth.

Model for the division of powers

Powers are divided under the Australian Constitution by giving particular powers to the Commonwealth and leaving the remainder with the States. Most of the Commonwealth powers are "concurrent". This means that the States can exercise them as well, although if there is a conflict between a Commonwealth and a State law, the Commonwealth law will prevail and the State law will be "inoperative". A few Commonwealth powers are "exclusive", including power to impose duties of customs and excise. The States may not legislate at all in relation to Commonwealth exclusive powers.

The Australian federal model divides executive and judicial power between the Commonwealth and the States as well, in a way that broadly matches the division of legislative power. In this respect Australia (and most of the other common law federations) is different to the German federal model, where the States have more administrative than legislative power. This approach is also reflected in the institutional structure of government. With a few exceptions, there is a complete set of governing institutions at the national level and within each State, to exercise these various powers.

Thus each State has a Parliament, an executive government with a Governor representing the Queen, and a court system. Other institutions are duplicated as well, including Auditors-General and Ombudsmen. Similarly, the Commonwealth has a Parliament, executive government and Governor-General and court system; although the highest Commonwealth court, the High Court of Australia, also acts as the final court of appeal from all State courts and State courts can exercise federal judicial power. Some institutions are found only at the Commonwealth level, because they fall within Commonwealth power, or have been established by co-operation between governments. The Reserve Bank of Australia, the Australian Competition and Consumer Commission and the Australian Corporations and Investment Commission are examples.

The mere description of the Australian model for dividing federal power makes it sound as if it favors the States, as indeed it was expected to do. In practice, however, power has gradually shifted to the Commonwealth, largely through judicial interpretation, but in a manner that seems to have reflected the changing needs and circumstances of the Australian people. Australia is not unique in this regard; a similar pattern of growth of central power can be seen in, for example, the United States (US), which divides federal power in the same way. The US and Australian experience suggests that, if particular powers need to be guaranteed to the States in a federation in Burma, the Constitution should expressly say so by, for example, providing a list of exclusive State powers.

It might be helpful to give an example of how the division of powers works in the Australian federation. One of the legislative powers given to the Commonwealth by the Constitution is a power to make laws with respect to "external affairs". The High Court has held that this enables the Commonwealth Parliament to incorporate into Australian law any international treaty to which Australia is a party. Some of these treaties deal with matters otherwise within State power; the environment is an example. By relying on the external affairs power, the Commonwealth Parliament therefore can make laws on matters that the States had previously thought were their responsibility. Moreover, the decision to sign and ratify a treaty is an executive decision, which falls within Commonwealth executive power. Any legal dispute arising under a Commonwealth law incorporating a treaty involves federal judicial power and will be dealt with in Commonwealth courts unless the Commonwealth Parliament has given jurisdiction to the State courts.

The particular powers given to the Commonwealth

The Australian Constitution gives 40 legislative powers to the Commonwealth Parliament.

Within this list, it is possible to identify particular categories of powers, as follows:

- **External affairs** and associated matters (for example, relations with the islands of the Pacific; quarantine; the influx of criminals)
- **Defense**, including maintenance of the defense forces, which effectively is an exclusive Commonwealth power, under section 114. The Commonwealth has an obligation to defend the States, under section 119. By contrast, the general police force is a State responsibility; while there is a federal police force, it deals only with criminal matters arising under Commonwealth law (for example, offences dealing with the importation of drugs).
- **Commercial** matters: interstate and overseas trade; banking; insurance; weights and measures; currency and coinage (effectively also exclusive, under section 114); foreign, trading and financial corporations.

- A few **social** powers, although these are the exception rather than the rule; in particular, marriage and divorce and the power in section 51(23A) to make certain welfare payments.

Grouped in that way, it is possible to understand the logic underlying the allocation of most of these powers to the Commonwealth. As a generalization, the Commonwealth was given powers that could not be handled adequately within State borders, particularly if, as was the case in Australia, federation was intended to establish a national common market. As originally conceived, the Australian federal model left to the States all or most of the powers necessary to run their own communities. Important powers left to the States included, for example:

- Health, education, housing and intrastate transport
- Land, agriculture and natural resources. Section 51(31) of the Constitution also ensures that the Commonwealth cannot acquire property, from the States or anyone else, without providing "just terms".
- Local government.
- Civil liberties and human rights
- Environment

In practice, however, it has proved almost impossible for Commonwealth and State powers to be exercised in isolation from each other. The area of health provides an obvious example. The States have power in relation to hospitals and health services. The Commonwealth has power in relation to health insurance and medical benefits. Clearly it is not possible for these two sets of powers to be exercised completely independently. As a result, health and hospitals are now managed through a complex intergovernmental scheme.

Another complication for the federal division of powers is that matters that in 1901 were seen as purely a State concern gradually have developed a national dimension. Human rights and the environment are obvious examples. Another, less obvious example is education. Education traditionally is considered to be a sub national power in a federal system. On the other hand, there are aspects of education that now have some relevance for areas of national power. A skilled and educated workforce, for example, has significance for national economic management.

The Australian Constitution has proved difficult to change and there have been relatively few changes to the list of Commonwealth powers. As mentioned earlier, judicial interpretation has enabled the Commonwealth to expand into some areas of purely State concern. Thus the interpretation of the external affairs power now enables the Commonwealth to make laws in relation to human rights and some aspects of the environment. Other areas in which the Commonwealth lacks power but in which a national response is needed are often handled through co-operation between the Commonwealth and the States.

As a result, the Australian federal system now has an extensive network of intergovernmental co-operation, involving regular meetings of ministers from the different governments, agreements and schemes to achieve uniform laws and conditional Commonwealth funding for particular State services including education, transport, housing and health. While all of these arrangements involve joint action, their general effect is to shift power away from the States. They also raise some accountability problems, for both levels of government. In drafting a federal Constitution for Burma, attention might be given to providing a constitutional framework for intergovernmental co-operation, to minimize accountability problems and to recognize that this is now a normal aspect of any functioning federation.

Fiscal federalism

All federations need to provide in some way for a division of financial resources between governments, to enable both the centre and the States to exercise the powers allocated to them. There are two broad models for this purpose, with many variations on each of them. At one extreme, each government has the constitutional authority to raise taxes for its own purposes, and is self-sufficient. The United States is the paradigm example. At the other extreme one level of government, usually the central government, imposes all or most taxes but the Constitution makes it clear that the sub-national governments are entitled to the proceeds of particular taxes. Germany is an example of this approach.

The original Australian model was closer to the United States approach. Under the Commonwealth Constitution, both the Commonwealth and the States have a general power to tax. The only exception, which proved important, was the power to impose duties of customs and excise, which was given exclusively to the Commonwealth, in the interests of a single market. Customs duties were an important revenue source for the colonies immediately before federation, however. It was therefore necessary for the new federal Constitution to provide for the redistribution to the States of some of the customs revenue raised by the Commonwealth. This was one of the most difficult issues for the framers of the Constitution. They could not agree on a lasting system for revenue redistribution and so they left this to the Commonwealth government and Parliament, to be decided after federation was achieved. They also included in the Constitution a power for the Commonwealth Parliament to grant financial assistance to the States "on such conditions as the Parliament thinks fit" in case a financial emergency arose.

This has been one of the least satisfactory aspects of the Australian federal design. As a result of judicial interpretation and strategic federal legislation, the Commonwealth now imposes most of the taxation, including income tax and taxes on goods and services. The States are left with relatively minor taxes: land tax, gambling taxes, motor taxes, payroll tax, stamp duties. The States are more

dependent than ever on revenue redistribution, for which the Constitution makes no clear provision, other than allowing grants of financial assistance to be made.

As a result, the States rely on the Commonwealth government and Parliament to decide the amount that will be made available to them each year and the basis on which that amount will be determined. Systems that have been used for this purpose over the years include formula based arrangements, tax sharing of various kinds and commitments to match the previous year's grant levels. Under current arrangements, the Commonwealth makes available to the States the proceeds of the federal Goods and Services Tax. Some grants are also made on condition, that they will be spent in a particular way. Through the use of these grants, the Commonwealth influences policy in a range of areas of State responsibility that require significant expenditure including education, housing, health and transport.

Revenue redistribution from the centre to the States in a federation typically has two aspects. The first aspect concerns the total amount to be distributed to the States. The second concerns the manner in which the total will be allocated between the States. Australia and many other federations divide such funds between States with the assistance of "fiscal equalisation" principles. In Australia, the goal is to put each State in a position in which it can offer broadly comparable services to the other States, without unduly raising its own taxes and charges. To this end, an independent body, the Commonwealth Grants Commission, recommends "factors" by which the population of each State should be weighted, in distributing federal funds. The factors are calculated by reference to State revenue disabilities and expenditure needs. The Grants Commission's recommendations are almost always accepted. The system is complex, however, and the principle of fiscal equalisation itself is intermittently under attack from the richer States, which receive less per capita than the others.

It is important to note that the general revenue funds that are distributed between the States in accordance with fiscal equalisation principles are not subject to any conditions. In particular, a State is not required to spend the funds on the "expenditure needs" by which its State factor was calculated. This feature of the system is also criticised from time to time. On the other hand, there is a sense in which it provides a good illustration of how the combined principles of unity and diversity can work in a federal system. The principle of unity suggests that it is fair for States that are poorer to receive more than the richer States and, in effect, for the latter to assist the former. The principle of diversity, however, suggests that neither the centre nor the richer States should tell the others how to spend the funds that they have received. In a federal system, they should be able to determine expenditure priorities for their own communities, by democratic means, through democratic institutions.

Indigenous people

The Australian federal system has worked reasonably well to protect small State communities from the larger States, while still enjoying the advantages of union. All Australian Constitutions, however, both Commonwealth and State, were written for a monocultural society. At the beginning of the 20th century, the Australians saw no need for their Constitutions to accommodate cultural diversity. There is no protection of rights in either the Commonwealth or State Constitutions, although the former precludes the establishment of any religion.

One hundred years later, largely as a result of immigration, the Australian population is very diverse. Moreover, although there have been no relevant changes to the Commonwealth Constitution, the system has adapted to these new circumstances reasonably well, although without seriously challenging the dominant culture. New, multicultural policies have been adopted, through the ordinary political processes, at both Commonwealth and State levels. Anti-discrimination legislation has been introduced and works quite effectively. There is relatively little intercultural conflict. Whatever their backgrounds, all Australians are free, within the private sphere, to pursue their own religion, to speak their own language and within limits, to follow their own culture.

The Australian constitutional system has worked much less well for indigenous Australians, however. The indigenous people are a small minority of the Australian population; in 2002 approximately 2 %. They live in all States, although with a larger concentration in the north, diluting their influence further still. Their culture is unfamiliar. They occupied the whole territory, at the time of European settlement and in that sense represented a threat. Partly as a consequence, there is a direct conflict between their interests and those of the majority community.

At the time of European settlement, from 1788, Australia was deemed to be *"terra nullius"*. The indigenous legal system was ignored and, with it, indigenous interests in land. The indigenous people were dispossessed by the settlers and pushed north and west. More than one hundred years later, at the time of federation in 1901, the indigenous people were expressly excluded from Commonwealth power. Their interests and welfare thus remained entirely with the States. The State Constitutions contained little, if anything, to protect them. There was no special provision for indigenous representation; indeed, they were not fully included in the franchise until the 1960s.

As a result, throughout most of the 20th century, the indigenous people of Australia were treated very badly. Until relatively recently there was no recognition of their law and little of their culture. Many groups lost their languages. Except in the far north, they were generally without land. They suffered extreme social and economic disadvantage. They were politically powerless to remedy their own situation.

The situation began to change in the latter 20th century, as world opinion changed. In 1967, the Constitution was changed to give the Commonwealth concurrent power in relation to indigenous people. In the 1970s the Commonwealth began to implement land rights legislation, although only in the Northern Territory, where it had more complete legislative power. In South Australia, also, some public lands were given to indigenous people; but in general the States resisted the land rights movement at this stage. In 1992, in the landmark decision in *Mabo v Queensland (No.2)* the High Court of Australia held that the common law of Australia would, after all, recognise indigenous title to land, if it could be proved and if it had not been subsequently overridden by, for example, the general land law. While the *Mabo* criteria were difficult for indigenous groups to meet, it was a symbolically important decision. The Commonwealth enacted legislation to control the claims process. The States were unable to nullify the effect of the Mabo decision, because of supervening Commonwealth law. The greater bargaining power of the indigenous people led to some greater willingness to negotiate with them, on the part of States and private sector interests. By the end of the 20th century, there were some specifically indigenous local government areas, within States and territories and other areas where indigenous people pursued their own culture, on their own lands.

In the scheme of things, these changes were important, but minor. Indigenous Australians are still struggling for land, equal economic opportunity and recognition of their law and culture. Nevertheless, their new bargaining power, however small, may enable them to make the federal system work better for them. Federal systems involve different governments, with different ideologies and policy preferences. In principle, they offer the opportunity for experimentation; and successful experiments tend to spread. Thus more States are considering the return of lands to indigenous people; some States are experimenting with indigenous court systems; some are entering into agreements with indigenous people, to provide a greater measure of self-government and economic development. It is easier for indigenous people to achieve representation in the relatively smaller State or territory Parliaments, although there is presently one indigenous Senator in the national Parliament as well. It is possible that one or more State Constitutions might eventually recognise the indigenous people and provide some protection for their interests. In particular, if and when the Northern Territory becomes a State, there will certainly be pressure for acknowledgement of indigenous law and culture in the Constitution of a State in which indigenous people constitute 25% of the population.

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In general, however, this aspect of the Australian experience throws up negative lessons. It shows that minorities, especially small minorities, need protection from majorities that are likely to be hostile or indifferent to their interests. It shows that the protection needs to be provided by both national and State Constitutions. And while protection of political, economic and cultural rights is necessary, the Australian experience suggests that it is not sufficient. Treatment of minorities in

a way that is perceived as "special" by the majority community creates resentment. Desirably, steps should be taken to create a climate in which cultural diversity in general and the minority culture in particular is valued and respected. True enjoyment and development of its culture by the minority community also calls for a measure of self-government. A properly functioning federation should enable each of these developments to occur.

Conclusion

Is federalism expensive and complicated and does it encourages conflict? Based on the Australian experience, federalism is found to be more expensive but has channelled conflict through democratic processes.

Federalism is more expensive and complicated than a unitary system in a relatively compact, mono-cultural country in which everything is working smoothly; but that is not usually the alternative. Thus, in Australia, federalism was the only basis on which the six colonies would have agreed to unite. A unitary system might have been possible, but it would have been smaller, certainly without Western Australia and possibly without Queensland as well. Even now, 100 years later, federalism assists to maintain the unity of the country. It provides greater opportunity for democratic and responsive government and, as a consequence, contributes to efficiency as well.

Federalism provides institutions through which conflict can occur, openly and in a democratic manner, consistently with the rule of law. It thus provides a means to express conflicts that are latent; but it provides a framework to manage them as well.

These are not serious objections to federalism, although of course they should be considered in the federal design, in order to minimise cost and complexity and avoid unnecessary division and delay. More importantly, however, objections of this kind often mask attitudes to governance which are not conducive to federalism and which need to be confronted to establish an effective working federation. There is more to federalism than designing a federal constitutional model. A federal culture is needed also, to underpin the institutions and inform the principles and to find agreed solutions as problems arise and changes occur. A federal culture requires a commitment to both unity and diversity; a respect for difference; and a willingness to share power. It does not necessarily come easily in any political system. It needs to be exposed as an issue and given some priority.

NIGERIA'S EXPERIENCE IN MANAGING THE CHALLENGES OF ETHNIC AND RELIGIOUS DIVERSITY THROUGH CONSTITUTIONAL PROVISIONS

Otive Igbuzor

Preamble

Ethnicity and Religion are two issues that have played dominant roles in the way of life and governance in Africa.

> Religion dominates the roots of the culture areas of Nigeria…Little or no distinction existed between the profane and the sacred dimensions of life. Thus, all activities and instruments of governance and survival were clothed in religious ritual, language and symbolism.[11]

Over and above the factors of environment, political organization and outlook of traditional Nigeria, the religious factor remained the major source of inspiration in the catalyst for the people's activities and world view.[12] The political behavior of some Nigerians is still influenced heavily by the hyperbolic assumption that one's destiny is intrinsically and exclusively linked with one's ethnic, linguistic and religious identity. [13]

This paper gives an overview of Nigeria's political and constitutional history and the evolution of its Federal system. The paper argues that the evolution of federal system in Nigeria was truncated by military intervention. The paper also reviews the operation of federalism in Nigeria and posits that minority rights are not protected. Finally, the paper outlined the challenges of ethnic and religious diversity in Nigeria and drew lessons particularly for countries in democratic transition.

Introduction

Nigeria is the most populous country in Africa with a population of over 120 million people of diverse ethnic, linguistic, cultural and religious identities. The history of the country can be traced to pre-colonial times when there were "elaborate systems of governance, which varied in scale and complexity depending on their geographical environment, available military technology, economic, spiritual and moral force."[14] There were various kingdoms and empires such as the

11) Kalu, O.A (1989), "Religions in Nigeria: An Overview" in J. A. Atanda et al (Eds), Nigeria Since Independence: The first Twenty-Five Year,. Vol. IX. Ibadan, Heinemann P.11
12) Enwerem, I. M (1995), A Dangerous Awakening: The politicization of Religion in Nigeria, Ibadan, French Institute for Research in Africa.
13) Dlakwa, H. (1997), "Ethnicity in Nigerian Politics: Formation of Political Organisations and Parties" in Okafor, F. U.(1997) (Ed), New Strategies for Curbing Ethnic and Religious conflicts in Nigeria, Enugu, fourth Dimension Publishers
14) Political Bureau, (1987), Report of the Political Bureau. Abuja

Yoruba kingdom, the Benin kingdom, the Fulani emirate, the Igbo traditional system, the Urhobo gerontocratic system etc. All these changed with the conquest of Lagos in 1861 by the British and the subsequent amalgamation of Southern and Northern Nigeria in 1914. As a result of intense struggle, Nigeria gained independence in 1960. The First Republic lasted only six years under a parliamentary system of government with Sir Abubakar Tafawa Balewa as Prime Minister and the military took over political power by force in 1966. The military ruled for thirteen years under four heads of state[15] and handed over power in 1979. The Second Republic changed to a Presidential system of Government under Alhaji Shehu Shagari which lasted only four years and the military took over again in 1983. The military ruled for another sixteen years under four military rulers[16] and set up an illegal institution called Interim National Government headed by Ernest Shonekan. The military handed over power on 29th May, 1999 to Chief Olusegun Obasanjo who was himself a military ruler from 1976-1979. Thus out of the 42 years of post-independence Nigeria, the military has ruled for 29 years. It has been argued that "Nigeria's political misfortunes in the past and the failure to evolve a united, prosperous and just nation can be blamed partly on inadequate and defective structures and institutions as well as on the orientation which British colonialism bequeathed to the young nation at independence and the reluctance of succeeding Nigerian governments to tackle these problems decisively."[17]

Constitutional history of Nigeria

Nigeria has had a very rich history of constitution making. There have been at least ten attempts to make constitutions for the country. These include the 1914 amalgamation constitution, the 1922 Clifford Constitution, the 1946 Richards Constitution, the 1951 Macpherson Constitution, the 1954 Lyttleton Constitution, the 1960 Independence Constitution, the 1963 Republican Constitution, the 1979 Constitution, the 1989 Constitution and the 1999 Constitution. Nigeria was brought together as one country by the amalgamation Constitution of 1914 which united the Southern and Northern protectorates. But the first and most significant constitution was however the Clifford Constitution of 1922 named after the Governor, Sir Hugh Clifford. The constitution was made following agitation by Nationalists at that time. With the introduction of this constitution, for the first time in the history of the country four people were elected into the legislative council of 46 members.[18] After the Second World War, the fight for the right to self-determination and struggle against colonialism increased in tempo leading to a review of the Clifford Constitution. In 1946, the Richards Constitution was made also named after the Governor, Sir Arthur Richards. With the Richard Constitution, twenty-eight people were elected into the legislative council of 46. Four of the twenty-eight were directly elected and the

15) General J.T. Aguiyi Ironsi: January 1966 -July, 1966; Yakubu Gowon: July 1966- July, 1975; Gen. Murtala Mohammed: July, 1975 –February, 1976 and General Olusegun Obasanjo : February, 1976 – October, 1979
16) Generals Muhammadu Buhari:1984-1985, Ibrahim Babangida:1985-1993, Sanni Abacha:1994-1998 and Abdulsalami Abubakar:1998-1999
17) Report of the Political Bureau, (1987)
18) Three members were from Lagos and one from Calabar.

remaining twenty four were indirectly elected from their regional assemblies. It has been documented that the lack of consultation that characterized the making of the Richards Constitution angered many Nigerians. It was therefore regarded as an arbitrary imposition on the country"[19] As a result of the non-consultation, the criticism and rejection of the Richards constitution was immediate. This led to a series of activities that culminated in the making of the Macpherson Constitution of 1951 also named after the then Governor Sir John Macpherson. It is instructive to note that before the Macpherson Constitution was promulgated into law, the draft was debated at village, district, provincial and regional level. In addition, there was a general conference held in Ibadan to discuss the draft. Thus 'the 1951 constitution came into being after an unprecedented process of consultation with the peoples of Nigeria as a whole… On 9 January, 1950, a general conference of representatives from all parts of Nigeria started meeting in Ibadan to map out the future system of Government in Nigeria with the recommendation of the Regional Conferences as the working documents"[20] The Macpherson Constitution provided for a central legislature with 147 members out of which 136 were members elected from the three regional houses.

Despite the consultation that went into its making, the implementation of the Macpherson Constitution was ridden with crisis. This led to the 1953 London Conference and the 1954 Lagos conference culminating in the promulgation of the Lyttleton Constitution in October, 1954. Under the constitution, Nigeria became a federation of three regions, Northern, Western and Eastern regions. Remarkably the Lyttleton Constitution "removed the elements of unitarism contained in the 1951 constitution. Consequently, the constitution for the first time established a federal system of government for Nigeria.[21] In preparation for independence, the London Constitutional conferences of 1957 and 1958 were held leading to the 1960 independence Constitution. In 1963, the Republican Constitution was made. It was pointed out that "both the 1960 (Independence) constitution and the 1963(Republican) constitution were the same. The only differences were the provisions for a ceremonial President (1963) in place of the Queen of England (1960) and the judicial appeals system which terminated with the Supreme Court (1963) rather than the Judicial Committee of the British Privy Council (1960).[22]

The military intervened in the political scene in 1966 and the 1979, 1989, 1994 and 1999 constitutions were made during military regimes. The 1979 constitution was written by a constitution drafting committee made up of 49 wise men (no woman). A draft of the 1989 constitution was debated by an elected Constituent Assembly (with one-third of the members appointed by the regime). But, fundamental alterations were effected through another review process undertaken by the regime.[23] A Constitutional Conference was convened to discuss

19) Dare, L. and Oyewole, A Textbook of Government for Senior Secondary Schools. Ibadan, Onibonoje Press and Book Industries (Nig.) Limited. P. 132)
20) Sagay, I. E (1999), "Setting the Agenda for Constitutional Development in Nigeria" in Strengthening Nigeria's Constitution for Sustainable Democracy. London, Centre for Democracy and Development. P14
21) , Oyovbaire, et al (1991), Government: A Preparation Course, Ibadan, Evans Brothers (Nigeria publishers) Limited. p. 193.
22) (Sagay,1999)
23) Jega, A. M (1999) "Popular Participation in Constitution Making: The Nigerian Experience" in Alemika, E.E.O and Okoye, F.O (Eds), Constitutional Federalism and Democracy in Nigeria, Kaduna, Human Rights Monitor, p. 11.

the 1994 constitution. However, the election into the conference was boycotted as a result of protest against the annulment of the June 12th 1992 election believed to have been won by Chief M.K.O. Abiola. The result was annulled by the Babangida regime. More than one-third of the membership of the conference was appointed by the regime. In addition, 'the regime effectively used its control of the technical/executive committee of the constitutional conference to literally, alter decisions arrived at on the floor of the conference".[24] The 1999 Constitution was promulgated into law by the Military regime of General Abdulsalami Abubakar after the Constitution Debate Co-ordinating Committee led by Justice Niki Tobi submitted its report. The Tobi Committee had barely two months to consult with all Nigerians before submitting its report. On 19th October, 1999, the Obasanjo regime inaugurated the Presidential Technical Committee on the Review of the 1999 Constitution to co-ordinate and collate the views and recommendations from individuals and groups for a review of the 1999 constitution. The review process is still on.

Nigera's federal system

The concept of federalism has attracted the attention of scholars, political activists, politicians and public affairs commentators over the years. It has been noted that federalism did not begin as a concept of social and political organization evolved by reflective philosophers or postulated by didactic political scientists.[25] The earliest most profound theoretical exposition is probably found in the 85 essays that appeared in 1788 under the now famous title "the Federalist". These essays were actually written in defense and support of the 1787 constitution of the United States. However, the discussion of contemporary federalism is located with K.C. Wheare who stressed the formal division of powers between levels of government. According to him, the federal principles include the following:

1. The division of powers among levels of government
2. Written constitutions showing this division, and
3. Coordinate supremacy of the two levels of government with regards to their respective functions.[26]

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• The division of powers among levels of government
• Written constitutions showing this division, and
• Coordinate supremacy of the two levels of government with regards to their respective functions

Wheare's formulation has been criticized as being too narrow and legalistic. A scholar, William Livingstone suggest a process approach which points to the phenomenon of intergovernmental cooperation that cuts across and formal constitutional division of powers.

Livingstone distinguished between a federal constitution which is the legal document and a Federal Society which is characterized by historical, cultural and lin-

24) Ibid p. 12.
25) Ramphal, S. S(1979), Keynote Address in Akinyemi, A. B., Cole, P. D. and Ofonagoro, W (Eds), Readings on Federalism. Lagos, Nigerian Institute of International Affairs
26) Ramphal, S. S(1979), Keynote Address in Akinyemi, A. B., Cole, P. D. and Ofonagoro, W (Eds), Readings on Federalism. Lagos, Nigerian Institute of International Affairs

***…federalism include**:*

• The need for a supreme written constitution.
• A predetermined distribution of authority between federal and state governments.
• An amending process which allows revision of the federal compact.
• A supreme court exercising powers of judicial review.
• Some measure of financial self-sufficiency

guistic background and geographical location. According to Ramphal, the broad patterns of classical federalism include:

1. The need for a supreme written constitution.
2. A predetermined distribution of authority between federal and state governments.
3. An amending process which allows revision of the federal compact but by neither the federal government nor the state government acting alone.
4. A supreme court exercising powers of judicial review.
5. Some measure of financial self-sufficiency[27]

From the above, three things are clear. First is that constitutional specification is the starting point of any federal arrangement. Second, economic, social, political and cultural factors determine and affect the nature of any federal system. Third, federalism is a concept for promoting unity in diversity and has to be worked upon by the country to reflect economic, social, cultural and historical reality.

The federal system in Nigeria is unique. There are specific factors that led to federal formation in Nigeria which include among other reasons diversity of the country, desire for political unity in spite of ethnic and religious differences, shared colonial experience since 1914 amalgamation by the colonialists, problems associated with the emergence of tribal nationalism and ethnic based political parties, desire for economic and political viability as a country and general disenchantment with experimenting of unitary constitutions and the eventual breakdown of the Macpherson Constitution.

…federalism is a concept for promoting unity in diversity

From the constitutional delineation above, it is clear that the move for federalism in Nigeria started with the Richards Constitution of 1946, which created three regional councils for the Western, Eastern and Northern Regions. The Macpherson Constitution consolidated this by providing that whenever central and regional laws were inconsistent, the law which was made later would prevail. The Lyttleton Constitution concretized the federal Structure for Nigeria. It provided for exclusive legislative list which specified the items on which the federal government could legislate and concurrent list stating the items that the Federal and Regions could legislate. Although, whenever there is a conflict, the federal law would prevail over regional laws, the residual powers resided with the regions. The independence and republican constitutions retained most of the provisions of the Lyttleton Constitution. Thus at independence, each region in Nigeria had its own constitution, coat of arms, motto and semi-independent missions. The federal list contained items such as archives, aviation, external borrowing, copyright, defense, currency, external affairs, extraditions, immigration, meteorology, armed forces, and nuclear energy while the regional list contained items such as antiquities, arms and ammunition, census, higher education, labor, prisons, security, traffic etc. The advent of military regime completely undermined federalism in Nigeria. The regions were broken into States by the military (from four regions to 12 States in 1967 to 19 states in 1976 to 30 states in 1991 to 36 states in 1996). The constitution was suspended

27) Wheare, K. C (1943), in Ransome P.(Ed), Studies in Federal Planning. London, Macmillan. P. 34

throughout the 29 years of military rule. On return to civilian rule in 1979, there is only one constitution for the whole country.

We have argued elsewhere that federalism in Nigeria particularly as it affects resource allocation and minority groups can be divided in to two phases:

> The phase before military rule and the phase after the military take over in 1966. During the First Republic (1960- 1966), the revenue of the country was distributed based on derivation principle. 50 percent of the revenue from mineral resources was given to the region from where the minerals were extracted. Another 30 percent was put in a distributable pool, which is divided among all the regions including the producing region. Only 20 percent went to the Federal Government. The military took over power in 1966, which was followed by a 30 month civil war. Most of the oil producing communities was in the Republic of Biafra, so declared by Col. Emeka Odumegwu Ojukwu. In 1969, when the Federal Military Government had successfully "liberated" the oil producing communities, it promulgated the Petroleum Decree (No 51) of 1969 that vested all the lands and the resources in, under or upon the Land on the Federal Military Government. There is no doubt that the Federal Government has continued with this war strategy on the Niger Delta people till date.[28]

Challenges of ethnic and religious diversity in Nigeria

…ethnic and religious manipulation by the political elite has posed challenges to governance and security in Nigeria.

The ethnic and religious composition of Nigeria and its manipulation by the political elite has posed many challenges to governance and security in Nigeria. This has been aggravated by the failure of the State to perform its core duties of maintaining law and order, justice and providing social services to the people. For instance, the failure of the State has led to the emergence of ethnic militias in several parts of the country such as the Odua Peoples' Congress (OPC) and the Baakasi Boys.

Much has been written on the politicization and manipulation of ethnic and religious identities in Nigeria.[29] In the past twenty years, there is a resurgence of ethnic and religious violence in Nigeria. It is instructive to note that this resurgence coincided with economic crisis experienced in Nigeria and the introduction of Structural Adjustment Programme (SAP).[30] The sources of conflict in Nigeria include militarism, absence and distortions of democracy, economic problem, collapse of the educational sector, the growing army of

28) Ramphal, (1979)
28) Igbuzor, O. (2002), "Federalism and Resource Control in Nigeria," in Igbuzor, O and Bamidele, O (Eds), Contentious Issues in the Review of the 1999 Constitution, Lagos, Citizens Forum for Constitutional Reforms (CFCR)
29) Otite, O. (1990), Ethnic Pluralism and Ethnicity in Nigeria, Ibadan, Shaneson; Nnoli,, O. (1978), Ethnic Politics in Nigeria, Enugu, Fourth Dimension Publishers
30) Ihonvbere, J.O. (1993) " Economic Crisis, Structural Adjustment and Social Crisis in Nigeria" in World Development, No. 1; Osaghae, E. E. (1995), Structural Adjustment and Ethnicity in Nigeria, Uppsala, Nordiska Afrikainstitutet Research Report No. 98; Egwu, S. G. (1998), Structural Adjustment, Agrarian Change and rural Ethnicity in Nigeria. Uppsala, Nordiska Afrikainstitutet Research Report No. 103

almajirai,[31] security inadequacy, intensification of micro-nationalism, absence of justice and equity and weakness of Civil Society groups.[32] Increasingly, most ethnic clashes in Nigeria often have religious dimensions.[33]

Surveying ethnic and religious crises in Nigeria there are clearly some trends. First impressions are that the crises are triggered mainly by religious reasons. But the reasons for the crisis go beyond religion to include political and economic factors. The political class lacks national acceptance and cannot spearhead a national mobilizing ideology, it resorts increasingly to the politicization of ethnicity, and makes a fetish of religious differences, and the awakening of pristine and atavistic norms and practices.[34] The Muslims appeared to be on the offensive. But some have pointed out that "Muslims are often provoked into violent action by offensive preaching by some Christian Evangelists."[35] Thirdly, the frequency and intensity of conflicts increased during the Babangida regime. This may not be unconnnected with the controversy that engulfed the nation when Nigeria applied for membership of Organisation of Islamic Conference (OIC). Finally, there has been an increase in violence and many crises since return to civil rule in Nigeria. Studies have shown that when countries emerge from long years of authoritarian rule through pacted transition arrangements, there is the tendency for increased violence particularly if greater emphasis is not placed on the building of institutions and mechanisms to operate them.

Some measures have been taken to curb ethnic and religious conflicts.[36] These include:

…measures to curb ethnic and religious conflicts include:

• Adoption of Federalism.
• Enhancement of Human Rights.
• Adoption of a Multi-Party System.
• Modification of Electoral System.
• Prohibition of Ethnic and Religious Parties.
• Prohibition of State Religion.

- **Adoption of Federalism in Nigeria:** It was reasoned that with the diversity of Nigeria, federalism would be the best system suited for the country. As noted earlier, the move towards federalism, which started with the Richards Constitution of 1946, was consolidated by the Lyttleton Constitution of 1954 when there was co-existence of the Federal Government alongside the Regional Governments of North, East and West. In 1963, the Midwest region was created bringing the number of regions in the country to four. Each region had its own police, Courts and Prisons. The intrusion of the military into governance changed all these and turned the country into a defacto unitary and centralized State after the manner of military high commands.
- **Entrenchment of fundamental Human Rights provisions in the Constitution:** During the 1954 Constitutional Conference that led to the

31) Children that are given to experienced Islamic clerics for the purposes of Koranic lessons. In most cases, they are left to fend for themselves through begging.
32) Shawalu, "The Socio-Economic and Political Context of Ethnic and Religious Crises in Nigeria" in Okoye, F. (Ed) (2000), Impact of Religious and Ethnic Conflicts on Women and children in Northern Nigeria, Kaduna, Human Rights Monitor
33) Okafor, F. U.(1997) (Ed), New Strategies for Curbing Ethnic and Religious conflicts in Nigeria, Enugu, fourth Dimension Publishers; Alemika, E.E.O. "Sociological Analysis of Ethnic and Religious Conflicts in the Middle Belt of Nigeria" in Ethnic & Religious Rights, A Quarterly Publication of Human Rights Monitor Special Edition, April, 2000; Okoye, F. (Ed)(2000), Impact of Religious and Ethnic Conflicts on Women and children in Northern Nigeria, Kaduna, Human Rights Monitor
34) Williams, P.T (1997), "New Measures to Ensure an Effective Separation of State and Religion in Nigeria" in Okafor, F. U.(1997) (Ed), New Strategies for Curbing Ethnic and Religious conflicts in Nigeria, Enugu, fourth Dimension Publishers
35) Udoidem, S. I. (1997), "Religion in the Political Life of Nigeria: A Survey of Religious Related Crisis since independence" in Okafor, F. U.(1997) (Ed), New Strategies for Curbing Ethnic and Religious conflicts in Nigeria, Enugu, fourth Dimension Publishers, p. 179
36) Okafor, F. U.(1997) (Ed), New Strategies for Curbing Ethnic and Religious conflicts in Nigeria, Enugu, fourth Dimension Publishers

making of the Lyttleton Constitution of 1954, minority groups in Nigeria expressed fears of discrimination, marginalization and oppression. This led to the setting up of the Willinck Commission on 26 September 1957. The Commission recommended the entrenchment of fundamental human rights in the Constitution. This recommendation was accepted and fundamental human rights provisions have formed part of Nigeria Constitution from the Independence Constitution of 1960 to date.

- **Adoption of Multi-party system:** It was reasoned that a multi-party system would give the ethnic minorities an opportunity to protect their interest.
- **Modification of Electoral system:** As from the Second Republic, to become a president of Nigeria, a successful candidate is not only required to obtain a majority of votes cast but must also obtain not less than one-quarter of the votes cast in the election in each of at least two-thirds of all the States of the Federation. This was provided for in Sections 125–126 of the 1979 Constitution and replicated in sections 130–132 of the 1989 Constitution and sections 131–134 of the 1999 Constitution.
- **Constitutional prohibition of Ethnic and Religious parties:** In the first Republic, the major political parties were of ethnic origin.[37] It has been argued that the ethnic orientations of the political parties were among the main reasons for the collapse of the republic.[38] In order to address this pitfall, the 1979 Constitution of the Second Republic prohibited the formation of political parties with ethnic or religious connotation. Section 202 of the constitution provides that "No association by whatever name called shall function as a political party unless-
  a) The names and addresses of its national officers are registered with the Federal Electoral Commission;
  b) The membership of the association is open to every citizen of Nigeria irrespective of his place of origin, sex, religion or ethnic grouping;
  c) A copy of the constitution is registered in the principal office of the Commission in such a form as may be prescribed by the commission;
  d) Any alteration in its registered constitution is also registered in the principal office of the Commission within 30 days of the making of such alteration;
  e) The name of the association, its emblem or motto does not contain any ethnic or religious connotation or give the appearance that the activities of the association are confined to a part only of the geographical area of Nigeria; and
  f) The headquarters of the association is situated in the capital of the federation.

This provision was repeated in Section 220 of the 1989 Constitution and section 221 of the 1999 Constitution.

37) The Northern Peoples Congress (NPC) emerged from a Northern based cultural group known as Jam'iyyar Mutanen Arewa with the support of Hausa-Fulani while the Yoruba cultural organization Egbe Omo Oduduwa metamorphosed into the Action group with its base in Western Nigeria. The National Convention of Nigerian Citizens (NCNC) had its base within the core of Igboland in Eastern Nigeria. Other smaller parties like Northern Elements Progressive Union (NEPU), United Middle Belt Congress (UMBC) and Niger delta Congress had their ethnic support from the Hausa/Fulani peasants, Tiv and Ijaw/Kalabari respectively.
38) Abubakar, D (1997), "The Rise and Fall of the First and Second Republics of Nigeria", in Okafor, F. U.(1997) (Ed), New Strategies for Curbing Ethnic and Religious conflicts in Nigeria, Enugu, fourth Dimension Publishers

- **Constitutional prohibition of State Religion:** Section 10 of both the 1979 and 1999 Constitutions and section 11 of the 1989 Constitution provides that "The Government of the Federation or of a State shall not adopt any religion as State religion".

Apart from the measures described above, government usually sets up a Commission of Enquiry after every major crisis in Nigeria. Unfortunately, the reports of most of the Commissions are neither made public nor acted upon. In the recent past, the Federal Government set up an Institute for Peace and Conflict Resolution. However, there is no mechanism for early warning signal and conflict prevention in Nigeria.

Lessons from Nigeria's experience

1. Constitutional engineering after the failure of the First Republic in Nigeria has prevented the emergence of religious parties in Nigeria. Although some of the political parties have more following in certain regions of the country (Unity Party of Nigeria (UPN) and Alliance for Democracy (AD) in South Western Nigeria, Peoples' Redemption Party (PRP) in Northern Nigeria, All Progressive Grand Alliance (APGA) in eastern Nigeria, the outlook, programs and mobilization of all the parities are national.
2. The Nigerian experience has shown that constitutional provisions alone cannot prevent ethnic and religious conflicts. Furthermore, the constitutional prohibition of State religion has not prevented Governments (both Federal and State) from giving preferential treatment to certain religions. It has also not stopped some State Governments in Northern Nigeria from introducing the Sharia legal system.
3. The experience of constitution making in Nigeria shows that the people have never really participated in the making of a constitution for the country. Since the people did not participate in the making of the constitution, they cannot relate to the final product as their own. They are therefore alienated from the political process and the end result is lack of respect for the rule of law, corruption and conflict.

Since the people did not participate in the making of the constitution, they cannot relate to the final product as their own.

4. Religion is used by the elite as a tool to manipulate people and to have access to power. There is therefore a big difference between the constitutional provisions and reality. The challenge is to ensure the creation of institutions and mechanisms that will anticipate, and try to prevent these conflicts and mobilize the people to ensure good governance, accountability and transparency while ensuring that there are institutions of horizontal accountability that are independent.

About the Authors

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Chao-Tzang Yawnghwe is an activist and advisor of the United Nationalities League for Democracy (UNLD), the Shan Democratic Union, the National Reconciliation Program (NRP), and Technical Assistance Network (TAN). He works with the various political fronts and organizations of Burma's democratic movement. After serving as a leader of the Shan resistance movement, including 14 years as a commanding officer in the field with the Shan State Army, he earned a Ph.D. in political science at the University of British Columbia. He has taught at the University of British Columbia and Simon Fraser University in Vancouver. He has published on Burma, issues of third world nationalism and development, and on modern social and political theory.

List of Participating Groups:

The workshops were attended by around 120 representatives from various ethnic nationalities.

All Arakan Students and Youth League AASYL
All Burma Students Democratic Front ABSDF
All Burma Students League ABSL
All Burma Democracy Lusei Women's Organization ABDLWO
All Kachin Students & Youth Union AKYU
Arakan Liberation Party ALP
Arakan League for Democracy ALD
Burma Lawyers Council BLC
Chin National League for Democracy CNLD
Chin Forum
Chin Students Union CSU
Chin National Front CNF
Chin Human Rights Organization CHRO
Chin Refugee Committee CRC
Chin Women Organization CWO
Chin Literature and Cultural Committee CLCC
Chin Trade Union CTB
Chin National Council CNC
Cho Youth Association CYA
Delhi Haka Seino Bu
Democratic Party for New Society
Federation Trade Union of Burma FTUB
Falam Union (Delhi)
Khumi Democracy Organization KDO
Khumi Youth Association KYA
Kuki Women Human Rights Organization KWHRO
Kuki Students Democratic Front KSDF
Kuki National Organization KNO
Mara People Party MPP
Matu Youth Organization MYO
Naga National League for Democracy NNLD
National League for Democracy NLD (LA)
Radio Free Asia RFA
Shan Students & Youth Union SSYU
Women Rights and Women Affairs of Burma WRWAB
Zomi Human Rights Foundation
Zomi Youth Association ZYA
Zomi Re-unification Organization ZORO
Zo Revolutionary Organization
Zo National Union ZNU
Zomi National Congress ZNC (Liberated Area)

About International IDEA:

Created in 1995, the International Institute for Democracy and Electoral Assistance (IDEA) is an inter-governmental organization with member states across all continents. IDEA operates at the interface between governments, research and the international development community to support sustainable democracy worldwide. IDEA works with both new and long-established democracies, helping to develop the institutions and culture of democracy. It operates at international, regional and national level, working in partnership with a range of institutions.

IDEA aims to:

- Help countries build capacity to develop and strengthen democratic institutions.
- Provide a forum for dialogue between academics, policy-makers and practitioners around the world.
- Synthesize research and field experience, and develop practical tools to help improve democratic processes.
- Promote transparency, accountability and efficiency in election management.
- Facilitate in-country democracy assessment, monitoring and promotion by local citizens.

IDEA's current areas of activity include:

- Electoral systems and management
- Political participation, including women in politics
- Political parties, management and financing
- Post-conflict democracy building and dialogue
- Democracy at local level
- Democracy indicators and assessment