

# **Federalism and the Protection of Minority Rights: Some Lessons for a New Democratic Burma**

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One of the most urgent problems in the world today is to preserve diversities either where they are worth preserving for themselves, or where they cannot be eradicated even if they are not desirable, and at the same time to introduce such a measure of unity as will prevent and facilitate co-operation. Federalism is one way of reconciling these two ends.<sup>1</sup>

Few political concepts and constitutional doctrines have enjoyed as much attention in the second half of this century as federalism. This concept has assumed particular significance since the collapse of communism, so much so that, in the opinion of one observer, "a federalist revolution [is] sweeping the world."<sup>2</sup>

In its broadest terms, federalism can best be described as "an ideology which holds that the ideal organisation of human affairs is best reflected in the celebration of diversity through unity."<sup>3</sup> It has been commended as the best method of power-sharing in a democracy. The federalist philosophy has particularly influenced the architects of deeply-divided post-colonial societies as a means of containing ethnically-based centrifugal forces which are an inherent feature of such societies.

## **The Essential Characteristics of Federalism**

There is a wide variety of federal systems to be found in the continuum between true confederations (in which the constituent regional units enjoy a high degree of autonomy and the central government is the delegate of, and subordinate to,

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<sup>1</sup> Wheare KC, *Federal Government*, 4th ed., (London: Oxford University Press, 1963), at 244-5.

<sup>2</sup> Elazar D, "Federal democracy in a world beyond authoritarianism and totalitarianism" in McCauley A (ed), *Soviet Federalism, Nationalism and Economic Decentralisation* (Leicester: Leicester University Press, 1991), at 7.

<sup>3</sup> Smith G, "Mapping the Federal Condition: Ideology, Political Practice and Social Justice" in Smith (ed.), *Federalism: The Multiethnic Challenge* (London: Longman, 1995), at 4.

such units<sup>4</sup>) and classic unitary states (where there is only one level of truly autonomous government<sup>5</sup>). This has sometimes led to difficulties in classification: should a given political system be more accurately categorised as 'federal', 'quasi-federal' or 'unitary'? – a question which has not always been easy to answer. Even so, political scientists and constitutional theorists have, over the years, devised some rough and ready tests to apply. One such, proffered by Preston King, suggested four essential features of federalism:

1. the predominantly territorial nature of its representation;
2. the existence of at least two sub-national levels on which this territorial representation is normally secured;
3. the incorporation, by electoral or other means, of the constituent regional units into the decision-making procedure of Central government; and
4. the requirement that any alterations to the relations between Central government and the regional units can only be achieved through resort to extraordinary constitutional measures, and not by, say, a simple vote in the national legislature or a unilateral decision of the national executive.<sup>6</sup>

It is also generally assumed that most federal governments are liberal democracies, given that federalism, by its very nature, involves the politics of accommodation, but this view has been contested by some commentators. Graham Smith has argued, for example, that to dismiss non-democratic federations such as the former Soviet Union or Yugoslavia would be unwise, not least because "multi-ethnic polities whose democratic federal credentials are suspect may be capable of moving on to experiment with more democratic forms."<sup>7</sup> Generally speaking, however, it would be true to say that federalism requires a high degree of co-operation, compromise and mutual toleration on the part of its practitioners – attributes which are more likely to

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<sup>4</sup> A commonly cited example would be the Swiss Confederation where each of the twenty Cantons and six half-Cantons enjoy constitutionally-guaranteed sovereignty and the right of self-determination and where the Central Government can only exercise certain specified powers.

<sup>5</sup> A commonly cited example would be the United Kingdom, although recent developments in that country, viz. the creation of devolved assemblies in Scotland, Wales and Northern Ireland, cast doubts on the continuing validity of that description.

<sup>6</sup> King P, *Federalism and Federation* (London: Croom Helm, 1982).

<sup>7</sup> Smith, Note 1, at 8.

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be found in democracies than in totalitarian regimes. One observer has gone so far as to characterise federalism as “the twin brother of pluralistic democracy.”<sup>8</sup>

It is not surprising that federalism has been increasingly used as a means of conflict management in divided societies. As well as moderating the use of unbridled majoritarian power which can often result in the legitimate aspirations of minorities being marginalised, federalism is seen as a facilitator of greater administrative and economic efficiency through its capacity to encourage and optimise the use of local talent and creativity. A. E. Dick Howard argues that, Federalism “[e]nsure[s] a fair measure of local choice about important questions of policy and government [and] tends to promote experimentation, diversity and pluralism.”<sup>9</sup>

### **Not an Unmixed Blessing**

However, there can be no denying that there is an underlying tension between the federal principle and the principle of majoritarianism which is the central tenet of democracy. Those who believe in the centrality of individual liberty have argued, for example, that federal systems have a tendency to lead to ‘tyranny by a minority’, especially in circumstances where partisan minority groups within multi-cultural societies are allowed to exercise a veto over policy initiatives which command a broad consensus in the nation as a whole, or where such groups are allowed to assert special rights to the detriment of the freedoms and liberties of others. The language policies of the Québécois in Canada is a case in point.

Federalism also presents other difficulties. Even as a means of managing ethnic conflict, for example, the concept fails where there is no clear-cut correspondence between sizeable concentrations of the main ethnic minority groups and the boundaries of the regional units created to give them autonomy. Events that followed the collapse of communism in the former Soviet bloc or the recent disintegration of Yugoslavia would illustrate this point. Related to this is the problem, in multi-national, poly-ethnic states, of determining which

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<sup>8</sup> Duchacek ID, *Comparative Federalism: The Territorial Dimension of Politics* (Lanham: University Press of America, 1987), at xi.

<sup>9</sup> Howard AED, cited in Edrisinha R and Saravanamuttu P, “The Case for A Federal Sri Lanka” in Edrisinha and Uyangoda (ed.), *Essays on Constitutional Reform* (Colombo: Centre for Policy Research and Analysis, 1995), at 89.

minority cultures qualify for territorial recognition – a problem which is often made worse by the potential for cultural hegemony by “historical communities” (who would qualify for special treatment) over other, smaller, minorities within a regional unit. This gives rise to secessionist pressures within those units and sets the scene for further fragmentation of the nation – a process which, if allowed to continue beyond a point, might defeat the very purpose for which the federation was created in the first place. Most people would argue, of course, that federalism does not encompass the right to secession, but this distinction is not always easy to maintain in practice.

For a federation to succeed, therefore, it is absolutely essential that the right balance be struck between accommodating the legitimate aspirations of minorities and securing the wider national interest - a task which, obviously, calls for deep reserves of statesmanship, sagacity, patience and tolerance on the part of the political actors involved. History is replete with examples of federations, created with much promise, which have fallen by the wayside for want of those qualities in their leaders. Ultimately, any mechanism, however well-crafted, is only as good as the people who work it.

### **Institutional requirements**

It is also necessary to develop the need for appropriate institutional safeguards to ensure the smooth working of any federation. The institutional requirements may vary from country to country, and the safeguards may have to be tailored to meet the demands of particular situations, but it is nevertheless possible to identify certain basic structures and mechanisms that are indispensable to almost any form of federal government. These include:

1. a freely elected national legislature, whose members are directly chosen by all the people living within the boundaries of the state, including in the constituent units, normally on the basis of universal adult franchise;
2. a freely elected second legislative chamber at the Centre, composed of representatives from the constituent units, often with equal representation for each of those units (to avoid accusations of marginalisation from the smaller units), chosen by direct or indirect elections;
3. freely elected legislatures in each of the constituent units, broadly representative of the people within each unit;
4. a written constitutional document which sets out, as exhaustively and as precisely as possible, the spheres of

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- competence of the federal and state legislatures for law-making, and which specifies the procedure for amendment of the constitutional provisions (usually involving a special majority in the national legislature and concurrence of at least half the number of constituent units);
5. a legally enforceable and entrenched bill of rights with adequate protection for the cultural, social and customary rights of ethnic, linguistic, religious or other clearly identifiable minority groups;
  6. adequate mechanisms (eg. a federal Supreme Court or Constitutional Court), with binding powers of adjudication, to settle disputes that may arise over jurisdictional matters or concerning individual liberties; and
  7. clear, equitable and legally binding arrangements for revenue-raising and revenue-sharing between Central government and the constituent units.

In addition, governments have, over the years, experimented with a number of other safeguards to minimise the possibility of excessive friction between the Centre and the regional units. These include: a provision for regular consultations between the federal chief executive and the executive heads of the regional units on matters of mutual interests<sup>10</sup>; precise and legally binding mechanisms for resolving any inconsistency in the laws made by the Centre and by the regional units on subjects falling within the Concurrent List, where such a list has been prescribed by the Constitution<sup>11</sup>; avoidance of broadly-worded provisions which allow the Centre to legislate on subjects reserved for the regional units under certain circumstances<sup>12</sup>; imposition of strict limits on the use of

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<sup>10</sup> For example in Canada, the "First Ministers' Conferences" have been hailed by commentators as a vital building block for "co-operative federalism" - see Boron R, *Centre-Provincial Relations in Canada: Lessons for Sri Lanka*, Centre for Policy Research and Analysis, Colombo, 1995), p 11

<sup>11</sup> For example Art. 251, Constitution of India, which gives primacy to Central law over that State law when such inconsistencies arise.

<sup>12</sup> An oft-quoted example of this kind is the provision in the Canadian Constitution which allows the federal government to bring local works in the provinces into federal legislative jurisdiction by simply declaring them to be for "the general advantage of Canada". This provision has, however, rarely been used in practice. The Indian Constitution contains a provision (Art. 249) which goes further and allows the federal Parliament to legislate on matters falling within the exclusive competence of the States "in the national interest". This provision is hedged with some safeguards in that it can only be invoked when a majority of members in the upper house (the Council of States) passes a

emergency powers by both the Centre and the regional units, with particular care being taken to ensure that, even where a state of emergency is justified, it does not impact adversely on civil liberties more than is strictly necessary<sup>13</sup>; and giving the regional units an effective role in the choice of constitutional functionaries such as the national President, the Chief Justice of the Supreme Court and provincial Governors.<sup>14</sup>

As for the choice of particular models of government, viz. executive president v. prime ministerial or monarchical v. republican, this is determined, more often than not, by a country's history, although, occasionally, nations do decide deliberately to make a clean break with their pasts (eg. after a prolonged period of military dictatorship) and choose systems and processes which are radically different from any that went before. This, obviously, presents opportunities for creative thinking and for the adoption of legal and administrative models that are likely to be more responsive to the needs and aspirations of the people. Given the unfortunate recent history of Burma, it is hardly surprising that those in the vanguard of the ongoing campaign for the restoration of democracy there have indicated a preference for just such a fresh start.

Whatever model is ultimately chosen, those working to shape the destiny of a new democratic Burma would do well to remember that, any system for power-sharing between the majority Burman population and the ethnic minorities should not only be fair and meaningful, but should also take into account existing realities, however uncomfortable they may be. In the first place, there must be a genuine consensus on the part of all the leading players over power-sharing. Absent this consent, and any resultant federation is likely to collapse, sooner or later, as happened, for example, to the ill-fated Central African Federation in the 1950s.<sup>15</sup> Building up the

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resolution to that effect, and any such resolution would only remain in force for up to a year at a time.

<sup>13</sup> The Indian Constitution underwent extensive changes in this area following that country's nightmarish experience under the state of emergency declared by Prime Minister Indira Gandhi in 1975 - see Seervai HM, *The Emergency, Future Safeguards and the Habeas Corpus Case: A Critique*, N.M. Tripathi Pvt Ltd, Bombay, 1978.

<sup>14</sup> One way in which this can be achieved is by providing that all such appointments are made by a committee consisting of, among others, the presiding officer of the upper house who would normally be a representative of the regional units.

<sup>15</sup> This federation involved a union between white-dominated Southern Rhodesia, the relatively wealthier Northern Rhodesia (Zambia) and the small

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necessary consensus may not be an easy task - it is particularly difficult in poor, strife-ridden societies - but the effort must nevertheless be made.

Secondly, the limits of power-sharing must be settled reasonably precisely in advance, so that no one is left in any doubt about the extent of their commitment to the emerging union. A particularly thorny question that is likely to arise in the context of Burma is whether those likely to enter into a future federation would also want to reserve the right of secession. To put it another way, the concept of self-determination, often such a prominent part of constitutional discourse, needs to be clarified to a high degree of precision at the outset, to avoid recriminations later on.

Thirdly, the *terms* of membership of the federation need to be spelt out clearly to all potential member-states, so that they are able to judge for themselves the consequences of membership. This may doubtless lead to protracted - and possibly acrimonious - bargaining at the pre-union stage, but it is far preferable to go through a painful bout of bargaining and negotiation earlier on than to face the prospect of stalemate or collapse even before the ink has dried on the federation documents, or worse still, to have to work the union with disgruntled partners.

Fourthly, those at the helm of the constitution-making process would do well to remember that, while they can learn a lot from the experience of other countries, both in Asia and further afield, any attempt to blindly replicate such experience in Burma without taking into account local realities would be foredoomed to failure. In particular, they must be very mindful of the risks of heeding the glib, off-the-peg advice that some of the more ideologically fanatic foreign 'experts', whose enthusiasm for politically-correct solutions usually far exceeds their knowledge of local cultures or conditions, are bound to offer. As often as not, the prescriptions of these experts result in the disease being made worse, not better.

### **The BLC's proposals**

It is heartening to see that the Burma Lawyers' Council has already begun thinking ahead in terms of devising appropriate

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and backward Nyasaland (Malawi), the latter at the behest of the then colonial power, Great Britain.

constitutional structures for a new democratic Burma and is going about the task with a degree of thoroughness and open-mindedness which is truly commendable. The draft future Constitution, published under the auspices of the National Council of the Union of Burma, reflects these qualities in abundant measure. Its provisions on federalism are generally well thought out and sensible, although, as with any such document, there will inevitably be some need for fine-tuning as the process of consultation continues. In the opinion of this writer, the NCUB and the BLC might profit from revisiting the following areas of the document in the next stage of their consultative process:

- **Separation of powers:** this eminently desirable principle has been properly recognised as an integral part of the federal structure, but some more thought needs to be given to ensuring that it works effectively in practice. For example, one might question the advisability of having a provision which requires legislative approval for the appointment of judges (Art. 97);
- **Composition of the federal union:** the provisions creating National States, Nationality States and Member States, and National Autonomous Regions and Special National Territories within Member States (Art. 34) as well as the relationship between these entities need to be clarified further;
- **Languages:** while it is quite sensible to allow the use of native languages within Member States (Art. 6), while designating Burmese and English as the official languages of the Union, there might perhaps be some merit in also specifying: (a) the languages to be used in the courts, especially the higher courts; and (b) the link language/s to be used for intercourse between the federal and Member State governments.
- **Convening of National Assembly sessions:** it may be helpful to clarify how many of the representatives (out of the four from each Member State) need to sign a requisition for convening a special session of the National Assembly (Art. 51);
- **Initiation of legislative proposals:** the provision requiring all Bills relating to natural resources to be introduced only in the National Assembly (Art. 67) may be unduly burdensome on that Assembly, especially given that, even if such Bills are allowed to be introduced in the other House, they do have to be voted upon in the National Assembly before they are allowed to become law. Perhaps it may be



advantageous to drop this restrictive requirement in the interests of legislative efficiency;

- **Foreign investment:** the need for approval of foreign investment laws by both the federal and state legislatures (Art. 76) appears too onerous and an unfair impediment on the liberty of Member States to devise their own strategies to attract foreign investment. This provision clearly needs reconsideration;
- **The executive:** there appears to be little rationale for barring members of the National Assembly from becoming Ministers in the federal Government (Art. 88). It is not uncommon in most democracies for Ministers to be selected from either House, as this will only maximise the pool of talent available to the nation;
- **Appointment of Auditor-General:** it would be desirable to introduce additional safeguards to ensure the independence of the Auditor-General (Art. 124) - and indeed other key functionaries such as Supreme Court judges - by putting his appointment in the hands of a committee which includes, for example, the Leader of the Opposition in the People's Assembly;
- **Federal Protection to Member States:** The circumstances and the terms under which the provision for federal protection for Member States may be invoked needs clarification to avoid abuse of this power;
- **Constitutional amendment:** the provisions for amendment of the Constitution (Art. 149) appear to be insufficiently stringent, and there may be some merit in tightening them. In particular, where an amendment is likely to affect State rights, it may be desirable for it to require the approval of at least half the number of State legislatures as well as that of the federal parliament. Also, it may be worthwhile introducing some safeguards to prevent constitutional amendments unjustifiably abridging the fundamental rights of citizens.

### **Conclusion**

Federalism is clearly one of the most useful methods of power-sharing and conflict management in modern societies. It has been used successfully in countries as far apart as Switzerland and Australia, Canada and India, to contain the tensions that

are endemic in non-homogenous societies. But it is by no means a fail-safe panacea for all the ills of such societies, as the long list of short-lived federations has shown.<sup>16</sup> Indeed, an over-reliance on the federal concept as a guarantee of peace and harmony can often bring a country to grief, as the 1860 to 1865 "crisis" (the Civil War) in the American experiment with federalism starkly demonstrated. In the words of one perceptive observer, "the path of federation is no more likely to run smooth than the path of true love."<sup>17</sup> Federalism requires a high degree of commitment, political will, tolerance, statesmanship and patience on the part of its practitioners.

Given all those qualities, however, federalism offers the best hope of creating a more stable and harmonious polity, especially in societies such as Burma that are deeply divided along ethnic lines. The architects of a new democratic Burma would do well to embrace this concept - with all its promise and all its challenges - but they need to work very hard to ensure that any future Burmese federation lives up to the high expectations of the Burmese peoples. Not only will the balance between unity and diversity have to be struck with a great deal of pragmatism, but every effort will have to be made to secure the widest possible consensus on the terms of the new federal settlement. More importantly still, no one should be left in any doubt as to the continuing price that every man, woman and child across the land would have to pay - in terms of patience, vigilance, tolerance and co-operation - to make federalism a success. To adapt a quotation from that great American jurist, Felix Frankfurter, "Federalism involves hardship - the hardship of the unceasing responsibility of every citizen."

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<sup>16</sup> Among such federations are those attempted in the Carribean in the 1950s and 1960s, between Singapore and Malaysia between 1963-65, and in Central Africa in the 1950s. There were also a number of attempted federations which never materialised, eg. in South Africa in the mid-1800s and in East Africa in the 1960s.

<sup>17</sup> Hicks UK, *Federalism: Failure and Success - A Comparative Study*, Macmillan, London, 1978, p 14.