Minority Rights in Myanmar's Constitutions Compared with Certain Other Commonwealth Countries Gaining Independence Postwar

This paper provides analysis of how minority groups were treated in the national constitution of Burma at the time of independence as well as in successive constitutions and laws. While there is a particular focus on issues of citizenship, the paper also looks at provisions relating to the self-governance of minorities. In both cases, comparisons are drawn with various other commonwealth countries that achieved independence in the post-war period.

Citizenship and Nationality

A. The Meaning and Approaches to Citizenship

Historians debate how far back some concept of citizenship has existed in the West, but there is no doubt that it developed into a central concept with the growth of representative government and liberal democracies, when "a culture of citizenship rights and duties was born"[1]. Citizenship's importance is attested by the prominence of the citizenship provisions, along with rights, in the early sections of many modern constitutions throughout the world.

Technically, a citizen is recognized as being a legal member of a sovereign state. Being a citizen carries certain common rights, but not all rights are equally extended to all citizens, e.g. minors, prisoners, expatriates. Republicans saw citizens as the source of sovereign power and over time, and with many battles, those with the status of citizen were provided many common rights. In 1950, the British social theorist T.H. Marshall wrote a famous analysis of the development of citizenship to encompass first civil rights (the law), then political rights (democracy) and ultimately social rights (the welfare state),[2] and it has been suggested that in more recent years citizenship in many countries has been extended to include cultural minority rights.[3]

The classic distinction regarding how different countries determine who qualifies for citizenship turns on the concepts of *jus soli* and *jus sanguinis,* but this is often over-stated because frequently the criteria involve elements of both principles. According to *jus soli,* citizenship is determined by place of birth—those born in a country are its citizens. While according to *jus sanguinis*, citizenship is determined by descent—those whose parents (or grandparents) were, or had the right to be, citizens themselves become citizens, and, in its purest form, this regardless of where they may be born. As we shall discuss, many countries combine elements of both concepts, so, for example, a right to citizenship might involve some element of ancestry but also regarding place of birth. And countries typically also

[1] John Keane, *The Life and Death of Democracy,* (London: Pocket Books, 2009), p.xxi.
[2] "Citizenship and Social Class" in idem. and Tom Bottomore, *Citizenship and Social Class* (London: Pluto Press, 1992)
[3] Rainer Baubuck, "Cultural Citizenship, Minority Rights, and Self-Government",….

have procedures for citizenship by "naturalization", which can involve criteria such as length of residency, understanding of the national language and history, and oaths of allegiance. Patrick Weil has argued that each state's citizenship laws are influenced by juridical traditions, nation-state building, examples from abroad, the role played by emigration and immigration, and the presence of minorities, and that over time there have been pressures for convergence of nationality laws in countries with *jus soli* and *jus sanguinis* traditions. In particular, he shows that the *jus sanguinis* concept as originally conceived in Prussia was not racial—Prussian citizenship was equally open to Jews and Poles—and that it only became racialized by the Nazis. Paradoxically, Federal Germany continued the racialized approach after World War II as a way to connect with displaced Germans in Eastern Europe and the population of East Germany, but its laws have evolved to include elements of *jus soli* as well.[4] Increasingly, countries of emigration are using descent as a criterion for citizenship as a way to maintain connections with their diaspora—even, in several cases, to the point of having representatives in their parliament elected by citizens abroad. This is one reason for the growing acceptance of dual nationality in many countries: the countries of emigration want the connection, while the countries of immigration face political pressures from their newcomers to have both citizenships.

The luxury of dual citizenship can only be dreamed of by the great losers in the international web of citizenship laws, namely the stateless who have citizenship in no country. Statelessness was recognized as a reality during World War II and initially it was thought it could be dealt with under conventions on refugees, but not all stateless are refugees. The international community addressed this issue first in the 1954 Convention on Statelessness, which is designed to ensure that stateless people enjoy a minimum set of human rights and standards of treatment relating to education, employment and housing and, importantly, the right to identity, travel documents and administrative assistance. The 1961 Convention on the Reduction of Statelessness established an international framework to ensure the right of every person to a nationality and requires states to establish safeguards in their nationality laws to prevent statelessness. Eighty-nine states are party to the 1954 Convention and 68 to the 1961 Convention, but not Myanmar or its neighbours Bangladesh and India.

B. British Subjects in Burma

Burma achieved its independence on January 4, 1948, four months after India and Pakistan and one month before Ceylon, in what was the first postwar wave of former British colonies achieving independence. This ended 123 years of British presence in what is now Burma, which started with the first Anglo-Burmese war and led to Burma's integration in 1885 as a province of India in the British Empire. It became a separate colony only in 1937. British rule, interrupted from 1942-45 by

[4] "Access to Citizenship: A Comparison of Twenty-Five Nationality Laws", in T. Alexander Aleinikoff and Douglas Klusmeyer (eds.), *Citizenship Today: Global Perspectives and Practices,* (Washington: Carnegie Endowment, 2001).

the Japanese invasion and occupation, was re-established in 1945 and led to a period of political instability, which stabilized in late 1946 when Aung San, the nationalist leader, was brought into government and became effectively the government leader. Within four months he and Prime Minister Atlee has signed an agreement guaranteeing Burma's independence within a year. A critical issue on the road to independence was the future of the Frontier Areas, which the British had deemed backward and not ready for self-determination. Leaders of the Shan, Kachin, Chin and Karen peoples had preliminary discussion around independence with senior Bamar representative at the first Panglong conference in 1946, but the breakthrough, which paved the way for independence, came in February 1947 when joint agreement was reached on achieving early independence for a Union of Burma, which would provide full autonomy for the Frontier Areas.

Citizenship had not been a concept associated with the British Empire at the time of Burmese independence. Rather, persons born in the British Empire were deemed "subjects" and entitlement to this status had been set out in the British Nationality and Status of Aliens Act of 1914. Its main implication for Burma was that any person born in the Empire was a subject, as were persons born outside the Empire of a legitimate British subject father, or married to a male British subject. The concept of citizenship only entered into British usage after Burmese independence when Commonwealth countries agreed to follow Canada's example of enacting its own citizenship law. In Britain's case this was done through the British Nationality Act of 1948, which created the status of citizen of the United Kingdom and Colonies. At the same time, Commonwealth member states legislated for the shared status of Commonwealth citizen, which carried different rights in various jurisdictions, but this did not apply to Burmese in that Burma left the Commonwealth on acquiring independence.

While all Burmese had certain rights as British subjects, e.g. to a passport, when the country was a colony, internally there was nothing like a common, modern citizenship. Partly this was because of the limits on internal sovereignty, but it also was intrinsic to the British practice of indirect rule and preserving exclusive notions of identity through tribal and ethnic affiliations, which was inherently in conflict with British encouragement of a progressive move towards an inclusive sense of nationhood. In most colonies, the British had two legal systems: one modern and one customary for natives and often only white settlers were completely under modern law, while natives were governed in large part by the customary law of their ethnic communities. As Mahmood Mamdani has written of experience in Africa:

> Colonial legal theory justified the subordination of subjects to a fused power as the continuation of a customary law and gave it the name of indirect rule; in contrast, it termed as direct rule the racially defined exclusion of colonized persons from citizen rights guaranteed by civil law in a differentiated form of power that framed civil society. Postindependence governments seeking to overcome this duality took one of two alternatives: either preserving the customary in the name of defending tradition against alien encroachment or

> abolishing it in the name of overcoming backwardness and embracing triumphant modernism.[5]

In Burma, the British made a sharp distinction between the more manageable lowland areas and the less tractable mountainous areas. "In the latter… local leaders were allowed to maintain near total autonomy in return for tax payment and professed loyalty to the British Empire. Meanwhile, administration in mostly lowland 'Ministerial Burma' was systematically centralized, limiting the authority of local power holders."[6]

C. Citizenship in Post-Independence Burma/Myanmar

The 1948 Constitution gave the first expression to the concept of a Burmese citizenship. It stated there would be but one citizenship, with no distinct citizenship at the unit level (Art. 10). And a citizen was to be any person both of whose parents were from one of the indigenous races, or a person born in Burma one of whose grandparents was indigenous, or a person born in the British dominion and who has resided for not less than 8 of the 10 years preceding independence day and who intends to reside permanently and elects for citizenship (Art. 11). At the same time, Parliament may make any laws relating to citizenship, regardless of Article 11. Given this, the subsequent legislation was critical. The 1948 Union Citizenship (Election) Act, 1948 basically reiterated the terms of Article 11 of the constitution, while the 1948 Union Citizenship Act made explicit reference to Article 11 as grounds for citizenship, while expanding eligibility regarding those born outside the country and those who had served three years in the military. The latter act also provided a list of indigenous races, which were also to include "such racial groups as settled permanently from 1823 AD" (Art. 3); this was deemed to exclude the Rohingya, who were deemed to have arrived after this, though the historic origins of the Rohingya in Burma are disputed. In 1951, the Residents of Burma Registration Rules were promulgated: these established procedures for issuing registration cards to "whoever resides within the Union of Myanmar" and were for identification related to security, so that the card had to be on a person when in certain areas; these procedures were deemed to encompass those for the registration of foreigners of 1940.

It will be seen that these provisions were a mix of *jus sanguinis* and *jus soli,* with the greater emphasis being on citizenship by descent, but citizenship by residence of a sufficient duration seemed to be open on a non-discriminatory basis to those with no claim of descent, at least in law. As a practical matter, it has been argued that Article 11 (iv) denied citizenship to recently arrived Indian immigrants, who had trouble documenting the necessary residency. At the same time, most other ethnic minorities, including the Rohingya, obtained National Registration Certificates,

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[5] *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism,* (Princeton: Princeton University Press, 1996), p. 298.

[6] Kim Jolliffe, *Ethnic Armed Conflict and Territorial Administration in Myanmar,* Asia Foundation, June 2015, p. iv

which conferred full legal status and allowed them to participate in the political system.[7]

The military takeover of the Burmese government in 1962 marked a significant hardening of practice regarding the citizenship status of the Rohingya and some other minorities. By 1970 Rohingya were no longer being issued citizenship cards and this appears to have been done without any change in the law. However the more restrictive intent was clear in the new constitution of the Socialist Republic of the Union of Burma, 1974, which stated simply that all born of parents, both of whom are nationals, are citizens, and for the rest citizenship was to be prescribed by law. This intent was elaborated in the Burma Citizenship Law (No. 4 of 1982), which defined as citizens nationals such as the Kachin, Kayah, Karen, Chin, Bamar , Mon, Rakhine or Shan and ethnic groups settled in any of the territories included in the State as their permanent home from a period prior to 1823 AD. Citizens were to include every person both of whose parents are nationals. It also created a new category of Associate Citizen, which was open to those who qualified under the 1948 Act, whose holders were entitled to the rights of a citizen "except those stipulated by Council of State". And there were similar provisions for Naturalized citizens. There were complicated rules governing the right to acquire citizenship by descent, depending on the full, associate or naturalized status of various combinations of parents or grandparents. Associated with this law was a document of official procedures in 1983, which gave as the rationale for Article 4's exclusion from national status of groups not settled in the country in 1823 that they came to country the first Anglo-Burmese war, which marked the effective end of Burmese sovereignty.

The text of these instruments with the different classes of citizenship was new and opened the door to reduced rights for associate or naturalized citizens. In particular, it reduced the status of those who had acquired their citizenship through the residency provisions of the 1948 constitution and citizenship legislation to that of "associate citizens". However, it appears that few who had obtained citizenship under the 1948 provisions managed to qualify as associate citizens under the 1982 Act[8]. There was a nation-wide citizenship verification drive in 1989, which issued colour-coded identity cards based on class of citizenship. Apparently, Rohingya who submitted old national registration cards were given temporary registration cards, not citizenship cards, regardless of past status. Since this law came into effect, members of excluded minorities have been largely excluded from employment in the civil service or military and have seen significant constraints on their rights of mobility and to education—though how much of this was spelled out in law is unclear. An exception was that the temporary registration cards were accepted as qualifying the Rohingya to vote in the 2010 general election, but this was revoked in 2015, when they were disenfranchised. The International Observatory on

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[7] Cresa L. Pugh, *Is Citizenship the Answer? Constructions of belonging and exclusion for the stateless Rohingya of Burma,* IMI Working Paper No. 76, International Migration Institute, University of Oxford, 2013, p.14

[8] The author has been unable to ascertain whether the Council of State promulgated rules defining the rights of associate or naturalized citizens.

Statelessness claims that three groups in the country were effectively denied any form of citizenship after 1982 and so were stateless: the Rohingya (about 700,000), persons of Indian origin (PIOs) (over half a million); and children born outside the country whose Burmese parents left illegally or fled persecution (perhaps two million migrant workers and 150,000 refugees).[9]

The final legal document of importance regarding citizenship is the Constitution of the Republic of Myanmar 2008. Article 345 marks a continuation of policy in defining citizens as those born of parents, both of whom are nationals, or already citizens, while Article 347 gives Parliament the authority to pass legislation on the subject. This constitution, like its predecessor of 1948, has extensive provisions on rights, but a striking feature of these rights in both documents is how many are deemed to be attached to "citizens", with very few attached to "persons". Thus citizens are guaranteed equal opportunity for employment and business, liberty re expression, association and language development, residence throughout the country, protection of their property, privacy and the security of their homes, but the only rights attached to "persons" relate to due process before the law, a right of defence, freedom of conscience and religion, and habeas corpus.

In conclusion, the story of citizenship in Myanmar has been one of increasing restriction and exclusion for marginalized minorities. The original policy of 1948 placed a strong emphasis on descent from a national group, but with some opening to naturalization for those with long established residency. With the arrival of military government in 1962, this shifted to an increasingly restrictive approach, often of questionable legality, that makes naturalization extremely difficult and has created inferior classes of citizenship, which themselves are difficult to obtain and have uncertain rights, so that many are left with no more than identity cards as foreigners, which carry few rights—the right to vote having been lost most recently. This has produced large numbers of stateless people, both in Myanmar and in its diaspora. It can be argued that extending citizenship to these populations will not in itself resolve the issues of marginalization[10], but it would mark a major step.

D. Comparisons with Experience in Other Newly Independent ex-British Colonies

Burma was one of four British colonies to get independence in the immediate post-war period. Citizenship in India and Pakistan was complicated by the massive human dislocation of partition, which required special provisions in both cases, but otherwise the initial approach was that every person having domicile, or having been born, or having parents born in or ordinarily resident in India or Pakistan respectively would qualify as a citizen. In due course both permitted those born of one parent qualifying for citizenship to become a citizen. Policies on dual nationality have evolved as both countries have had an interest in maintaining

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[9] *Burma/Myanmar,* accessed at file:///Users/georgeanderson/Desktop/myanmar%20citizenship/%20Stateless%20in%20Myanmar.webarchive on 9.6.2017

[10] Pugh, op.cit.

relations with their diaspora. Pakistan initially permitted it for those having British citizenship (which included all colonies at the time) and for women married to a Pakistani citizen; it now has dual citizenship arrangements with 18, mostly Western, countries, but dual citizens may not run for public office, or serve in the civil service or military. Indian policy has been much more restrictive in that the constitution prohibits dual citizenship, but persons of Indian origin who are citizens of other countries (other than Pakistan and Bangladesh) can now be granted the status of Overseas Citizenship of India, which entitles holders to a lifelong visa but no more.

Whatever the formal citizenship arrangements, there have been many cases of strained relations between distinct populations, which have affected rights and effective citizenship in important ways. The many British colonies that gained independence in the 1950s and 1960s tended to have fairly liberal citizenship laws, usually extending citizenship to those born in the country with one or both parents also born in the country and to those born outside if their father was a citizen. They also provided for citizenship by naturalization, usually after a period ranging from 4 to 10 years. It was common to prohibit dual citizenship, which became especially significant in some ex-colonies that had large settler communities of British or Asians, for these people had the choice of taking the citizenship of the newly independent country or of the United Kingdom and Commonwealth. Those who chose the latter were sometimes discriminated against or even, in the worst cases, expelled.

Inter-group animosity and resentment, hostility toward and rejection of the "other", has arisen in widely diverse circumstances, which go beyond the scope of this paper. Each situation has its own dynamic, logic and history, and this affects ultimate outcomes. Populations that are viewed as "alien" or non-national in some way by national communities may be refugees, relatively recent migrants, long-established communities but whose origins are viewed as alien, and long-established populations who have strong ethnic or national links with a neighbouring population, which may be the majority in a neighbouring country. Equally important are social and economic distinctions, such as whether a "marginal" or "alien" community is advantaged or disadvantaged, whether it is secessionist or not, how large it is relative to the "national" community.[11]

We can see this variety amongst the British colonies that gained independence post-war:

- The Somalis in Kenya, a poor indigenous group of largely nomadic pastoralists, who were 5 percent of Kenya's population, occupied the arid North Eastern Province that had 30 percent of the country's land. There was no issue regarding their historic roots in the area, but during the process of decolonization the British did soundings on the preference of these people,

[11] Mass expulsions of groups have occurred in war and peace. The targeted groups include "aliens", migrant workers, and persons enjoying special protection. Expulsions can be explicit or indirect, where a government adopts "refugee generating policies". See Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice,* (Martinus Nijhoff: The Hague, Boston, London, 1995)

who overwhelmingly wished to be united with British Somalia, but Jomo Kenyatta objected to such a drastic loss of territory, so the Kenyan Somalis became Kenyans, in principle with full citizenship. However, the group, which had been marginalized and discriminated against during the colonial period, became even more so, especially during a separatist insurgency in the 1960s and an extended period of Emergency Rule. While conditions slowly improved—and some Kenyan Somalis had high office in the national government—the Kenyan Somalis of the northeast had especially strong expectations for political devolution, following the Constitution of 2008, in which they form the majority in three of 47 counties. As a marginalized area, they have advantageous fiscal support and "county officials say it has brought more development" than the preceding 50 years. However, progress has been hampered by the spillover from the conflict in Somalia—hundreds of thousands of refugees and attacks by Al-Shabab, which has meant that security considerations often trump respect for Kenyan Somalis' rights as citizens.[12]

- In Malaysia, the majority of the population, the indigenous Malays, were economically disadvantaged compared to the minority Chinese and Indian communities, largely descended from settlers in the nineteenth and early twentieth centuries. The original constitutional bargain in 1957 saw the latter granted full citizenship while the Bumiputera (the Malay and other indigenous groups) were recognized to have a "special position" that could merit remedial programs. The initial government was a coalition of parties representing the three major communities, but high inter-communal tensions and economic disparities led to the eruption of Malay-Chinese riots in 1969 and a shift towards very aggressive affirmative action programs in favour of the indigenous. These have been a success in virtually eliminating economic disparities, but politics has become dominated by the Malay and other indigenous groups, with the Chinese and Indian communities largely excluded, seemingly blocking the transition to a more neutral, "needs based" approach to government programming.[13]
- In Fiji, by contrast to Malaysia, the indigenous population was a minority at independence in 1970, while the more prosperous Indian community, largely descended from indentured labourers who came in the nineteenth century, formed the majority. The independence constitution was designed to give the two major communities equal weight, which involved voters being registered by group and voting for separate lists. The country has had a troubled history of coups interrupting democracy and the emigration of many Indo-Fijians has resulted in a clear indigenous majority. The 2013

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[12] Crisis Group, *Kenya's Somali North East: Devolution and Security,* Nairobi/Brussels, 17 November 2015

[13] Hwok-Aun Lee, *Majority Affirmative Action in Malaysia: Imperatives, Compromises and Challenges,* Global Centre for Pluralism, March 2017, www.pluralism.ca

constitution marked a clear break from ethnic voting rolls—all citizens now vote together in a national proportional representation system and there are no ethnic criteria for holding any office. However, significant restrictions on certain freedoms remain and the country is still subject to Commonwealth restrictions because of certain undemocratic practices.

- A number of non-national minorities were persecuted in newly independent African countries: Ghana expelled long-resident Nigerians in 1969, Nigeria expelled illegal immigrants in 1976 and Idi Amin of Uganda notoriously ordered the expulsion of the Asian community with 90 days notice in 1972. Some 23,000 of these had had their citizenship approved and they were ultimately exempted (though many left voluntarily), while the many more with United Kingdom and Commonwealth citizenship were systematically expelled. The community was devastated and this had serious economic costs as well to Uganda. In 1992 the law permitting Asians to recover lost property was made more accommodating and a significant number have returned to Uganda.

The experiences of Ceylon/Sri Lanka and Nigeria may have special lessons for Myanmar.

- Ceylonese citizenship was much more complicated because of the hostility of the Sinhalese majority to citizenship for the Hill or Indian Tamils, most of whose ancestors came to Ceylon between 1820 and 1840 to work the tea plantations. The initial Ceylon Citizenship Act, No. 18, 1948, defined citizens as those born in Ceylon if they had a father or paternal grandfather and great grandfather born in Ceylon; those born outside Ceylon qualified if their father was a citizen and they were registered within one year of birth. Only about 5,000 of 700,000 Hill Tamils qualified under these rules and the rest were rendered stateless (which they had not been when Ceylon was a colony). In 1949, the Indian and Pakistani Residents (Citizenship) Act No. 3 qualified a further 100,000 Hill Tamils, but the Ceylon (Parliamentary Elections) Amendment Act of the same year stripped them of the franchise, which was significant in that with about 11 percent of the population they had had seven MPs and their votes were important in another 20 constituencies. The treatment of the Hill Tamils became of source of tension between India and Ceylon and led to a series of meetings and agreements: in 1954, the Nehru-Kotelawala Pact provided that India would repatriate Hill Tamils on a voluntary basis if they did not qualify for Ceylonese citizenship; in 1964, the Sirima-Shastri Pact provided for the repatriation of 525,000 Hill Tamils, with another 300,000 to become citizens while the status of 150,000 was unresolved; and, in 1974, the Simimavo-Ganhi Pact provided for the grant of Indian citizenship for all those without status. However in 1982, India abrogated the latter two pacts, which resulted in 90,000 Hill Tamils with Indian citizenship still in Sri Lanka and another 86,000 not having completed their applications. Finally, in 1988, the Sri Lanka parliament unanimously passed the Grant of Citizenship to Stateless Persons Act, which granted citizenship to all those who had no citizenship and then in 2003 it

passed the Grant of Citizenship to Persons of Indian Origin Act No. 35, which granted citizenship to all Hill Tamils resident in Sri Lanka since 1964—some 168,000 people, including those with Indian citizenship which they had to renounce.

- While Nigerian citizenship itself has been granted on a basis quite similar to other ex-colonies, the meaning of citizenship within the country has been profoundly coloured by the concept of indigeneity. The idea of populations indigenous to Nigeria has a long history and it found legal expression in 1954 in the colonial Native Authority Law, which defined a non-indigene as "any Native who is not a member of the native community living in the area of its authority". This linked in with the British approach to indirect rule, where traditional leaders in different areas had extensive legal authority over their communities. The independence constitution of 1960 referred to "a community indigenous to Nigeria" (Art. 25.1). Thus, there was a long cultural tradition of distinguishing between indigenes and settlers (who may have been resident in a region for several generations), but this took on added significance during the period of military rule, and especially after the introduction into the 1979 Constitution of the principle that the "federal character" of the country should be respected in the composition of federal government and the conduct of its affairs (Art. 23.1.a). This found further expression in the 1999 Constitution which states that "the President shall appoint at least one minister from each state, who shall be an indigene of such a state" (Art. 147.3.ii). Moreover, the 1999 Constitution formally established the Federal Character Commission (FCC), which had been set up in 1996, which has the responsibility to enforce fairness and equity in the distribution of public posts among the various federating units of Nigeria. In practice, Nigeria has drifted towards two classes of citizenship, one for indigenes and the other for "settlers", though the significance of this varies greatly according to locale. Local governments are responsible for determining who qualifies as an indigene and they can be narrow or broad-minded in their approach. But non-indigenes in many states find themselves disqualified from employment by governments, as well as from eligibility for educational grants and certain land rights. This has led to major inter-communal clashes with thousands killed over the last two decades, especially in some states with significant "settler" populations. Many argue that such discrimination runs counter to the non-discrimination clause of the Constitution (Art. 15 and 42) that prohibits discrimination on the grounds of place of origin or ethnicity and provides for free mobility and full residence rights for every citizen. The extent of discrimination against settlers in many parts of the country has given Nigerian federalism a distinctly "ethnic" as opposed to "territorial" cast, which politicians have been reluctant to challenge—given the indigene majorities locally—and the Supreme Court has so far not ruled on this politically volatile issue. Discriminatory practices against minorities in other federations are not unknown—in India they have led to repeated demands for new state creation—but the concept of ethnic federalism runs counter to that of universal citizenship rights.

Self-Governance Arrangements for Minorities

A. Comparative Approaches to Self-Governance

While the normal approach to democratic "self-government" is majoritarian, in many cases this model poses difficulties because of the presence of distinct, and sometimes quite antagonistic, populations within a country. When all or some of these populations are territorially concentrated, one way to deal with the tensions around self-government can be through devolution, which may be called federal or by some other name.[14] (Sometimes, there can be special autonomy arrangements for a particular region, such as Aceh.) The general reason for devolution is to "bring government closer to the people", but it can pose its own problems or challenges:

- There may not be agreement on what should be the units of devolved government or the criteria for creating units—these can be ethnic, linguistic, geographic, historical, economic, or a mix.
- While devolution may permit different territorial populations to have a large measure of self-governance, there will still be important issues that must be decided at the national level, where arrangements and can be vital. These may include a demand for special power-sharing, as in Belgium and Bosnia Herzegovina, or at least enhanced representation and certain procedural protections for minorities and their interests.
- Creating regional governments can potentially create regional minorities that feel disempowered or fear for their rights and fair treatment. Sometimes, these minority populations may seek power-sharing relations at the regional level, as in Northern Ireland, Brussels and South Tyrol.
- Allocating responsibilities amongst levels of government can confront the problem that "water-tight" compartments may not work for subjects that have national and regional significance. Thus there are distinct models for devolving powers, some of which try to maximize their separation while others stress shared, cooperative approaches.
- Governance arrangements are usually supplemented by provisions setting out legally protected rights, which can be especially important for minorities, e.g. right to religion, non-discrimination, language and educational rights.

A critical issue underlying approaches to federalism and devolution is whether it is largely conceived in territorial or communitarian terms. The underlying concept of territorial devolution is the equality of all citizens living within the territory of a

[14] While there are clear cases of "federalism", there are also several where the use of the term is debated. In some countries, the term is too loaded politically for arrangements that experts might deem federal to be used. Typically federal arrangements are constitutionalized while devolution is often by normal statute. Federal arrangements are not necessarily more devolved than those that do not use the name.

sub-national political unit (e.g. region, state, province, or municipality). It may be that a certain ethnic, linguistic or religious population forms the majority in a devolved unit, but members of such a majority do not have a privileged status relative to other citizens resident in the region or locality with its own government. While the creation of the political unit may have responded to the distinct identity of its majority and (as seems to have happened in Kenya) promot local development, the government is meant to be neutral as between its citizens, whatever their identity. By contrast, with so-called "ethnic" devolution, there may be a sense that the members of the majority or indigenous (historic) population have certain rights that other citizens resident there do not. In Nigeria, as discussed above, indigenous populations often have special privileges relative to others. Federal and devolved arrangements across countries are characterized by tremendous variety, reflecting their political culture and stresses.

B. Self-Governance and Minorities in Burma's 1948 Constitution

The Panglong Agreement was an essential step on the road to Burmese independence in that it confirmed the boundaries of modern Burma and addressed how the Frontier Areas were to be governed. The agreement was signed by Aung San on behalf of the Burmese government and by representatives of the Kachin, Chin, and Shan communities. It endorsed the principles of "full autonomy" in internal administration and all the fundamental democratic rights and privileges for the Frontier Areas. It was agreed that a Kachin state should be created. The agreement was signed on February 12, 1947, which is celebrated in Myanmar as Union Day. This cleared the way for the election of a constituent assembly in April and the conclusion of a constitutional draft in September.

The constitution reflected the pluralistic composition of Burma right from its first words "We, the People of Burma, including the Frontier Areas and the Karenni States…", and more fundamentally in the extensive provisions for a Chamber of Nationalities, the separate sections relating to the Shan, Kachin, Karen, and Kayah states and the special division of the Chins, the provisions relating to new states and the right of secession, and procedures requiring the consent of each affected state when its constitutional powers or fiscal rights are amended. A number of these provisions are unique or rare, reflecting the thin political consensus that underlay the newly independent state.

- Chamber of Nationalities: The government was to be parliamentary and prime ministerial, with a popularly elected lower house and an upper house, the Chamber of Nationalities, with 125 seats, allocated as follows: Shan state, 25; Kachin state, 12; Chins division, 8; Karen state, 3; ethnic Karens 24; Anglo-Burmese community, 4; all other territories and divisions, 49. The Shan representatives were to be elected by the Saohpas, the traditional leaders of the principalities from among themselves, while the Kachin representative were to include 6 non-Kachins from Kachin State. Normal laws would pass with a majority in both houses, but should they fail to agree the matter would be decided by a majority vote in a joint sitting of the two houses, in which the Chamber of Deputies 250 members, largely Burman,

would have twice the votes of the upper house. Money bills required the approval of the Chamber of Deputies only, with the Chamber of Nationalities being limited to making recommendations on such bills. While the Chamber of Nationalities had a significant majority from the non-Bamar populations, this provided only a limited counter-balance to the Bamar majority in the Chamber of Deputies, given the voting procedures.

- State Councils: These were established for each of the Shan, Kachin, Karen and Kayah states. Their membership was that of all members from the two houses of parliament representing the state. The Prime Minister would nominate, in consultation with the State Council, from among a state's members of parliament the Head of the state, who would serve as a Minister in the Union government. The State Council approved the state budget, which was then incorporated into the Union budget. The Kachin Cabinet was to have no less the fifty percent non-Kachin's and the Head of the State was to exercise his executive authority in areas where non-Kachins form the majority only in consultation with the members representing the non-Kachins in the Cabinet. Three named Sawphyas were named to represent Kayah State in the Chamber of Nationalities. The Special Division of the Chins has a Chin Affairs Council, whose head was a minister in the Union government, but the council was advisory and had no law-making authority.
- State delimitation and new states: The Karen and Kayah states were new creations, as was the Chin division. The constitution also provided for the creation of new states, subject to the agreement of any state whose boundaries might be affected by their creation.
- Right of Secession: The Karenni and Shan states were given the right of secession, which could be exercised only after ten years, but this was not extended to the Kachin. For secession, a two-thirds vote in favour by the State Council would trigger a plebiscite, though the Constitution was silent on the majority required in the vote.
- State legislative powers: These included state public services, inland fisheries, land and land revenue, public works, markets and fair, local water, local police, organization of courts below the High Court, local infrastructure, primary and secondary education, public health and sanitation, and local government. Revenues were to include land revenue, petroleum and rubber royalties, and various excise taxes.

These arrangements have a number of distinctive features. First, the structure of the Union was highly asymmetric, with only some of the non-Bamar populations having any form of devolved government. Secondly, these devolved governments were unusual hybrids, made up of members of the two houses of the national parliament—so not elected separately—and their Heads served as Ministers in the Union government. This had some parallel with the Secretaries of State for Scotland and Northern Ireland in the United Kingdom, but in the UK these ministers came from the party of government, which was by no means assured in Burma and this could have given rise to ministers who were hostile to the government. The rules for approving laws in parliament provided the Bamar majority with the ultimate

say, if it was united; the concept of joint sittings of parliament to resolve disputes existed in India as well. The arrangements for non-Kachins and the representation of different populations for Kayah State showed sensitivity to the existence of minorities within these states. The reliance on traditional leaders drew heavily on the history of indirect rule in the Frontier Areas. The right of secession, which had been a major demand of some of the Frontier Area leaders, found precedent at the time only in the Leninist constitution of the Soviet Union (where it existed only on paper). The state powers were reasonably extensive (though experience in India, Pakistan and Malaysia shows that having a right to royalties on petroleum may not result in getting the lion's share of revenues).

Legally this model continued until the military takeover in 1962, but it was contested from the outset by, on the one hand, Bamar nationalists and, on the other hand, various insurgencies of ethnic separatist groups, notably the Karens, and of the Communists. The military suspended the operation of the 1948 Constitution and functioned by decree for several years. In the years following unsuccessful peace talks in 1963-64, a new wave of insurrections had broken out, and in "the following years, new movements were established representing Arakan, Rohingya, Kayan, Shan and Zomi ethnonationalist agendas, while the Kachin Independence Organization, New Mon State Party and numerous Shan movements grew rapidly".[15] The military promulgated a new Constitution in 1974, which was imbued with a strongly socialist and nationalist spirit, with the "working people" given much greater prominence than the national races. It created a single party system with a unicameral legislature. There were 14 states and divisions, but these were essentially administrative units under strong central control with no meaningful self-government below the national level.

C. Self-Governance and Minorities in Myanmar's 2008 Constitution

This constitution presented itself at the instrument for a return to multi-party democracy, but it was very much impregnated by the "leadership role" of the Defence Services, which has important powers and prerogatives reserved to itself, notably control of defence, security, border administration and "so forth" at all levels of government. In addition, the Defence Services are "mainly responsible for safeguarding the non-disintegration of the Union, the non-disintegration of National solidarity and the perpetuation of sovereignty" as well as safeguarding the Constitution. In all of legislative bodies, 25 percent of seats are filled by Defence Services personnel named by the Commander-in-Chief, which gives them an effective veto over constitutional change and substantial influence on other matters.

The Constitution recognizes that "multi-National races collectively reside" in Myanmar, but asserts that the "Sovereign power of the Union is derived from the citizens and is in force in the entire country", thus effectively discounting any standing for sub-national collectivities, and it declares that "no part of the territory… shall ever secede from the Union".

[15] Jolliffe, *op.cit.,* p. 15

It establishes a system of seven regions and seven states, all of which are of equal status, as well as six self-administered zones or divisions and the union territory containing the capital. In the seven states as well as in the self-administered regions, the majority of the population is non-Bamar, so these territorial arrangements for self-government are potentially significant for minority rights. However, the degree of autonomy accorded to these devolved units is very limited.

The central institutions also make some accommodation for minority populations. At the national level, the lower house, the Pyithu Hluttaw, is elected on the basis of township and population, but the upper Amyotha Hluttaw has an equal number of representatives elected from each region or state, with at least one representative from each self-administered division or zone. While representation from the minority states in the upper house is equal to that from the Bamar regions, in cases of disagreement, there is a joint sitting, where the upper house's 224 members sit together with the lower house's 440 members, giving a clear advantage to Bamar member, who represent about two-thirds of the population. Moreover, in the 2015 election, the ethnic parties did very poorly, with the NLD exceeding the vote that of all ethnic parties combined in most constituencies it won and it now dominates most of the ethnic based assemblies.[16]

An Asia Foundation study concluded that "the state and region governance provisions of the 2008 Constitution and related instruments only partially devolve a limited set of decision-making powers and administrative functions, while retaining heavy elements of central and military control and oversight."[17] However, it also concluded that the formation of these governments was a major development in opening new, if restricted, political space.

Each region, state and self-administered unit has it own elected Hluttaw. "National races" in these whose population constitutes 0.1 percent (about 60,000) or more of the population are entitled to representatives in the respective Hluttaws. Each township elects two members. These procedures provide some assurance of a voice for minorities in these bodies. Having representatives elected from each national race must require separate electoral registries by race, at least for the relevant minorities. Twenty-one ethnic parties competed in the 2010 elections and they won 14 percent of seats in the state and regional elections across the country.[18]

The six self-administered units are for specific ethnic groups that are minorities within their state or region but a majority in specific townships. Their local governance is under the authority of Leading Bodies, which have a majority of locally elected officials and provide a basis fro addressing the issue of minorities within states where the majority is composed of other groups.[19] (A government spokesman indicated that if the Muslim population in northern Rakhine State were

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[16] Crisis Group, *The Myanmar Elections: Results and Implications,* 9 December 2015, pp. 4-5

[17] Hamish Nixon, Cindy Joelene, Kyi Pyar Chit Saw, Thet Aung Lynn, and Matthew Arnold, *State and Region Governments in Myanmar,* Asia Foundation, 2013, p. 32.

[18] *Ibid.,* p. 57

[19] Jolliffe, *op.cit.,* p. vi

recognized as a national race, it is likely that two township where the Muslims constitute a majority would qualify for self-administered status.)[20]

At the executive level, their Chief Ministers are nominated by and responsible to the President from amongst the Hluttaw representatives and his choice shall not be refused "unless it can clearly be proved that the person concerned does not meet the qualifications" (Art. 261). In addition, the President may specify the ministries and number of minister in a region or state and he, in coordination with the Chief Minister, determines appointments of ministers. Their governments have the "responsibility to assist the Union Government in the preservation of the Union, community peace and tranquility and prevalence of law and order" and to "implement projects" in the region subject to the policies of the Union Government. The ministers "loosely supervise and coordinate the activities" of a limited number of departments of Union level ministries.[21]

The regions and states have relatively broad legislative powers in some areas, such as agriculture, but in other areas, such as natural resources and the social sector, they are narrow and limited. Moreover, their budgets are developed in consultation with the Union Government, after which "suitable funds" are incorporated into the Union budget, and the "resources allocated for state and regions budgets is a tiny proportion of the total union budget", in 2013-14 being about 3.6 percent.[22] Direct spending by the administrative arms of the central government in the regions and states is far greater.

Article 53 stipulates the necessary steps for altering territorial boundaries of states or regions. Any such change requires first a majority of eligible electors in the township concerned and, if this is obtained, then a majority in the Hluttaw of the region or state concerned, and finally a majority of more than three-forths in the Pyidaungsu Hluttaw. However, should a region or state Hluttaw decide against the territorial change, the President may still proceed to re-delineate if more than three-fourths of the representative in the Pyidaungsu Hluttaw vote in favour. Thus a re-delineation cannot be done without a township's consent, but it can be done against the will of a region or state.

Whatever the new constitutional provisions in Myanmar, in practice large areas lie beyond the effective writ of the Union government or are contested and these are governed in practice, and in varying degrees, by various ethnic armed actors. In some cases, the government has tolerated this, notably following ceasefires in fragile areas. Establishing constitutionally-based governance throughout the country is Myanmar's central political challenge and it will necessarily require a radically revised approach at the subnational level.

In summary, the devolved governance provision of the 2008 Constitution provide a limited opening for territorial and national minorities to have a greater role in self-governance. While they have opened new political space, they may have created a significant mismatch between expectations and reality and "thus far,…

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[20] *ibid.,* p. 37

[21] *ibid.,* p. vi.

[22] Nixon et al, *op.cit.,* p. 43

these changes have failed to appease demands for local autonomy by the country's myriad ethnic armed actors."[23]

Conclusion

Successfully managing relations between distinct ethnic, national and religious groups is a constant challenge in countries with diverse demographic make-up. The fundamental democratic model is one of inclusion and non-discrimination—hence a broad approach to extending citizenship and equal treatment for citizens (and, in many regards, other residents). However, inter-group jealousies and resentments can build up for many reasons and lead to majorities sharply limiting the rights of certain minorities. Such group-based discrimination (excepting certain kinds of affirmative action) is contrary to international law, but it also has proven to be deeply dysfunctional in worsening inter-group relations (sometimes to the point of violence) and imposing significant economic and social costs on the larger community.

Myanmar has shown some increased sensitivity towards the treatment of its non-Burman indigenous communities, notably in its limited arrangements for devolved governance, but significant challenges remain as current negotiations attest. However, its progressive tightening of its citizenship rules has seriously marginalized the Rohingya, persons of Indian origin, and descendants of citizens who left the country illegally, often because they were fleeing persecution. Its practices here do not serve the objectives of national reconciliation or Myanmar's good standing in the international community.

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Ottawa
6 July 2017

[23] Jolliffe, *op.cit.,* p. vi.