

**PEACEFUL CO-EXISTENCE:  
Towards Federal Union of Burma**  
[Series No. 10]

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**DESIGNING FEDERALISM  
IN BURMA**

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## FOREWORDS

I have become one of the editors of this book series as a result of the sad death of a former editor, Chao-Tzang Yawnghwe, known to many as Uncle Eugene. I now assume his duties with the heavy awareness that I will never be able to fulfill them as he did. Uncle Eugene was one of the great leaders of the Burmese democratic movement in all its stages, from the very beginning to the most recent times. When we heard that his health had taken a turn for the worse, one of my friends e-mailed me: “He was a shining star of the movement, and now it seems, that star is falling down.” Life required of him extraordinary courage, resilience, and adaptability – as it does for all Burmese who keep alive the hope of a better future. When he thought it time to resist the military government by force of arms, he was ready, despite great personal peril. And then there came a time when he thought that he should turn away from guns and towards words, so that he could help his country prepare for a world after the SPDC. In the spirit of the Panglong Agreement, he was convinced that Burma could best be governed in a truly federal system, in which each state wrote its own constitution and then together created the federal union, with its constitution. In this book series, Lian H. Sakhong and I try to carry forward the work that he began.

Part of Uncle Eugene’s legacy is the work of the Support Committee for State Constitutions. The purpose of the committee is to assist the groups who are drafting proposed constitutions for their various states. Uncle Eugene always understood that the most important part of the SCSC’s work was not so much to write constitutions as to start a process of education and consultation. No-one can tell exactly what the future holds for Burma. We can, however, safely predict one thing: when Burma’s next chance at democracy comes, it will need a group of leaders who know how to take up the burdens of constitutional democracy. And if Burma is to survive as a

free country, it will need leaders who are committed to each other, so that they can steer their people through danger, hardship, anger, and fear.

Burma has before it a difficult balancing act: it must find enough unity to stay together as one country, and it must also find the strength and confidence to allow its various states and cultures to govern themselves in their own way. When times become hard, this balance can be especially difficult to maintain. Some will be tempted to break away from Burma altogether; and others will be tempted to suppress the self-government of the states. Under those circumstances, Burma will need leaders of strength, courage, and integrity. And three things might particularly help to sustain those leaders through dark times:

1. **KNOWLEDGE** that other countries have faced similar problems and survived, and knowledge of how they have achieved this success through constitutional design;
2. **MUTUAL COMMITMENT** to each other and to the common project, even people from very different backgrounds, growing from long exposure to each other in the process of developing a constitutional system;
3. **TESTED IDEAS** about how best to arrange a constitutional system that both allows the union government to keep the country together and also allows the constituent states to govern themselves.

In its supporting role, the SCSC tries to help the future leaders of Burma acquire these three things. Even after Burma is blessed with a democratic federal government, it will still face troubles. When those troubles come, Burma's leaders may be able to work out their differences if they have these three things. They will remember that other countries have come through the same sort of trouble, that constitutional ideas will help get them through, and above all, that they had

formed deep bonds and friendships in the process of creating a constitutional system for Burma, rooted in ideas and hopes, not anger and fear.

This volume is designed to serve as a concise introduction to certain constitutional ideas that may be relevant to Burma. It contains three documents: one essay by Lian Sakhong, and two lectures that I delivered to the SCSC, over several days in November 2003 and August 2004. All three contain common themes. First, sometimes ideas can show us a way through problems that we had thought were impenetrable. Second, Burma's problems have grown in part from some misunderstandings of certain ideas. In particular, many in Burma have imagined that governance can really occur only at the center: people look to the central government for ideas, initiative, direction, guidance, money, and even permission. They have feared that decentralization (when people look to state and local governments or even just to themselves as citizens) will lead to the breakdown of the social order. In fact, we know that the opposite is generally true: when the center tries to rule without the support and participation of the people, then the people invariably become angry and restless. Even democratic governments—perhaps especially democratic governments—need the people to be actively involved in their own governance, and the only feasible way for most people to govern themselves is at the local level. When the central government seeks to suppress local government, the people may rise up in arms, but when the central government seeks to support local government, the people may feel gratitude and devotion to the union. In other words, democracy and federalism are not in tension. In fact, it is hard to have democracy without also having some kind of federalism. Every well-functioning democratic government tries to empower the people, on a local basis, to take a hand in building their own future.

I feel it appropriate to close this foreword on a personal note. Some time ago, Uncle Eugene and others invited me to

speaking to the SCSC. At the time, I did not know that the invitation would substantially change my professional life. But exposure to the Burmese democratic movement and all its wonderful members is a blessing to everyone and everything that it touches. Even amidst its sometimes heated disagreements, the movement holds fast (and must continue to hold fast) to the things that matter most in human life. The movement realizes that humans make their world, so they can remake their world into a better place. Sometimes the path forward is not always clear, and then we are called on to speak from our hopes and our dedication to each other, to carry us through to a better time. By force of circumstance, the movement must therefore cling to its hopes and mutual dedication. Years from now, when people sit down to write the history books, they will remember the people who knew that Burma could be brought out of sorrow and into joy. And that memory will be a blessing to every future generation.

**David C. Williams**

**Bloomington, Indiana, USA**

October 2004

**FEDERALISM, CONSTITUTION MAKING  
AND STATE BUILDING IN BURMA**

# **FEDERALISM, CONSTITUTION MAKING AND STATE BUILDING IN BURMA**

**Finding Equilibrium between Nation-building for  
Self-rule and State-building for Shared-rule in  
Federalism**

**By**

**Lian H. Sakhong**

## **Introduction**

On 12 February 1947, the Union of Burma was founded at Panglong by four former British colonies, namely the Chin, Kachin, Federated Shan States and Burma Proper, all of which already had their own constitutions. The British occupied these four colonies separately as independent countries in different periods of time, and applied different administrative systems in accordance with the different constitutions that the colonial power had promulgated for them. The British officially promulgated the Chinland/Chinram Constitution, called the “Chin Hills Regulation,” in 1896, the “Kachin Hills Regulation” in 1895, the “1919 Act of Federated Shan States” in 1920, and the “1935 Burma Act” in 1937. The Chin Hills Regulation of 1896 covered present Chin State in Burma, present Mizoram State, Nagaland State, and part of Manipur and Meghalaya States in India. The 1935 Burma Act was applied to the area of the pre-colonial Myanmar/Burman Kingdom, which included the former Arakan and Mon Kingdoms as well as delta areas of Karen country.

Since independence, the twelfth of February has been celebrated as the Union Day of Burma. The observation of Union Day as an official holiday in Burma implies the recognition of the distinctive national identities of those who signed the Panglong Agreement and ratified the treaty through the constitutional arrangement of 1947. It also implicitly

recognizes their political rights—the right to gain their own independence and to establish their own nation-state. The essence of the Panglong Agreement was, and is, mutual recognition and respect, based on the principles of political equality, self-determination and voluntary association.

However, Aung San, who had persuaded the Chin, Kachin, Shan and other ethnic nationalities to join the Union, was assassinated before Burma gained her independence. After his assassination, the 1947 Union Constitution was rushed through to completion without reflecting the spirit of Panglong. As a result, the country was plunged into fifty years of civil war. Burma's political crisis today is therefore not merely an ideological confrontation between military dictatorship and democracy, but also a constitutional problem. The ethnic nationalities joined the Union as equal partners, preserving their rights of self-determination, on the basis of the Panglong Agreement, but Burma's constitutions have failed to adhere to the spirit of that agreement.

In this paper, I shall argue that federalism is the only viable solution to Burma's current political crisis, including five long decades of civil war. Federalism, therefore, is essential to the ultimate success of the democracy movement, to guarantee political equality for all nationalities, the right of self-determination for all member states of the Union, and democratic rights for all citizens of the Union. I will also argue not only that federalism is an essential goal of the struggle but also that federalism may and should be achieved by the drafting of federal and state constitutions. Under the National Reconciliation Programme (NRP), the SCSC has undertaken this drafting process, as a means to end fifty years of conflicts and to reach a negotiated settlement in Burma.

### **Federalism: Theoretical Analysis**

The term *Federal* is derived from the Latin words *foedus* and *fides*. According to S. R. Davis, the Latin word *foedus* is translated

as “covenant”, while its cognate *fides* means “faith” and “trust.” When we find in these terms the idea of a “covenant, and synonymous ideas of promise, commitment, undertaking, or obligation, vowing, plighting one’s word to a course of conduct in relations to others,” we come upon a vital bonding device of civilization. The idea of covenant involves “the idea of co-operation, reciprocity, mutuality, and it implies the recognition of entities — whether it be persons, a people, or a divine being.”<sup>1</sup>

According to Daniel J. Elazar, the first example of a federal state with the essential characteristic of the “idea of a contract, treaty, or alliance” was the ancient Hebrew state, whose principles are mentioned in the Bible.<sup>2</sup> In modern times, the rise of federal political thought went hand in hand with the emergence of a political-theological philosophy of federalism in 16th and early 17th century Renaissance Europe, when the sovereignty of the modern nation-state appeared as a conceptual instrument for the organization of power within the state.

Since the emergence of the modern nation-state, federalism has generally been defined as an approach to government that divides public powers not only horizontally, i.e. separation of powers between legislative, administrative and judiciary; but vertically, i.e. division of powers between two or more levels of government. In other words, federalism is “a constitutional device which provides for a secure, i.e. constitutional, division of powers between central and ‘segmental’ authorities in such a way that each is acknowledged to be the supreme authority in specific areas of responsibility.”<sup>3</sup> The basic essence of federalism, therefore, is “the notion of two or more orders of government combining elements of ‘shared rule’ for some purposes and regional ‘self-rule’ for the other.”<sup>4</sup> As such, federalism is seen as a constitutionally established balance between shared rule and self-rule: shared rule through common institutions, and regional self-rule through the governments of the constituent units or states.

The federal principles of self-rule and shared rule, in turn, are based on “the objective of combining unity and diversity: i.e. of accommodating, preserving and promoting distinct identities within a larger political union.”<sup>25</sup>

In a genuine federal system, neither the federal nor state governments (or, the constituent units) are constitutionally subordinate to the other, i.e. each has sovereign powers derived from the constitution rather than from one another level of government, each is empowered to deal with the citizens in the exercise of its legislative, executive and taxing powers, and each is directly elected by its citizens. The structural characteristics of a genuine federal system, at its full development, can thus be generally defined as follows:

1. Two or more orders of government each acting directly on its citizens, rather than indirectly through the other order;
2. A formal constitutional distribution of legislative and executive authority, and allocation of revenue resources between the orders of government ensuring some areas of genuine autonomy for each other;
3. Provision for the designated representation of distinct regional or ethnic views within the federal policy-making institutions, provided not only by a federal second chamber (i.e., what used to be known in Burma as the Chamber of Nationalities or the Upper House) composed of representatives of the state and regional electorates, but also by state legislatures or governments;
4. A supreme written *federal* constitution, not unilaterally amendable by one order of government, and therefore requiring the consent not only of the federal legislature but also of a significant portion of the constituent units or states, through assent by their legislatures or by referendum of majorities;
5. Written constitutions for all member states of the union, or constituent units, which are to be promulgated, exercised

and amended independently and unilaterally by each constituent state for its own state, so long as such procedures are conducted in accordance with the federal constitution;

6. An umpire (in the form of a supreme court, or as in Switzerland provision for referendums) to rule on the interpretation and valid application of the federal constitution;
7. Process and institutions to facilitate inter-governmental collaboration in those areas where governmental responsibilities are shared or inevitably overlap.<sup>6</sup>

What basically distinguishes federations from decentralized unitary systems, on the one hand, and from confederations, on the other, according to Blindenbacher and Watts, is that “in unitary systems the governments of the constituent units ultimately derive their authority from the central government, and in confederations the central institutions ultimately derive their authority from the constituent units and consist of delegates of constituent units.”<sup>7</sup> In a federation, however, “each order of government derives its authority, not from each order of government, but from the constitution.”<sup>8</sup>

### **Federalism in the Burmese Context: Lessons Learned from the 1947 Union Constitution**

At the Panglong Conference in 1947, the Chin, Kachin, Shan and other non-Burman nationalities were promised, as Silverstein observes, the right to exercise political authority (in the form of administrative, judicial and legislative powers in their own autonomous national states) and to preserve and protect their language, culture and religion, in exchange for voluntarily joining the Burmans in forming a political union and giving their loyalty to a new state.<sup>9</sup>

On the basis of the Panglong Agreement, the Union Constitution was framed. Aung San himself drafted the Union

Constitution and submitted it to the AFPFL convention held in May 1947, at the Jubilee Hall in Rangoon. Aung San delivered a long speech at the convention and explained the essence of the Panglong Agreement, which had the aim of establishing a Federal Union. He also argued:

When we build our new Burma, shall we build it as a Union or as a Unitary State? In my opinion it will not be feasible to set up a Unitary State. We must set up a Union with properly regulated provisions to safeguard the rights of the national minorities.<sup>10</sup>

Aung San also insisted on the right of self-determination for ethnic nationalities who signed the Panglong Agreement to found a new Federal Union with so-called Burma Proper. He referred to his co-signatories, the Chin, Kachin and Shan, as nations, or *pyidaung* in Burmese. He said:

The right of self-determination means that a nation can arrange its life according to its will. It has the right to arrange its life on the basis of autonomy. It has the right to enter into federal relation with other nations. It has the right to complete secession.<sup>11</sup>

Moreover, Aung San clarified the nature of ethnic and cultural minority rights and their implications, an issue which many of his contemporaries regarded as problematic:

What is it that particularly agitates a national minority? A minority is discontented because it does not enjoy the right to use its native language. Permit it to use its native language and this discontentment will pass of itself. A minority is discontented because it does not enjoy liberty of conscience etc. Give it these liberties and it will cease to be discontented. Thus, national equality in all forms (language, schools, etc.) is an essential element in the solution of the national problem [or, ethnic conflict?].

A state law based on complete democracy in the country is required, prohibiting all national privileges without exception

and all kinds of disabilities and restrictions on the rights of national minorities.<sup>12</sup>

On the basis of the principles of equality, the right of self-determination, and constitutional protection of ethnic and cultural minority groups, Aung San drafted a new constitution for a new Union of Burma, which was duly approved by the AFPFL convention. According to Aung San's version of the constitution, the Union would be composed of National States, or what he called "Union States," such as the Chin, Kachin, Karen, Karenni (Kayah), Mon, Myanmar (Burman), Rakhine (Arakan) and Shan States. The "original idea," as Dr Maung Maung points out, "was that the Union States should have their own separate constitutions, their own organs of state, *viz.* Parliament, Government and Judiciary."<sup>13</sup>

However, U Chan Htun reversed all these principles of the Federal Union after Aung San was assassinated. According to U Chan Htun's version of the Union Constitution, Burma Proper or the ethnic Burman/Myanmar did not form their own separate National State; instead they combined the power of the Burman/Myanmar National State with the whole sovereign authority of the Union of Burma. Thus, while one ethnic group, the Burman/Myanmar, controlled the sovereign power of the Union, that is, the legislative, judicial and administrative powers of the Union of Burma, the other ethnic nationalities who formed their own respective National States became almost like "vassal states" of the ethnic Burman/Myanmar bloc. This constitutional arrangement was totally unacceptable to the Chin, Kachin and Shan who signed the Panglong Agreement on the basis of the principle of national equality, and also to other nationalities.

Another serious flaw in the 1947 Constitution was the absence of state constitutions for all the member states of the Union. In contrast to the original agreement, according to which Aung San and Chin, Kachin and Shan leaders intended to establish a separate state constitution for each and every state, U Chan Htun's version of the Union Constitution

incorporated clauses covering all the affairs of the states. In this way, state affairs became part and parcel of the Union Constitution, with no separate constitutions for the Chin, Kachin, Shan and other ethnic nationalities. Such a constitutional arrangement indicated that whatever powers the governments of states enjoyed and exercised under the 1947 Constitution were given to them by the central government, characteristic of a unitary state system. In a unitary system, power lies in the hands of the central government, and the powers of local governing or administrative units derive from or are devolved to them by the central government.

What the Chin, Kachin, Shan and other ethnic nationalities envisioned in Panglong was a federal system, in which the member or constituent states were the basic and founding units of the federation, and whatever powers they exercised or possessed were not given to them by the centre. The powers of the constituent states of a federation are, in principle, derived from the peoples of the respective states, as is stated in most state constitutions in countries that are federal in form. In theory, as Dr. Chao Tzang Yawngghwe observes,

A federation is formed when a number of states agree for some reason to live and work together under one flag. And because there is an agreement among founding states to band together as equal partners, there arises a need for another level of government to handle matters of common interest. Accordingly, this government<sup>3/4</sup>the federal or central government<sup>3/4</sup>is given or vested with certain powers by the member states. In a federation, therefore, it is the power of the federal or central government that is derived from, or given to it, by the member states. Thus, in federalism, the federal government is not a superior government that holds all powers. Various and significant powers are held by the member states, and these are clearly spelt out in the state constitutions. In addition, some powers which are shared by all are given to the federal government, and these

too are spelt out, this time in the federal constitution. In a federation, therefore, there are two levels of powers as well as two levels of governments, which are intertwined, yet separate. Hence, in a federal system there are two constitutions: one is the federal constitution, and concurrently with it there exists another set of constitutions, those of member states of the Union.<sup>14</sup>

U Chan Htun's version of the 1947 Union Constitution of Burma did not allow for the existence of separate constitutions for the founding member states of the Union, namely, the Chin, Kachin, Shan and other nationalities — including the Burman.

The third point which betrayed the Panglong Agreement and Aung San's policy of federalism was the structure of the Chamber of Nationalities at the Union Assembly. The original idea of the creation of the Chamber of Nationalities was to safeguard not only the rights of non-Burman ethnic nationalities, but also the symbolic and real equality envisaged at the Panglong Conference. Thus, the intention was that each ethnic national state should have the right to send equal numbers of representatives to the Chamber of Nationalities, no matter how big or small their national state might be. But what happened under U Chan Htun's version of the Union Constitution was that, while all the non-Burman nationalities had to send their tribal or local chiefs and princes to the Chamber of Nationalities, it allowed Burma Proper to elect representatives to the Chamber on the basis of its population. Thus, the Burman or Myanmar from Burma Proper, who composed the majority in terms of population, was given dominance in the Union Assembly.

In this way, the Union Assembly, according to U Chan Htun's version of the Union Constitution, was completely under the control of the Burman or Myanmar ethnic nationality. Not only did the powerful Chamber of Deputies (the lower house of the legislature) have the power to thwart the aspirations and interests of the non-Burman nationalities,

the Burmans even dominated the Chamber of Nationalities itself. For that reason, the combined votes of the non-Burman nationalities (even in the Chamber of Nationalities) were unable to halt the passage of the “state religion bill” in which U Nu promulgated Buddhism as a state religion in 1961. Thus, all the non-Burman nationalities viewed the Union Constitution itself as an instrument for imposing a tyranny of the majority and not as their protector, and it was this perception that led Burma into fifty years of civil war.

The Panglong Agreement was the most solemn agreement that the Chin, Kachin and Shan had ever signed in their history, and therefore it had to be protected as the covenant on which they built the Union together with the Burman and other ethnic nationalities. However, since the agreement was betrayed or even broken by Burmese politicians after Aung San was assassinated, the Chin and other non-Burman ethnic nationalities in the Union of Burma have had to redefine the covenant, or Union Constitution, through which they have sought to build a peaceful Union of Burma.

### **Nation-building and the Problem of Forced Assimilation**

When the Chin, Kachin and Shan signed the Panglong Agreement in 1947, what they aimed to achieve was to “speed up” their own search for freedom, together with the Burman and other nationalities, based on the principles of equality, mutual trust and recognition; but not to integrate their societies and their lands into Myanmar Buddhist society and the Burman Kingdom. Thus, for them, the basic concept of independence was independence without integration, that is, what political scientists used to term “coming together”, or “together in difference.” These phrases refer to a process by which nations come together in order to form a modern nation-state in the form of a Federal Union, or *Pyi-daung-sub* in Burmese, while

maintaining the right of national self-determination and the autonomous status of their nations.

Within this concept of “coming together,” it is important to differentiate between “nation” and “state,” or what Hannah Arendt refers to as a “secret conflict between state and nation.” According to Arendt,

[The nation] presents the “milieu” into which man is born, a closed society to which one belongs by the right of birth; and a people becomes a nation when it arrives at a historical consciousness of itself; as such it is attached to the soil which is the product of past labour and where history has left its traces. The state on the other hand is an open society, ruling over territory where its power protects and makes law. As a legal institution, the state knows only citizens no matter of what nationality; its legal order is open to all who happen to live on its territory.<sup>15</sup>

The state, far from being identical with the nation, is “the supreme protector of a law which guarantees man his rights as man, his rights as citizen and his rights as a national.”<sup>16</sup> By signing the Panglong Agreement, the Chin, Kachin and Shan had co-founded a Federal Union of a multi-national state, which is an administrative and legal unit, but they still wanted to keep their own respective nations, a concept which according to Weber belongs to the sphere of values: culture, language, religion, ethnicity, homeland, shared memories and history, a specific sentiment of solidarity in the face of other groups or people. Thus, what Aung San and the Chin, Kachin, and Shan leaders wanted to achieve at Panglong was to build a Union through a state-building process, not to create a nation through nation-building.

As mentioned above, the Burmese word for “Union” is “*Pyi-daung-shu*,” which means “the coming together of different ‘nations’ and ‘national states.’”<sup>17</sup> As the term indicates, the *Pyi-daung-shu* allows the peaceful co-existing of different ethnic

groups with different cultural and religious backgrounds, i.e. different nations, within an administrative and legal unit of political union. It is, therefore, clear that state-building is very different from nation-building, because in the building of a multi-national state, there can be many nation-building processes taking place at the same time for the different member nations.

In contrast to state-building, nation-building excludes from its process other ethnic groups, cultures, religions and everything related to multiculturalism and diversity. Thus, by accepting only one homogeneous set of cultural and religious values as its political values, the very notion of nation-building can produce only a nation-state made by a homogeneous people or nation that claims “pre-state unity based on culture, history or religion.”<sup>18</sup> As a result, a nation-state made by a nation through the nation-building process cannot accommodate other cultures, religions and ethnic groups. At best, as Saunders argues, “it can tolerate non-integrated minorities as guests, but not as equal citizens. The status of fully recognized citizen can be attained only by integration. Those who want to become citizens must change their cultural identity.” Moreover, as Saunders explains:

If a cultural minority demands political recognition and identity, the state must reject the claim. Because it is unable to accommodate a fragmented political identity, it will ultimately come into conflict with its minorities. Either the minorities must be integrated within the majority culture, destroying their original cultural roots, or they must be denied the opportunity to enhance their cultural identity through political means. A fragmented political identity is rejected as a solution, because of its threat to the unity, homogeneity, and the roots of state's existence.<sup>19</sup>

Aung San seemed to have a clear policy of state-building based on the principles of equality and unity in diversity. He maintained that nation-building in the form of “one race, one

religion, and one language ha[s] gone obsolete.”<sup>20</sup> By inviting the Chin, Kachin, Shan and other ethnic nationalities to form a new Union, Aung San’s policy of unity in diversity transcended all different cultures and religions, rejecting them as structural and functional factors to unite the country. By rejecting culture and religion as uniting factors of the country, he opted for a secular state whose political values would be based not on cultural and religious roots but on the equality of individual citizens and the right of self-determination for member states of the Union. Aung San particularly rejected religiously oriented ethno-nationalism, which mixed religion with politics. He thus declared:

Religion is a matter of individual conscience, while politics is social science. We must see to it that the individual enjoys his rights, including the right to freedom of religious belief and worship. We must draw clear lines between politics and religion because the two are not the same thing. If we mix religion with politics, then we offend the spirit of religion itself.<sup>21</sup>

However, after Aung San was assassinated, U Nu reintroduced cultural and religious values into political debate and abandoned Aung San’s policy of unity in diversity together with the union-building process. For U Nu, the only means to build a new nation was to revive the pre-colonial cultural unity of *Buda-bata Maynmar Lu-myo*, which had nothing to do with the Chin, Kachin, Shan and other ethnic nationalities who joined the Union in order to speed up their own freedom.

Although Buddhism had been a powerful integrative force in traditional Myanmar society, a modern multi-national state of the Union of Burma with its multi-religious, multi-cultural, multi-ethnic plural society was a very different country from that of the pre-colonial Myanmar Kingdom. However, leaders like U Nu still believed that Buddhism could make a significant contribution to some aspects of national integration. When he became the Prime Minister of the newly independent Burma, U Nu contradicted Aung San’s version of the Union

Constitution, particularly the clause that separated religion from politics, by declaring: “In the marrow of my bones there is a belief that government should enter into the sphere of religion.”<sup>22</sup> In this way, U Nu’s government officially adopted Buddhism as its state religion, as a means of national integration. By this means, an attempt was made to achieve homogeneity by imposing religious and cultural assimilation into the predominant group of Myanmar Buddhists. In 1953, the Ministry of Religious and Cultural Affairs was created to promote the process of assimilation, and eventually it promulgated Buddhism as the state religion of the Union of Burma in 1961.<sup>23</sup>

While U Nu opted for cultural and religious assimilation into Buddhism, or *Buda-bata Myanmar-lumyo*, as a means of integration, General Ne Win, who came to power through military coup in 1962, removed the rights of the country’s religious and cultural minorities, including all civil and basic human rights, as a means of creating a homogeneous unitary state. Moreover, General Ne Win imposed his national language policy by declaring *Myanmar-sa* as the only official language in the entire Union of Burma, which therefore was required to be used at all levels of government and public functions, and also to be the only medium of instruction at all levels of schools in the country—from primary to university levels. He not only imposed the *Myanmar-sa* as the official language, but also suppressed the right to learn the other ethnic national languages of the Union.

Nation-building, for both U Nu and Ne Win, was simply based on the notion of “one race, one language and one religion”—that is to say, the ethnicity of *Myanmar-lumyo*, the language of *Myanmar-sa* and the state religion of Buddhism. Thus, what they wanted to achieve through nation-building was to create a homogeneous nation of *Myanmar Naing-ngan*, by drawing its political values from the cultural and religious values of *Myanmar-sa* and Buddhism. Although their approaches to national integration were different, U Nu and

Ne Win shared the goal of creating a homogeneous people in the country. While U Nu opted for cultural and religious assimilation into Buddhism as a means of integration, Ne Win used the national language policy of *Myanmar-sa* and denied the rights of the country's religious and cultural minorities as a means of creating a homogeneous unitary state. U Nu and Ne Win thus complemented each other, although their approaches in oppressing the cultural and religious minorities were different in nature.

Supplementing U Nu's policy of state religion and Ne Win's national language policy, the current military regime is opting for ethnicity as a means of national integration, by imposing ethnic assimilation into *Myanmar-lumyo*. The changing of the country name from Burma to *Myanmar*, the name only of the ethnic *Myanmar*, in 1989 is a case in point. When it implemented its policy of ethnic assimilation by force, the present military junta applied various methods: killing people and destroying the livelihood of ethnic minorities in fifty years of civil war, using rape as a weapon of war against ethnic minorities, and religious persecution as a means of destroying ethnic identity, especially of the Chin, Kachin and Karen Christians. In this way, the successive governments of the Union of Burma — from U Nu to Ne Win to Saw Maung and Than Shwe — have carried out the nation-building process in terms of “one race, one language, one religion,” that is — *Myanmar-lumyo*, *Myanmar-sa*, and *Buddhism*.

In the name of nation-building, the successive governments of the Union of Burma have violated not only basic human rights and civic rights but also all kind of collective rights. In the name of national sovereignty the rights of self-determination for ethnic nationalities are rejected; in the name of national integration the right to follow different religions, to practice different cultures, and to speak different languages are deprived; and in the name of national assimilation the rights to up-hold different identities and traditions are denied. In short, the successive government of the union of Burma,

particularly current military government have been practicing ethnic cleansing and cultural genocide for forty years.

### **State-building and Unity in Diversity: An Option for the Future**

As mentioned above, nation-building belongs to what social scientists call “subjective values,” that is, culture, language, religion, ethnicity, homeland, shared memories and history, etc., which differentiate one group of people from another—values that cannot be shared objectively. Thus, the nation-building process is impossible to implement in a multi-ethnic, multi-cultural, multi-religious plural society like the Union of Burma. The only way to implement the nation-building process in a plural society is to use coercive force for assimilation, but that approach will definitely result in confrontation and conflict, because the very notion of nation-building is “hostile to multiculturalism and diversity.”<sup>24</sup> Unfortunately, this conflict is exactly what has occurred in Burma during the past fifty years.

In a plural society like the Union of Burma, the only good option is federalism with a strong emphasis on decentralization and local autonomy, in which the parallel processes of nation-building for all the national states, i.e. member states of the union, and state-building for the union as a multi-national state, can go hand in hand. Federalism by definition is the division of power between the federal government and state governments, which have their own separate constitutions. When member states of the federal union are composed in terms of ethnicity and historical homeland, each national state can implement its own nation-building process within the territory of its homeland based on its own culture, language, religion, ethnicity, shared memories, etc., by making its own state constitution. Thus, while the purpose of writing a state constitution is self-rule through a nation-building process

allowing for the preservation and promotion of distinct identities, the purpose of making a federal constitution is shared rule through a state-building process aimed at the establishment of common institutions for multiculturalism and diversity. In a nutshell, while the state constitutions drafting process aims to implement a nation-building process for national states within the Union, the federal constitution aims to complete the state-building process for the Union of Burma. In this way, federalism can combine nation-building and state-building with the objective of unity in diversity, that is, “accommodating, preserving and promoting distinct identities within a larger political union.”<sup>25</sup>

Although the state constitution making process through nation-building can be a value-based subjective approach, the federal constitution making process through state-building is purely a matter of objective value; for the federal constitution is “a legal institution, [which] knows only citizens no matter of what nationality, and [whose] legal order is open to all who happen to live on its territory.”<sup>26</sup> As a legal institution, federal constitution rules “over territory where its power protects and makes law”, which guarantees “man his rights as man, his rights as citizen and his rights as a national.”<sup>27</sup> Thus, in a genuine federal system, the federal constitution will never adopt cultural values as political values, and it shall never promulgate a law that aims at the creation of a homogeneous culture, which excludes other cultures.

### **Conclusion: Finding Equilibrium between Nation-building and State-making**

The question of constitution making is usually focused on the structure and function of the state and government; how the state should be formed, how government should be organized, and how people should be governed. In a multicultural plural society like Burma, such simple questions

concerned only with good governance are simply not enough. We need to raise more controversial issues such as: Who should govern whom? What majority or majorities should rule over what minorities? Who should control the political power of the state, and with regards to whom? Who should decide the procedure by which it is settled who should govern whom?

As mentioned above, federalism is an approach to government that divides public powers not only horizontally, but also vertically. Federalism, therefore, has been viewed as a useful way of limiting governmental power in order to secure good governance. In addition to balancing self-rule and shared rule through constitutionally established mechanisms, the recognition and participation of cultural and ethnic minorities can also be achieved through:

- Emphasis on the political rather than the cultural base of the nation-state;
- Separation of the state and religious or other socio-cultural powers;
- Emphasis on human rights as protection of minority rights;
- Emphasis on separation of powers, formally and informally;
- Executive power sharing;
- Multiparty system and proportional rule in elections of the parliament;
- Decentralization and local autonomy, including bicameralism, as a means of vertical power sharing.

In today's Burmese political context, the processes of federal constitution and state constitutions drafting can be defined as finding a political compromise between state-building and nation-building, which will hopefully result in an institutional equilibrium. A political compromise has to be found between a cultural majority having enough power to define a majority regime on the one hand, and cultural minorities seeking recognition in the constitutional framework and participation in political decision making on the other.

The institutional equilibrium is always a compromise between a majority regime and institutional forms of minority protection and power sharing.

In the context of the legal system, an institutional equilibrium between state-making and nation-building implies the concept of equality. Thus, a multi-national state or a union that implements this fundamental principle must translate the concept of equality into effective collective rights. Although democracy is based on the principle of majority rule, the majority should not abuse its democratic power by tyrannising its minorities. Federalism can effectively control the tyranny of the majority through not only constitutionally mandated decentralization, but also the equalisation of majority and minority before the law, which recognizes the rights of a minority to be treated equally both as individuals and as communities.

The concept of equality implies both collective rights and individual rights. The protection of the human rights of individuals prevents the authorities of the state from discriminating against individuals who belongs to minorities, on the grounds of their language, religion, ethnicity or race. The guarantee of human rights as individual rights according to the law is different from that of tolerance. Tolerance also allows everyone to live within his or her community as a respected individual, free from discrimination on the ground of ethnicity, religion or language. However, those who are tolerated are not part of the governing people, the “We” who form the state; for members of tolerated minorities, the state is “their” state and “their” union, not “our” state or union. Diversity might be respected, but not as a political value. Minorities are respected because that is required by the universal values enshrined in the constitution, as in the 1947 Constitution of the Union of Burma. But in such a situation, diversity is neither a policy nor a goal of the state.

Fifty years of negative experiences of constitution making and practice teaches that federalism is the only good option

for the future of Burma. In order that unity in diversity becomes a political value of the Union, state constitution drafting must engage in nation-building; federal constitution drafting must engage in state-building; and the constitutional structure as a whole must seek equality between these two processes. Thus, the ultimate goal of the democracy movement in Burma is to establish a genuine Federal Union of Burma, which will guarantee democratic rights for all citizens, political equality for all ethnic nationalities, and the rights of self-determination for all member state of the Union.

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**THE BASIC PRINCIPLES FOR FUTURE  
FEDERAL  
UNION OF BURMA**

**THE BASIC PRINCIPLES FOR FUTURE  
FEDERAL  
UNION OF BURMA**

**By**

**Lian H. Sakhong**

**Preamble**

The Union of Burma was founded in 1947 at Panglong Conference by pre-colonial independent nations, namely, the Chin, Kachin, Federated Shan State and Burma Proper or Ministerial Burma; and the peoples of Karen, Karenni, Mon and Rakhine (Arakan) who later ratified the “Panglong Agreement” through the constitutional arrangement of independent Burma. The essence of “Panglong Agreement” was not only to “speed up” their own search for freedom but also to establish a new multi-national-state of the Union of Burma for those who struggled together to free themselves from colonial power. Based on the “Panglong Agreement”, the Constituent Assembly of the Interim Government of the Union of Burma promulgated a new constitution on September 24, 1947, thereby paving the way for securing “independence” from the Great Britain on January 4, 1948.

Ever since the independence, however, the Union of Burma has been suffering more than five long decades of civil war, in which thousands of lives were sacrificed. In the name of civil war the successive governments of the Union of Burma have violated not only basic human rights and civic rights but also all kinds of collective rights. In the name of national sovereignty the right of self-determination for the ethnic nationalities who joined the Union as equal partners are rejected; in the name of national integration the right to follow different religions, to practice different cultures, and to speak different languages are deprived; and in the name of

national assimilation the rights to up-hold different identities and traditions are denied. As a result, the entire population in Burma has miserably underwent for forty years of human rights abuses, the demise of democratic principles, the plummeting of nation's economics and its attendant poverty and hardship under the authoritarian rule of BSPP and present military dictatorship.

Therefore it is so urgent to rebuild the “Union of Burma” based on the spirit of Panglong, which General Aung San and ethnic nationalities leaders had anticipated in 1947. The Panglong Spirit is for “democracy, equality and self-determination”. Thus, the future “Federal Union of Burma”, which shall be built upon the spirit of Panglong, will guarantee the fundamental rights for all citizens including the principles contained in the United Nation's declaration of universal human rights, political and ethnic equality for all nationalities and the rights of self-determination for all member states of the Union.

We, the representatives of the Chin, Kachin, Karen, Karenni, Mon, Myanmar (Burman), Rakhine (Arakan) and Shan, therefore, in the spirit of Panglong, adopted the following “Basic Principles” for the future Federal Union of Burma. These principles, in fact, are the same Basic Principles as when the Union was founded in the first place in 1947. In essence, therefore, what we are putting forward as our vision for the future Union of Burma is the revival of the “Pang long Spirit”, which, we hope, everyone in the Union of Burma can agree upon.

### **The Basic Principles of Federalism at the time of Union Formation**

There are ten basic principles that were borne in mind by General Aung San and the Founding Fathers of the Union when they signed the Panglong Agreement for setting up a Federal Union. They are:

### **1. Sovereign State**

The Union of Burma shall be a sovereign multi-national-state, and the sovereign authority shall be rested with the people. General Aung San and the Founding Fathers of the Union particularly emphasized “popular sovereignty”, which opposed the concepts of both “the sovereignty belongs to the nation” (French Revolution’s tradition) and “sovereignty is vested in nation’s parliament” (British system). It was, therefore, assumed that the people of the entire Union of Burma, not merely a people from any particular ethnic group or state, are vested with sovereignty, it shall be exercised on their behalf on the basis of a functional division of powers between the central Federal Government and the member states of the Union.

### **2. Voluntary Association**

The founding members of the Union, who signed the Panglong Agreement in 1947, were leaders from pre-colonial independent “nations”. In principle, therefore, they all had the rights to regain their own independence directly from Great Britain, and to form their own respective independent nation-states. However, they all opted to establish a new multi-national-state of the Union of Burma together. The principle for joining the Union, or becoming a member state of the Union, was “Voluntary Association” which was strongly emphasized by General Aung San and the leaders of ethnic nationalities at the Panglong Conference and also at the Constituent Assembly of 1947, at which the Union Constitution was framed.

### **3. Equality**

In political domain, the term “equality” implies individual rights for all citizens, collective rights for all ethnic nationalities in the Union, and political rights for all member states of the Union. At individual level, every citizen of the country shall

enjoy equal rights and equal opportunities before the law; at collective level of ethnicity and nationality, every nationality has equal right to preserve, protect and promote their culture, language, religion and national identity. At political level, all member states of the Union shall enjoy equal political rights and political powers; which mean all political powers of legislative, administrative and judiciary shall be equally bestowed upon all member state of the Union. In order to exercise political powers freely and fairly, all member states of the Union shall be entitled to establish a State Legislative Assembly, State Government, and a State Supreme Court. Moreover, each of all member states of the Union shall elect and send an equal number of representatives to the Chamber of Nationalities (Upper House) of Union Assembly.

#### **4. Self-determination**

For the Founding Fathers of the Union, the principle of the right to self-determination was meant to have two aspects; “external aspect” and “internal aspect”. External aspect of self-determination implies colonial situation of being subjected to foreign domination, thereby emphasized as the right of the peoples of the Union of Burma to determine collectively to establish a sovereign multi-national-state and freely determine their international status as an independent country. An internal aspect of self-determination implies the right of all ethnic nationalities and member states of the Union to choose their own system of government and the right to participate in the political process that govern them. An internal aspect of self-determination also implies that all ethnic nationalities in the Union, by virtue of the right to self-determination, have the right to freely determine their political status and freely pursue their economic, social and cultural developments. Moreover, all ethnic nationalities of indigenous peoples in the Union of Burma have the rights to possess their natural wealth and natural resources in their own respective homelands.

Politically speaking, the internal aspect of “self-determination” implies the rights of member states of the Union to exercise political powers of legislation, administration and jurisdiction; and the rights to set up political institutions, namely, State Legislative Assembly, State Government and State Supreme Court, in order to ensure the free practice of political powers in accordance with laws.

Ethnic nationalities leaders who signed the Panglong Agreement with General Aung San took this issue of self-determination very seriously and accordingly made an ardent request for it. They retained the idea of “internal self-determination” in the administration and planning of their own internal affairs of respective states, even though they agreed that the Sovereign Power must be vested in the entire population of the Union in order to be able to set up a Federal Union. In that way they vested the sovereignty power in the Union while retaining in their hands the self-determination of legislative, administrative and judiciary powers; that will ensure them to legislate freely in each of all member states of the Union.

## **5. Federal Principles**

One of the most important principles that helps the realization of the above three principles (Principles 2 to 4) at the time of the formation of a Union is the “Federal Principle”. In other words, “Voluntary Association”, “Equality” and “Self-determination” cannot be materialized in any other constitutional form except for the Federalism. That means the principles of “Voluntary Association”, “Equality” and “Self-determination” cannot be realized in a system of a Unitary State. They can be implemented only through the political system of Federalism.

At the time of Union formation, this fifth principle, i.e., “Federal Principle”, was indeed a fundamental principle because it had to do directly with the constitution of the newly

independent multi-national-state of the Union of Burma. Questions like: Shall we set up the new Union in the form of Unitary State? Or shall we set it up in the form of a federal system? etc., were the crucial questions for both General Aung San and the ethnic nationalities leaders at the Panglong Conference. It was General Aung San who first raised and also answered the question. And he said:

When we build our new Burma, shall we build it as a Union or as a Unitary State? In my opinion it will not be feasible to set up a Unitary State. We must set up a Union with properly regulated provisions to safeguard the rights of the national minorities.<sup>1</sup>

The “Federal Principle” was the corner stone of Aung San’s version of a (draft) Constitution of the Union of Burma, which was ratified by the ASPFL convention in May 1947.<sup>2</sup> Moreover, based on the federal principle, Aung San submitted his “Seven Basic Principles”, which would form the main components and guidelines in drawing the Constitution of the Union of Burma, at the Constituent Assembly of Interim Burmese Government, and the Assembly duly ratified before he was assassinated.

In his now classic work: *Burma’s Constitution*, Dr. Maung Maung mentioned that the intention of General Aung San and the Founding Fathers of the Union at Panglong, was as follow:

The original idea was that the Union States [member states of the Union, i.e., Chin, Kachin, Karen, Karenni, Mon, Rakhine and Shan States] should have their own constitutions, their own organs of state, viz. Parliament, Government and Judiciary.<sup>3</sup>

The “Federal Principle”, therefore, implies the notion of two or more orders of government with combining elements of ‘shared rule’ and ‘self-rule’: shared rule through common institutions, and regional self-rule through the governments of the constituent states. The federal principles of self-rule

and shared rule, in turn, are based on the fact that all member states of the Union are entitled to exercise legislative, administrative and judiciary powers within their respective states, on the one hand, and, on the other to make sure that at the Union Assembly there must be a bicameral legislature consisting of Chamber of Nationalities (Upper House) and Chamber of Deputies (Lower House), and each member state of the Union should send an equal number of representatives to the Upper House regardless of its population or size.

This is the main principle of the federal system envisioned by General Aung San and leaders of Chin, Kachin and Shan when they signed the Panglong Agreement in 1947.

## **6. Minority Rights**

As mentioned, the Union of Burma was founded at Panglong by four former British colonies, namely the Chin, Kachin, Federated Shan State and Burma Proper, all of which already had their own constitution. All of these former colonies were territorial states; none of them were ethnically homogeneous. For example, there lived Karen, Mon and Rakhine peoples besides Burmans in the Burma Proper or Ministerial Burma, which was formed according to the 1935 Burma Act. The Chin Hills Regulation, which was promulgated in 1896, represented not only the Chins but also the Naga people living in present India and Burma, the indigenous peoples in present Manipur State in India, and also the peoples in the whole of Magalia State (excluding the Silong municipality). The same can be said about the Federated Shan State where many ethnic nationalities, such as Lahu, Pa-laung, Pa-o and Wa are living side by side with the Shan.

Therefore, for General Aung and the Founding Fathers of the Union, an important issue to be considered seriously was the rights of minority nationalities living in each of the member states of Union when it came to the issue of forming

a Union. The rights of the minority nationalities should be protected legally in accordance with laws in many ways.

To well protect legally the minority nationalities in the member states of the Union, General Aung San proposed in his draft of the Union Constitution that those areas where minority groups are living must be designated as Autonomous Regions and National Areas. He proposed that those minorities shall be granted not only the rights to preserve and develop their own culture, religion, language and national identity, but also personal autonomy, which would enable them to ensure their rights by acting themselves within the framework of their own institutions.

## **7. Fundamental Rights**

The 1947 Constitution of the Union of Burma enshrined the fundamental rights, such as freedom of speech and expression, freedom of religion, freedom of association, freedom of movement, and also freedom of voting and contesting in general elections, freedom of holding public office, freedom of pursuing education and professional life, and freedom of pursuing happiness in life. This also included gender equality, equal rights and equal opportunity for every citizen regardless of gender, race, ethnicity, language, religion and age.

## **8. Multi-party Democracy System**

Though this “Multi-party Democracy System” had been an important principle at the time of the Union Formation, this particular principle caused the most heated debate. At that time many Burmese political leaders were more or less under the influence of Marxist-left-wing ideology. Accordingly the extremist left wings and those who were members of the Communist party and the Socialist party did not support the multi-party democracy system. On the other hand, there were

some extremist right-wing politicians that admired Fascism in Japan and Nazism in Germany, who wanted to set up an absolute authoritarian system.

Moreover, the Chin, Kachin, Karen, Karenni, Shan and most of other ethnic groups were still practicing feudal systems with its attendant titles, such as *Ram-uk*, *Duma*, *Sawke*, *Saophya* and *Saobwa*, respectively, and thus did not understand much about the multi-party democracy system.

It was due to General Aung San and the Founding Fathers of the Union's far-sighted vision, however, that democratic rights were definitely enshrined in the 1947 Constitution of the Union of Burma. The multi-party democracy system lasted only 12 years, and General Ne Win, with the support of left- and right-wing politicians, militarists and chauvinists, seized power and established a one-party socialist-military dictatorship. As a consequence the country has witnessed repeated abuse of human rights, the demise of democracy, and bitterly suffered from various sorts of political, economic and social crises including civil war for more than 50 years.

The essence of this basic principle is that there should not be a lasting monopolization of power and bullying hegemony by one ethnic group or one ideology or one organization or one party, but a political ideology which envisions peaceful multi-ethnic, multi-ideology and multi-party coexistence; also envisions peaceful administration of the nation in accordance with the laws for the benefits of all people, and alternative participation in the administration during one's elected term through a free, fair and just process of multi-party election contests.

## **9. Secular State**

Like "Multi-party Democracy System", the principle of "Secular State" also received a heated debate among the Burmese politicians. Leaders like Dedot U Ba Chu argued that,

“if we cannot proclaim Buddhism as a state religion, independence would be a hallow freedom”. General Aung San, however, rejected such argument, and said:

Religion is a matter of individual conscience, while politics is social science. We must see to it that the individual enjoys his rights, including the right to freedom of religious belief and worship. We must draw clear lines between politics and religion because the two are not the same thing. If we mix religion with politics, then we offend the spirit of religion itself.<sup>4</sup>

In his draft constitution, General Aung San clearly stated his policy on religion as follows:

- 14(1). The abuse of the church or of religion for political purposes is forbidden.
- 14(2). The state shall observe neutrality in religious matters.
- 14(3). Religious communities whose teaching is not contrary to the Constitution are free in practice and exercise of their religion and religious ceremonies and are also free to have schools for the education of priests: but schools shall, however, be under the general supervision of the State.

However, after General Aung San was assassinated, U Chan Htun, under the supervision of U Nu, reversed the Union Constitution as follows:

- 14(1). The State recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the Union.
- 14(2). The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief, or status.
- 14(3). The State may extend material or other assistance to any religious institution.

U Chan Htun's version of the Constitution, which was promulgated in September 1947 as the Constitution of the Union of Burma, officially proclaimed a "confessional policy of religion". The reversion of "secular state" to "confessional policy of religion", and the promulgation of Buddhism as state religion of the Union of Burma in 1961, were the beginning of religious-oriented ethnic conflict in Burma.

### **10. Rights of Secession**

When the basic principles were laid down at the time of the Union formation, the "Right of Secession" was included as the principle that safeguards and underlines all the rest of the principles.

The essence of the "Right of Secession" is that the newly formed Union shall be multi-national-state and be founded on the principle of Federalism, and all member states of the Union shall decide for themselves to become a member state and accordingly join the Union in accordance with their own consent. All the member states of the Union shall enjoy equal rights politically and socially when they decide to join the Union as a member State. The member states of the Union shall also enjoy the right to self-determination in the areas of politics, economics, social and cultural affairs. What is meant by this is that all member states of the Union shall be entrusted with legislative, administrative and judiciary powers; and also that all member states of the Union shall send an equal number of representatives to the Chamber of Nationalities (Upper House) of the Union Assembly. In this way, the essence of a Federal Union formed by member states of the Union that are equally entrusted with the right of self-determination will be brought to light.

Moreover, the right of minority nationalities in each of all member states of the Union shall be protected legally and constitutionally. The democracy and fundamental rights shall be guaranteed for all citizens, and the Union shall observe

neutrality in religious matter. To prevent the emergence of chauvinism and narrow-minded nationalism, a clear guideline for the Form of State and Form of Government must be provided legally and constitutionally in accordance with above principles.

If it is found that the Form of State and Form of Government do not conform to the principles agreed upon or go astray from the intention of those principles, all member states of the Union have the right to secede from the Union. Thus, it was clearly enshrined in chapter 10, article 201 and 202 of the Constitution of the Union of Burma, adopted in 1947, that:

Chapter (X): The Right of Secession

201. Save as otherwise expressly provided in this Constitution or in any Act of Parliament made under section 199, every state shall have the right to secede from the Union in accordance with the condition hereinafter prescribed.
202. The right of secession shall not be exercised within ten years from the date on which this Constitution comes into operation.

The above principles are the lifeblood of the Union at the time of its formation. The Union would never be set up unless there were these principles. Therefore it is hoped that more or less these basic principles would be of help for the restoration of the Union.

**Proposal for the Future:**

**Basic Principles for the Future Federal Constitution of the Union of Burma**

All ethnic nationalities in the Union of Burma have lived together, sharing the fates of each other for more than 50

years. In this period they have faced together five long decades of civil war, and also passed through together the bitter experiences of dictatorship and associated persecution of various kinds. Together they have also suffered bitter severities of all sorts under military dictatorship. Likewise, they are waiting together for a new light of hope for the future.

Therefore we are now fighting in the hope of creating a situation in which all ethnic nationalities can live together peacefully and fraternally. All ethnic nationalities are still fighting the resistant war against the military regime in Rangoon, in the hope of creating the opportunity for all the peoples of Burma to fully enjoy their human right, to establish a democratic system, to create open society, and to materialize the right to self-determination for all member states of the Union. To build up a peaceful Union the following principles are outlined.

These principles are based upon those principles envisioned by General Aung San and the Founding Fathers of the Union at Panglong. In other words, it can be seen as a refurbished policy of national leader General Aung San.

However, due to the experience of 50 years two important principles at that time are omitted. These two principles are “Voluntary Association” and “Right of Secession”. For after 50 years of living together the “Voluntary Association” seems no longer necessary. Though this principle was important at the formation of the Union in the past, it is considered not to be important in the present Union, which has already attained 50 years chronologically.

Moreover, another important principle at the time of Union formation, that is, the “Right of Secession” is also omitted. The sole reason for the insertion of “Right of Secession” in the 1947 Constitution was for the protection of the right of non-Burman ethnic nationalities who joined the Union as equal partners in 1947 at Panglong. The “Right of Secession”, however, failed to protect the rights of ethnic

nationalities on one hand, and it rather encouraged, on the other hand, the emergence of one-party dictatorship (BSPP) and military dictatorship (Revolutionary Council in 1962 to present military junta), to bully the rights of the peoples at their whim. For taking his cue from this “Right of Secession” General Ne Win seized the political power on March 2, 1962. Using the “Right of Secession” as a pretext the civil war was created and fought, thereby causing huge casualties of both human lives and natural resources of the indigenous population of ethnic nationalities for more than 50 years. The military dictatorship is established on the conviction that “The Union will disintegrate without a strong army” on the backdrop of the “Right of Secession”.

Therefore it is believed that instead of emphasizing the “Right of Secession”, making a new constitution that will protect the rights of “democracy, equality and self-determination”, which are the very essence of “Right of Secession”, will bring more benefits to the Union and the people, and will also guarantee the survival and prosperity of the future generation.

Therefore for attainment of peace and progress for the future Union, the following principles are presented:

### **1. Popular Sovereignty**

The people of the Union of Burma, not a particular ethnic group or state, shall be vested with the sovereign power of the Union.

### **2. Equality**

All citizens of the country shall enjoy equal rights and equal opportunity before the law; all ethnic nationality shall be granted equal rights to preserve, protect and promote their culture, language, religion and national identity; and

all member states of the Union shall be entitled to exercise equal political powers and rights.

**3. Self-determination**

All ethnic nationalities and member states of the Union shall enjoy the rights to self-determination in the areas of politics, economics, religious, culture and other social affairs.

**4. Federal Principle**

All member states of the Union shall have their separate constitutions, their own organs of state, that is, State Legislative Assembly, State Government and State Supreme Court. Moreover, the Union Assembly must be a bicameral legislature consisting of a Chamber of Nationalities (Upper House) and a Chamber of Deputies (Lower House), and each member state of the Union shall send an equal number of representatives to the Upper House regardless of its population or size.

**5. Minority Rights**

The new Federal Constitution of Burma shall protect legally the minority nationalities in the member states of the Union, they shall be granted not only the rights to preserve and develop their own culture, religion, language and national identity, but also personal autonomy, which will enable them to ensure their rights by acting themselves within the framework of their own institutions.

**6. Democracy, Human Rights and Gender Equality**

Gender quality, democratic rights and human rights shall be enshrined in the new Federal Constitution of the Union of Burma; including, freedom of speech and expression,

freedom of religion, freedom of association, freedom of movement, freedom of voting and contesting in general election, freedom of holding public office, freedom of pursuing education and professional life, and freedom of pursuing happiness in life. This includes gender equality, equal rights and equal opportunity for every citizen regardless of gender, race, ethnicity, language, religion and age.

#### **7. Multi-party Democracy System**

A Multi-party democracy system shall be applied for the country governing system.

#### **8. Secular State**

The Union Assembly shall make no law that proclaims a state-religion; and the abuse of religion for political purposes shall also be forbidden. Moreover, the Union shall strictly observe neutrality in religious matters.

*[This is a Concept Paper for Seminar on the Basic Principles for Future Federal Union of Burma, held on February 9-12, 2005. The Seminar was attended by more than 106 representatives from 42 organizations, including elected MPs, senior leaders of ethnic nationalities and political parties, representatives of women and youth organizations; and adopted above 8 principles as the "Basic Principles for Future Federal Constitution of the Union of Burma". Written by Dr. Lian H. Sakbong, General Secretary of UNLD-LA, for the seminar and presented on behalf of the Joint Action Committee of NUGUB, NCUB, NDF, UNLD-LA and WLB.]*

Notes:

- <sup>1</sup>. Aung San, *Burma's Challenge* (Rangoon, 1947), reprinted in Josef Silverstein, *The Political Legacy of Aung San* (New York: Cornell University Press, 1993), cited in Maung Maung, *Burma's Constitution* (The Hague, 1959), p.169.
- <sup>2</sup>. U Nu and U Chan Htun changed Aung San's version of Union Constitution after he was assassinated in July 1947.
- <sup>3</sup>. Dr. Maung Maung, *Burma's Constitution* (1959), p. 170.
- <sup>4</sup>. Aung San's speech entitled "Problems for Burma's Freedom", delivered on January 20, 1946, in Josef Silverstein (ed.), *Political Legacy of Aung San* (Ithaca, New York: Cornell University Press, 1993), p. 96.

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**CONSTITUTIONAL DESIGN FOR BURMA**

[The first Lecture in 2003]

## **CONSTITUTIONAL DESIGN FOR BURMA**

**[The first Lecture in 2003]**

by

**Prof. David C. Williams**

**Bloomington, Indiana, USA**

It is a privilege and pleasure to be here with you today. I am here today because I have had a number of Burmese students, and I have always admired them because they do not just think deeply but also feel deeply. In my view, both are necessary for great scholarship. And I now see that they are part of a democratic movement that encourages them to do both, so I thank you for the gift of these students that have come into my life. Please let me say that I deeply admire your courage, hope, idealism, and determination. I know that you carry forward the dreams of your parents and grandparents for a free Burma, and I pray that their dream will come to reality in our generation. And I am very happy to be here to talk with you about how a new set of constitutions might help bring that result.

What I will do over the next several days is to talk about the main subjects that one needs to address when designing a constitution. I cannot tell you what sort of constitution would be best for you; that is ultimately your work. But I hope that I can help you to think about that work, by highlighting the decisions that you have to make, the concerns that you will want to weigh, and the various possibilities that different constitutions open up. There is no perfect constitution, but it is possible to choose intelligently among the types of constitution, so that you end up with a frame of government that suits your experience and hopes. Given the time constraints, I will be talking primarily in general terms. The real work will occur in tailoring these remarks to your particular circumstances.

## A. THE PURPOSE OF A CONSTITUTION

So let me begin with the purpose of a constitution. A constitution is a law that is more fundamental than any other law; it is the basic law of a state. It organizes the state up and places limits on its operation. A law that is in conflict with the constitution is not valid. A government that seeks power beyond that given by the constitution has over-reached itself. Most states these days have constitutions, and more are being written every day. So most people think that it is a good thing to have a constitution. But why?

There are three basic answers to that question. First, a constitution can express a popular identity or culture. Members of a culture think about who they are and who they have been and who they want to be. Then, they think about the way that they want their basic law to reflect that identity, and they write that down into a constitution, so that they will have a legal picture of themselves. And when they are uncertain or confused or divided, they can look to that picture to remind themselves of who they are most fundamentally. So a constitution can give guidance, unity, and purpose to a culture, if the members of that culture embrace it as their own. It can be a great help in troubled times.

But for a constitution to work this way, it must come from you, and you must see yourselves in it. You must ponder your past, present, and future, and you must decide who you are at root. When you write your constitution, therefore, you must also try to ensure that when the people read it, they will rally to it, because they think that it embodies their identity. So the constitution comes from you, and the most important thing is that it contains what is most important to you, regardless of what any other nation may think or want.

Sometimes that means that you want to put in something that no-one else necessarily understands. For example, the Chin Forum was especially keen that we should put in residency

requirements for their state officials, because in the past, some of the officers of Chin State refused to reside at the seat of government. Now, coming from the outside, this is not the sort of thing that I would normally think belongs in a constitution, because it is very specific. But for the Chins in particular, with their special history, it mattered a great deal. When the Chins look in this constitution, therefore, they can see their concerns mirrored there.

The U.S. Constitution has some similar provisions. For example, it bans the granting of titles of nobility. Few constitutions contain such a ban, and to many it seems a little strange. But you must remember that when the Americans were making their constitution, they had just fought a war of independence against a country with kings and nobles. They rejected the idea that you can inherit power from your father, as nobles did; instead, you had to earn it through the process of democracy. So when they wrote their constitution, they painted a picture of themselves: we are democratic, they said, we are not like the British with their dukes and earls and barons. And we must always remember that this is the kind of people that we are, so we put that picture in our constitution.

So while it is possible to learn from the experience of other nations, ultimately this is your constitution. It doesn't matter what the Americans or the Germans or the Australians or the Chinese have done, and it doesn't matter what I think is best for you. What ultimately matters is what you want to do. When you look into your state constitution, you must see the people of your state mirrored there, so that they will hold their constitution dear. So I have a suggestion. As you think about drafting your constitution, you might begin by thinking about your respective state cultures: what does it mean to be a citizen of each of your states? And how can you reflect that identity in a constitution?

The other purpose in a constitution is to create a government, and, even more important, to limit that government, so that it may not commit mischief or worse. In

general, we hope that our governments will be just and good, but we also know that it's not always true. So when we write a constitution, we try to anticipate when we can trust the government and when not. Ideally, we develop a list of subjects over which we can trust the government and a list of subjects over which we cannot trust them. As for the former, the areas where we can trust them, we give them discretion to do as they will. But as for the latter, where we cannot trust them we seek to use the constitution to protect against governmental misbehavior. We entrench certain rights or procedures to ensure that the legislature will not be tempted to misbehave.

Now to make a constitution work this way, we need to do two things. First, we need to sort out those subjects that should belong to the government and those that should not. For example, it is probably safe to allow the legislature to set speed limits on public highways, because the legislators have no particular incentive to act badly on this subject. But when it comes to voting rights, we might be especially suspicious of the legislature: our elected representatives may want to manipulate the electoral system to ensure that they get re-elected again and again, even if it not really what the people want. And I know that there is some worry that the military regime is trying to do that right now in the constitutional process going on in Rangoon.

So we need two piles of things, the government guards one pile, but it must keep its hands off the other pile. But then, to make these constitutional protections effective, you need to appoint a guard to protect that pile from the government. You have to be able to trust that guard with this task, and it must have the strength and independence to be a good guardian. So who shall it be? Different constitutional systems appoint different guardians. Some think that the citizens are the best guard: if they think that the legislature is violating the constitution, then they will vote them out the next time around. Others think that local legislative bodies should do some of the policing. But the most common device

used today is called judicial review, because the courts are appointed to ensure that the government stays within its constitutional bounds.

Again, I don't think that there is a right answer for all people at all times and places: it depends on your history and nature. If you strongly believe in the legal system, and if you believe that courts are likely to be brave, independent, and objective, then they are probably the right course. If you think that the people will be zealous and careful in protecting the constitution, then they might be best. And so forth. The one thing that is clear, however, is that for your constitution to be effective, you need a system in which some group assumes the duty to be faithful to the constitution, rather than merely to their immediate political gain. And who that should be cannot be answered in the abstract; to know whom you can trust, you must consult your own knowledge of your own society.

Another way that constitutions limit governments is to divide power so as to preserve freedom. As Burmese have reason to know, if you concentrate power into a small group of men, those men may feel free to act in arbitrary ways, ways that serve their own interests and power, rather than the interests of the whole. Now in any system, there is always a risk that powerful men will take more power to themselves, until they rule all without restraint. And there is nothing that one can do to guarantee that it will never happen again. But constitutions typically try to set the system up so that power is divided between different groups or government branches. That way, no-one can dominate completely. And because each of these groups will act to protect its own constitutional power against the others, we can hope that power will stay divided.

We therefore hope that these different groups will be watching and limiting each other, to make sure that the government acts only for the common good. If many people agree that the government should do something, it is likely that the government should do it. If only nine people in a military government think that the government should do

something, you have no reason to trust that the action will be good.

The main subjects in a constitution are the different ways that we can divide power between different groups, so that they can check and limit each other so as to preserve freedom. I will now give a general summary of those different ways of dividing power, and in subsequent days, we will examine some of these ways in greater detail.

### **(i). Electoral Systems**

First, constitutions typically specify an electoral system, they tell us how the government shall be elected. In many ways, this is the most basic division of power on a democracy: the government makes the rules, but the people choose the government, keep an eye on them, and can vote them out if they should prove corrupt. Now there are many different ways to structure an electoral system, and they produce different political systems. For example, you can deliberately design an electoral system to produce a legislature that includes people from all different political beliefs. In this case, your politics may well be contentious and divisive, because all sorts of people are participating, but everyone will feel that they have a voice, even the smallest minorities. On the other hand, you can design an electoral system that will produce a very moderate legislature, which consistently keeps to the middle of the road. In this system, minorities will feel that they have less power, but the system as a whole may be more stable.

So you have to decide which sort of system is right and desirable for you, right now in your history, with your particular culture and needs and hopes. And again, although friends can offer advice, no-one can tell you what is best for you. Because this subject is so important, we will be devoting all of tomorrow afternoon to it.

So the basic limit on government is that the people elect their leaders. Sometimes, however, this division is not enough because the government tries to deceive the people, or it tries to hijack control, even against the will of the people. So it is frequently useful to have other divisions built into the system. Both government actors that will limit one another.

### **(ii). Separation of Powers**

To that end, the next division is called the separation of powers, the division of power within the government between three different sorts of actors. First, there is the legislature, the body charged with making the law because it is the most democratic. Then there is a body that is usually charged with proposing law, enforcing law, and leading the country in war and foreign relations. In some systems, this part of government is called the executive branch; in others, it is called simply the government or the administration. And finally, there are the courts, charged with deciding cases and interpreting the meaning of the law. In many countries, the courts are also given the final say over the meaning of the constitution, so that they are the ultimate check on the other two branches.

The reason that we divide power in this way is that if it is done right, the branches will keep an eye on each other and ensure that no one of them achieves complete dominance. One branch may become corrupt and pursue only its own interests, but we hope that the others will stay true and so will keep the corrupt branch in line. For example, the legislature can pass laws, but it must still rely on the executive and the judiciary to enforce the law in particular cases. So the legislature will be reluctant to pass truly awful laws, because it is worried about what the executive and the courts may do. The executive may refuse to enforce the law or enforce it only laxly, or he may go to the citizens and alert them to what their legislature

is doing, or he may refuse to give those who backed the law any place in his cabinet. The courts may also refuse to apply the law, or they may interpret it in such a way as to eliminate its worst parts, or they may declare it unconstitutional. Similarly, if the executive behaves in irresponsible ways, the legislature may pass laws to restrain him, or it may publicize his bad behavior, or the courts may declare his conduct unconstitutional. In all these ways, if power is divided, it is less likely that any one person or group can seize control of the government to its own advantage.

But in order for this system to work, the branches must all be vigilant to protect their own space and to keep the division of powers in place. The system will not just work by itself; it depends on the people involved. And it is common that despite a constitutional division of powers, one branch, almost always the executive, ends up taking more and more power, on the claim that young countries need strong leadership. So it is important when one designs a constitution, that you give the other branches the resources and the incentives to block such a centralization of power in one man or one branch.

Now as in all of constitutional design, it is important to understand that this separation of powers is a balance: you want to divide the powers enough, but you don't want to divide them too much. If you divide not enough, the president or prime minister may make himself a king, and there will be no one to stand in his way. But if you divide too much, the government may be so divided that it cannot act effectively. It cannot address the country's problems, and it may eventually fall apart in civil war. And again, where you should strike that balance depends mostly on your culture, your history, your tendencies, and your hopes for the future.

When we speak of the separation of powers, some countries add the military as a fourth and final branch of government, as a separate component in the system, designed to check and limit the others, on a par with the legislature, the executive, and the judiciary. And of course, in Burma, there

are those who claim that only the military really stands for the common good of the whole of Burma, so that it must be given a central part to play in any future constitution.

Now I cannot say how transition to democracy will occur in Burma. I know that it will be the product of long negotiations. It may be that in order to agree to democracy, the current government will insist on an important military role. It is up to you to decide whether you want to agree, so as to get a democratic system in place. No-one can stand in your shoes, so no-one can tell you what you should want. Nonetheless, constitutional democracies generally do not give the military this sort of role, and overwhelmingly, constitutional scholars think it a very bad idea.

The reason, of course, is that the military is not democratic. Democracy is a bottom up system; democratic leaders listen to the people below them, the voters. Ideally the voters control the whole government. That way, we can ensure that the government does not use its power tyrannically. So to have the best democratic government, the citizens and the officials must have certain habits of mind: they must listen to each other patiently; they must look for ways to compromise and work things out; they must seldom give orders; they must realize that disagreement is normal, healthy, and good, and that the way to deal with disagreement is by conversation, not by suppression.

Now, as you know, professional militaries do not usually act this way. The people on the top often do not listen to the people on the bottom. Instead, the people on the top give orders to the people on the bottom, who are supposed to obey without question, on pain of being shot. Disagreement is regarded as disobedience. For that reason, for good soldiers to become good citizens, they must commonly transform themselves. And if you give the military a formal role in government, you are giving power to a non-democratic institution at precisely the moment that you are trying to move to democracy.

I know that the military government claims that the military represents the soul of Burma, the common good. Lots of military governments make that claim about their armies. Very occasionally, they might be true. But usually, militaries obey orders. And that means that the soldiers carry out the will of those on top which is often not congruent with the common good.

So it would probably be a bad idea to make the military a part of the government but that does not mean that you can just ignore it in your constitution. For a long time, the military has been an important part of the Burmese way of government; to change that, you must take overt steps to change the role of the military. Probably most important, you must make the military subordinate to the civil government, not part of the government but its servant, so that it will be democratically controlled. But it's not enough just to write down on paper that the military should follow the orders of the civilian government, because when given an order that they don't like, the military may simply seize control again. So ideally, the constitution should restructure control of the military to make it more subordinate. There are a lot of ways to do this, change the makeup of the officer class and the method of promotion, divide control over the military between different branches, and so forth.

But one of the most important things that you can do is to give the military a new and positive vision of itself. Since it will no longer be running the government, it needs something else to do, something that is noble and good, something that consumes its energies so that it will not be dreaming about retaking the government all the time. In other words, it is not enough simply to tell the military what it may NOT do; you also must tell it what it SHOULD do, so that it can be an honored and important part of a new democratic regime.

### **(iii). Federalism**

The next division is called federalism, which refers to a division of power between the central government and more local governments. Federalism can divide power into any number of levels. The most common form is a simple division between the federal or central government on the one hand and the state or provincial governments on the other. But the state constitutions can further subdivide state power, between the state government and local governments. And local governments can then subdivide power into even smaller units.

Federalism serves four main purposes. First, if your society contains a number of distinct cultures, it can guarantee those cultures some measure of self-determination, so that the majority culture will not always be telling them what to do. We will talk about this function at length in a later session. Second, federalism can give local people the power to handle local problems, because they know and understand their problems best, and they can act quickly and without a lot of bureaucratic inefficiency. Third and relatedly, federalism can encourage local people to become involved in their own government and to solve their own problems, because they know that they have the power and responsibility to do so. So the citizenry becomes much more engaged and active, much less passive and angry. And fourth, the local government can act as a check on the central government. Often, central governments think that they have the wisest, most talented, most devoted public servants, so of course the central government should run everything. Now the problem is that even if the central government is wise and talented and devoted in the beginning, it may not remain so if it has all the power. When one government holds all the power, without any other government to limit it, it may forget that it is only the servant of the people, not their masters. So it is useful to have some local governments, with constitutionally guaranteed powers,

to remind the central government that it holds power only on trust from the citizens.

Burma has learned by hard experience the utility of all four of these benefits. At least since the beginning of military government, the center has tended to make policy for the whole country and to repress self-determination for local cultures. The center has also tended to administer the whole country from Rangoon, even when local people better understand their own problems and can more effectively address them. The center has encouraged local people to become disengaged from governing themselves, so that they will always look to the center for a solution. And finally, because there are no independent local governments to put up an argument, the military government has convinced itself that it alone knows what is good for Burma and it alone will protect that good. The creation of strong state and local governments may help change this situation.

#### **(iv). Individual Rights**

The final division of power is individual rights. Governments have the power to make policy in certain spheres, but individuals retain a certain sphere of autonomy that the government may not invade. Commonly, the constitution lists those rights in a section that is called a Bill of Rights or a Charter of Rights. The idea of a written, judicially enforceable bill of rights originates with America, but more and more countries have chosen to adopt one.

A complete bill of rights commonly includes two types of provisions: private rights and public rights. Private rights guarantee the individual some protection for his private life, so that he can carry out the projects most dear to him, immune from government interference. Typically, these rights might include the right to get married and have children, the right to

raise your children in the way that seems best to you, the right to form private associations such as literary clubs, and so forth. In America these days, people talk a lot about private rights.

But the bill of rights really originated in a concern about public rights. These are rights guaranteed to the people to ensure that they can check the government. In a democracy, the people are the government; they are not subordinate to the government. They should keep an eye on the government, and ultimately they should control government policy. Unfortunately, governments tend to forget this fact, and they treat the people as subjects, not citizens. And this is true everywhere in the world, even in the most settled democracies.

So bills of rights guarantee that the people shall have certain public or political rights, designed to ensure that they may restrain the government. The most obvious example is the right to vote, so obvious and important that we took it up first, in a separate section, under the heading of electoral systems. These rights also include the right to organize political parties, and the government may not ban these parties just because it dislikes their views. Relatedly, individuals and party members have the right to speak their opinion on the issues of the day, and the government may not punish them for it. In addition, rights to fair criminal procedures ensure that the government cannot punish you except for good reason; it cannot, in other words, punish you merely because it does not like your views.

It is important that the protection for these rights be very strong, because government is always tempted to encroach on them. Many countries feel that it is especially important for judges to be in charge of these protections for individual rights, to safeguard them against the political branches. But more broadly, in order for the protection to be strong, the political culture must become comfortable with the idea that disagreement is normal and good, not a sign of treason. And again, Burma has had considerable experience with this issue. I know that some of you have been in prison for speaking

your mind, so you know better than anyone else the importance of this issue.

So the people need to have strong, constitutionally protected individual rights. But there is a risk here: if the constitution protects these rights too much or in the wrong way, people may come to feel that they have the freedom to do as they please, without any obligation to the greater good. In other words, people may feel that they have rights without responsibilities. Frankly, I believe that in America, this is a significant problem right now, and it may become worse. It is good for people to be free to do as they choose, but they must remember that they have duties to their families, to their fellow citizens, and to their governments. And right now, too many Americans are thinking only about themselves, about getting money and power for themselves, even if it hurts their country. And they think this way in part because their constitution talks only of rights and not of duties.

So some believe that a constitution should also recognize certain personal duties, and it should indicate that rights must always be balanced against duties. For that reason, many constitutions newer than America's have included a charter of duties along with its charter of rights.

Now there is a risk, or at least a complication, in this balance of rights and responsibilities. I have suggested that a constitution might remind citizens that they have obligations to the greater good, to each other, to their families, to their nations, and to their governments. But frequently, governments like to imagine that citizens therefore have a duty uncritically to obey their government, to act and believe just as the government wants them to. And I know that you have had some a great deal of experience with this problem.

But that is not the nature of the constitutional duty that I am talking about. Instead, your duty to government is to ensure that it acts the way that it is supposed to act, as outlined in the constitution, in other words, that it promotes the public good, respects the rights of citizens, and behaves in a democratic

way, taking its instructions from the people. If it behaves badly, it is not a citizen's duty to obey; quite the contrary, it is a citizen's duty to push the government to return to the constitutional path. Once you have written a constitution, your ultimate obligation is thus not to the particular people who hold governmental office at any given time; instead, your ultimate obligation is to the collection of ideals entrenched in your constitution itself. And if the government tries to convince you to do otherwise, you may use your individual rights to resist.

So in a well-functioning democracy, citizens have rights to be free from government when it is misbehaving, but also duties to the government when it is behaving well. And in the same way, governments have powers to make policy, but they also have duties to the public to govern well and to care for the people. Just as do individuals, governments tend to forget that they have duties, and they remember only their powers. And this tendency makes for a government that is likely to govern in its own interest, a government that has forgotten that its whole reason for existence is the people. Many therefore think it a good idea to include in the constitution itself a list of governmental duties, as well as the list of governmental powers. And again, the government's powers and duties are not actually in conflict, because the reason that the government has power is to perform its duty to the people.

This balance between rights or power on the one hand and obligations on the other is therefore extremely important to any well-functioning constitutional democracy. But it is often quite difficult to specify in advance exactly how to balance them: it all depends too much on the facts of history. For example, surely the government has a duty to educate its citizenry. But what if the government has very little money, how much of that should go to education? On what other things may the government first spend money, such as police officers to stop looting or judges' salaries or the costs involved in running an election?

For that reason, although many constitutions include a list of obligations, often that list is not judicially enforceable. You cannot go into court and insist that the government fulfill its obligation of educating you. Instead, it is intended a reminder to the legislature and the citizens that duties are as constitutionally important as rights and powers; and so we should all bear this fact in mind when going about our constitutional tasks.

So those are the main subjects of constitutional design. Clearly, a good constitution must seek to accomplish a good bit. It may express a popular identity; it must distinguish those matters on which the government can be trusted and those on which it cannot, and it must take the latter from the government's dominion and give it to some other constitutional guardian; it must divide power, so as to check and control it, through some arrangement involving electoral rules, separation of powers, federalism, and individual rights and duties. Finally, all of these parts of a constitution must somehow come together to form a unified whole, in which all the parts work together. For example, if you want strong individual rights, you may also want an independent judiciary to protect those rights. If you want a strong legislature, you may want to create an electoral system that will give the legislature great legitimacy. And so forth. Not surprisingly, nobody writes a perfect constitution on the first draft. It usually takes many attempts even to get something approximating a good system.

Our remaining time together will really be only an amplification of matters that we have introduced this morning. In future sessions, we will discuss how constitution-framers ensure that their constitution grows out of popular feelings, especially when the people are not themselves directly involved in the writing process. In another session, we will talk at length about federalism; in another, we will discuss electoral systems; and in still another, we will consider judicial review. Finally, if time permits, we will start to discuss the possible design of a union government that grows out of your state constitutions.

## B. SECURING THE BASIS OF CONSENT

As I mentioned earlier, it is critical important that your constitution come from you: when you look at it, you must seem yourselves. And for that reason, after the transition to democracy, your people will see themselves as well, and they will embrace the constitution as their own. If you try to push something on them that does not seem like them, they will ultimately reject it, and the constitution will not work. I am sure that you keenly feel an obligation to your people, people who are not at this table, to make a constitution that reflects their history, ideals, traditions, and hopes.

But while their constitution must reflect them, it is not possible for them directly to write it. For logistical reasons, it is not possible for a whole people to write a constitution; instead, a committee must do it in their name. In some ways, the process of writing a constitution is therefore a little odd. A small group of people writes the constitution, but the document that they write claims to speak for the whole citizenry. To outsiders, it sometimes looks as though the committee has tried to take over the process, and it illegitimately claims to speak for the people. And when this is accusation is made, often the constitution-writers become very uncomfortable. They worry that people will think badly of them. And if you have lived under a system in which the military government has seized power for itself, everyone is especially sensitive to the charge that the constitution-writing committee is seizing power for itself.

Now on this subject, when we look over the history of constitution-writing, we should learn two lessons. First, it is always the case that committees write constitutions, because as a practical matter, there is no other way. It would be nice for the whole people to meet in some enormous room and write their constitution, but it just cannot happen that way. And for that reason, someone has to take a leadership role

and initiate the process. To be a leader in this way takes courage and energy, and even well-meaning people might suddenly start to suspect you. But someone has to do it, even if it is a thankless task, and really people should be grateful that you had the courage to risk their disapproval. So although people may accuse you of seizing power merely because you are taking a leadership role, constitution-makers have always faced that charge and always will, and they cannot let it stop them.

But here is the second lesson: although the process must start with the committee, it must not end with the committee. As you know, it is very important that you write a constitution that you think will find favor with your people; it is important that you consult with them as much as possible during the writing; it is important that you give them a reasonable chance to approve or disapprove it before it goes into operation; and even after operation, it is important that your political leaders implement it in such a way that the people willingly give their support. Indeed, most new democracies first adopt provisional constitutions, so as to allow the government to function, but then during the first several years, they actively explore popular opinion on the outlines of a final constitution. In Burma, this process will probably be especially important because of course, right now, your ability to communicate with your people is limited. After the transition to democracy, however, you will be much better able to secure the basis of consent.

Now as you know, the Chins have been writing a constitution for several years. It is still unfinished and tentative, and it will change many times. Today, they bring it before you only by way of illustration: this is what a constitution might look like; it covers the main subjects that a constitution might cover; but you will have to make your own decisions about the precise content of your constitution. And as you think about how to write a constitution that will win popular support in your respective states, you might be interested in the experience of the Chins. We therefore have with us Pu Lian Uk and Mr.

Andrew Lian to talk about their experience in this process. I now turn the microphone over to them for that discussion.

### C. FEDERALISM

In this session, we will speak about federalism. Presently, Burma is governed by a military regime that is not democratic; the people do not elect their leaders in free and fair elections. It is important that Burma becomes democratic. But it is also important to understand that even a democratic government can be oppressive unless you have other protections in place. For many countries, federalism is one of those protections.

Federalism means that the constitution divides power between the central and local governments: the former receives one set of powers, and the latter a different set. There are a great many way to divide these powers, and different countries take different paths. As a result, there are many different kinds of federalism. All that they really have in common is that they involve some constitutional division of power between the center and the states. Accordingly, there are federalisms in which the center holds almost all the power, and there are federalisms in which the center holds almost no power.

Worldwide, the most common rationale for federalism is the self-determination of local cultures. Sometimes a country contains regions that have different characteristic cultures. The people in those different regions hold different ways of life or customary laws or styles of government, or they even dream different dreams for their future. In a simple, unitary democracy, without federalism, there is only one government, the center, and that government is governed by majority vote. In this situation, the minority cultures will never control the center, because they are by definition the minority. But if the center is the only government and the minorities will never control the center, then they will have very little opportunity to control their own destiny. So unitary democracy does not

promise real freedom for these groups; instead, they vote and they vote and they vote but they never win, because they are the minority. Federalism helps to solve this problem by giving some self-determination to minority cultures, with some power that the central government cannot invade.

If you want to protect these local cultures, it is probably a good idea to do so in the constitution itself, rather than leaving the matter up to the discretion of the central government. The reason is that if you do not put it in the constitution, the center may fail to understand the importance of local self-determination. For example, in the United States, Native Americans very much desire to govern their own affairs, and federal law gives them some measure of self-determination. If the USA were a unitary government, these Indians would be in trouble, because they would have almost no political powers: they would vote but always lose. The major drawback in this system is that the US constitution does not protect tribal self-government; the tribes have power only because the central government allows them to do so. From time to time, the federal government has eliminated self-government for certain tribes, and at times, it has threatened to eliminate self-government for all tribes. So Native Americans live under threat of extinction. This is a deficiency in the American system, and it may be that you will want to protect your federalism in your constitutions.

Now right at the outset, I should speak a little about the relationship between local self-government and ethnicity. I have suggested to you that federalism can help regional cultures have some control over their futures. Frequently, the people in these regions believe that their different life ways come from their different ethnic identity: the Corsicans, for example, might claim that they are different from the French because they are ethnically a different people. I believe, however, that this is a risky direction, and it often leads to great ethnic anger in new democracies. I will talk about the reasons at greater length at a later time, but here let me introduce the topic.

When people have a different culture, then they need some degree of self-determination to express that culture. Often, those cultures will grow out of the old lifeways of a particular ethnic group, so that a particular regional culture will draw heavily on the traditions of that ethnic group. I believe that in order for that culture to govern itself, it must be free to cling to those traditions if it wants. As an example, Chin state may want to protect Chin customary law, and if they want that, they should be allowed to so, and their constitution gives their government that power.

But it is one thing to say that local governments may protect local cultures that have their roots in an ethnic tradition. It is quite another thing to say that only those who are members of that ethnic group may fully belong to that state. It is always dangerous to treat people differently merely because of their ethnicity, because that approach tends to stir great anger between people. So while Chin state may protect its own regional culture, the current draft of the Chin constitution also prohibits the government from discriminating against people who are not ethnically Chin. Non-Chins are entitled to full individual rights under the Chin constitution, the same as Chins. In the long run, the experience of other countries suggests that this arrangement will be better for Chins and for non-Chins. Local governments will have the power to govern according to local culture, but no-one will be treated badly merely because of his ethnicity. And that means that Burma will celebrate all of its traditions and cultures, and that all Burmese may be able to live together happily.

To elaborate this point in the context of Burma, let me draw from a series of e-mails that I have received from Uncle Eugene. First, he wrote, We have had cries and demands for federalism or a federal union based on the equality of ethnic groups, with ethnic identity rather than territories, i.e., the states becoming the focal point. Actually, the problem is not so much conflict between ethnic groups, nor is it between the majority ethnic group and the minority ethnic groups. It in

reality involves the centralizing, monopolizing impetus of Rangoon and its encroachment of what are states' jurisdictions and spheres, so that the constituent states in Burma exist only in name. The problem and the confusion is compounded further by the distortion of the military regimes and successive juntas of federalism – misrepresenting federalism, equating it with secession and the break up of the union.”

At a later point, Uncle Eugene explained that local government can allow local cultures, rooted in ethnic traditions to express themselves. But he added that it is very important that local ethnic groups should not oppress others around them because of their ethnicity: As I see it, if there is emplaced in Burma a system of local governments with real power and real responsibility (as in Western countries, or real democracies, federal or otherwise), local governments will as a matter of course become ‘ethnic’. That is to say, in a certain local government (LG) area (in, say, the Shan State), where the majority population there is, say, the Pa-O ethnic group, the local government and the said area will become Pa-O (or Lahu, Palaung, Danu, etc.) – without a need for a superior body (the state or provincial, or the central/federal government) having to designate it as such. I think that too much focus on ethnicity is like going nowhere and everywhere. At the bottom, what ethnicity and ethnic based politics and demands are all about is recognizing their place as equal to any other ethnic group within, say, a country, or a nation state formation. I believe real LG will meet this need. Of course, there will always be minorities – like for eg, a Tai, or Danu minorities in a LG area that is Pa-O. There are many ways to deal with this, but the advantage of real de centralization in a democratic way is that LGs will be small, very local, not powerful enough to be used as a vehicle to dominate and repress other minority groups in the area. The majority group will have to accommodate, compromise, communicate, etc., in order to keep the LG running, and to win elections. In such a small government, small politics context, cross cutting cleavage (and loyalty) will

become more significant than ethnic ones. It is only when ethnicity, ethnic identity is repressed and people are not allowed to live and grow in their own 'skin' or tongue that we sow the seed of ethnic conflict and ethnic politics."

So the principal argument worldwide for federalism is that it can allow local cultures to govern themselves in their own way, and as long as these local cultures do not become rigidly or oppressively ethnic, federalism can therefore create greater freedom for everyone. In addition, there are several other reasons for federalism. First, local people may know more about local problems and be able to handle them more efficiently. Second, if local people know that local government makes many of the most important decisions that govern their lives, then they will be more likely to get involved in the democratic process. In the long run, democracy cannot survive unless the people participate, so as to express their views and keep control of government. Democracy cannot long survive unless the people set the terms of their lives. If they are always looking to the center for a decision or money or guidance or initiative, then democracy will never really come alive. The final reason for federalism is that state and local governments may be able to check the central government, so that it will never concentrate absolute power into its hands.

Federalism can occur at many levels. I know that you want to protect state power against the federal government. But you may also want to protect local power against the states. In other words, you may want to put federalism in the union constitution, so as to divide the states and the union government, but you may also want to put federalism into your state constitutions, so as to divide power between the states and more local units. You may particularly want to do this if you feel that empowering those local units will serve the values of federalism. Those local people may stand in the same relation to the states that the states stand in relation to the central government. Local people may understand local problems better; they may be more efficient at handling

problems; they may have a distinct local culture so they do not want to be governed at the state level; and giving power to local governments may inspire their citizens to become involved and proactive in their own governance.

So there is much that is good about giving power to state or local governments. But as in everything else in constitution-making, there is a balance here, because although there is much good about local government, there is also much good about central governments as well. If there weren't, then there would be no point in forming a union in the first place. Here are some of the advantages to being part of a larger country. Most people feel that a large country can better defend its territory from outside aggression. It can better negotiate with other governments, because it has more diplomatic power. And most people think that a larger market system makes for greater prosperity for the people in that system, so you will need a larger government to regulate the larger market in a unified way. So at least for defense, foreign relations, and the market economy, it can be a great advantage to build larger union structures, rather than just staying with local governments. And even very large nations are now trying to develop unions with other nations to handle some of these matters.

So we need to create a constitutional structure that will balance the advantages of local government with the advantages of central governments. How do we do this? We need to address at least three basic subjects. First, we need to figure out the basic structural relationship between the states and the union government: do the states come from the union, or does the union come from the states? Second, we need to decide which governments will have jurisdictions over which subjects. And finally, we need to make federalism real and significant by creating a local administrative apparatus that can make a difference in the lives of its citizens.

So let me begin with the first question: who comes first, the states or the central government, and why does it matter? We might imagine two basic answers to this question. First,

we might imagine that the nation begins as a unit, a single being, and the central government possesses all the power. This government then delegates, of its own will, some powers to state governments. If the government does this by statute, it may revoke the power at any time, and this system is therefore not technically federal, because the constitution does not guarantee a division of power. The states possess no independent power; they are merely instruments of the federal government to perform its will.

We might imagine, however, that the federal government goes further: it delegates power to the states, and it then gives those powers constitutional protection. If the powers delegated are broad enough, we might call this system federal. Even though the powers come from the center, they now constitutionally reside with the states.

In some countries, this sort of system works to produce real federalism. But there are risks associated with it. First, if the central government comes first, then it decides how much power it wants to delegate, and that is seldom as much as local people want it to delegate. Second, everyone concerned, the states, the central government, and the citizens, tend to perceive the central government as the real government, more permanent, more important, more powerful than the states, because it came first and because it created the states. The states, in this version, are mere creatures. Because everyone perceives the central government as more fundamental, it is likely to end up with dominant power. The central government is more likely to assume more power to itself; courts and citizens are likely to accept the central government's assumption of power; and states are unlikely to fight back very hard. Now when the country does not have a strong tradition of central power, none of this might matter. But if you have a history of authoritarian governance from a central point, all these dangers are real.

As a result, many prefer a different model: we imagine that the states came first, and then they joined together to

form a partnership, a union, giving certain powers to the central government to promote their aims. In this model, the union government is an agent of the states: it has only those powers that the states give it, cannot exceed those powers, and must always imagine its role as serving the common good of the states, considered collectively. Citizens owe obligations to their states first, and then to the central government. Courts begin with a presumption of state power, so that when they are in doubt, they are likely to find for the states. And the federal government remembers that it has been entrusted with certain goals by the states, and those goals do not include the subordination of the states themselves.

Again, as a practical matter it may not seem to matter very much whether the federal government or the states came first. Either way, we will end up with a constitution that divides power between the states and the federal government. So why does it matter how this constitution came to be? Again, the answer is psychological. If the states came first, then their legitimacy is presumed, in all their variety. They do not depend on a central authority to give them their legitimacy. And so built into this model is the idea that it is legitimate for states to be different; we need not be all the same; and disagreement is not treason. It can therefore be a useful device for making the transition from a unitary government to a federal one. I understand that some time ago, the NRP made the decision to adopt this model. You are beginning by writing your state constitutions, and then you will create a union government with powers delegated from the states. I assume therefore that you are already quite familiar with the benefits of this model.

So at the level of the union, you have already decided which comes first, the states or the union, the answer is the states. But in your state constitutions, you must also make a similar decision: which came first, the state governments or the local governments? Perhaps the local governments existed first, and then they created the states by delegating power to

them. Or perhaps the state existed first and then delegated power to local governments. And if the state came first, is local power to be guaranteed in the constitution, or can the state government decide when and how much power it wants to give away from time to time?

There is no one right answer to this, it all depends on your perceptions of your own needs and goals. You are trying to strike a balance here that is right for you. If you give too much power to the local governments, then the state may be divided, weak, inefficient, and full of strife. But if you give too little power to the local governments, the state government may become over-powerful and bureaucratic, stifling all local initiative. Now how you deal with those two risks, how you strike the balance, will depend on how much you worry about each risk in your particular context. Do you have many local cultures that need protection from the state? Do you worry that your state legislature may become too powerful? Are you afraid that the state government may bog down in bureaucracy and keep anything from getting done? Then maybe you want strong local government. Are you worried, on the other hand, that many strong local governments may take the loyalty of their citizens away from the state? Are you worried that these governments may adopt different rules for governing things, and these rules may be in conflict, and that may frustrate the creation of common rules across the state, in areas where a uniform system is important, such as the economy? Are you concerned that local governments may even become seedbeds of violent resistance to the new states? Then you may want to leave most of the power in the state government.

The Chins disagreed among themselves on this question, and so they asked me to draft up two different versions of the section of their constitution that deals with local government. In one version, their local governments are mere creatures of the state government, which can decide how much power it wants to give them. In the other, the constitution protects certain local powers from state meddling, and it carefully gives

the local governments their own tax powers and administration. In the Chin Forum, people disagreed precisely over the sort of worries that I am here outlining. Some thought that the legislature could be trusted to make these decisions, and too many local governments would be inefficient and might block a spirit of unity. Others worried that local governments needed constitutional protection because the state cannot so readily be trusted. These people worried that the state would take all the taxing power from local governments, would favor some localities over others, and would block local initiative.

I suspect that the Chins will be discussing this question for some time, and they may never all agree on an answer, which is fine. But the important thing is that they are talking about the right issues. They have their eye on what matters. And so their question is your question: you want both a spirit of unity within the state and also local freedom, so how do you balance these two?

In answering that question, one critical issue is our second subject: we need to generate a list of subjects over which the central government shall have primary power and a list of subjects over which more local governments shall have primary power. In pondering this large question, it is worthwhile to bear three sets of subordinate questions in mind, and this list applies whether you are dividing power between the union and the states or between the states and local governments.

First, you must try to identify areas where you need uniformity, provided by a single system of rules. Again, many people think that in the area of national defense, foreign relations, and the economy, it is important to have one system of rules. So in these areas, you may want to give primary power to the union government, less power to the states, and no power at all to the local governments.

Second, you will want to identify those areas where it is very important to states and localities that they retain power so as to assert their particular identity. Many people feel, for

example, that more local governments should control culture, primary education, and religion. So you may want to ban the union government from acting in these matters, and you may want reserve power to the states. You may even want to give the state the power only to set general guidelines, and then reserve the rest of the power to local governments. So, for example, the state might be able to prescribe general standards of excellence for the schools, but the local governments might be able to control curriculum, teaching method and the like. The Chin Forum has adopted essentially this general division of power in their constitution.

So when thinking about federal powers, you need to think about those areas where you need unity. When thinking about state powers, you need to think about those areas particularly important to your culture as states. And then finally, when thinking about the division of power, you always need to be thinking about issues of trust: which arm of the government can you trust in which area and why?

For example, perhaps you think that local governments should make most educational decisions. For that reason, you constitutionally reserve power over education to local governments. But then you think some more, and you might conclude that the state legislature can actually be trusted to make this decision: if local governments should have control over education, you can trust the state to realize that fact. So in that case, instead of constitutionally reserving power to the local governments, you may want to give full power over education to the state, in the expectation that the state will delegate to local governments when appropriate. But, on the other hand, perhaps you don't trust the state with the taxing power because you fear that it will keep all the money. In that case, you may want to constitutionally guarantee some independent taxing power to the local governments, and to keep the state from interfering with it.

Now in deciding which government should have power over which areas, it is also important to remember that it is

possible to give both governments some power over a given area. In the USA, for example, both the Federal Government and the states have power over commerce. In this case, we say that the governments have concurrent power over the subject, meaning that they can both exercise power at the same time. Often the two governments will work together on a problem, and that is all to the good for everyone. Sometimes, however, the governments will disagree about how to handle a problem, and they cannot work out a compromise. In such cases of conflict, the constitution should specify which government will win. For example, in the area of the economy, perhaps the union government should set the basic rules, but states can add extra ones, as long as they do not conflict with union policy. If they do conflict, the central government's rules win. But in the area of education, you might want just the opposite arrangement: the federal government can develop educational policies only so long as they do not conflict with the states'. And so forth.

When you divide power in this way, of course, it is critical that the constitution designate somebody reliable to enforce the divisions. Often, enforcing the division calls for interpretation of the constitution, and for that reason, many constitutions give this power to the courts. For example, suppose that you give the union government power over the economy, but you give the states power over culture. The central government then starts to regulate schools on the grounds that education has a big effect on the economy. Who wins, the state or the federal government? Is this economy or education? Someone must decide.

If you decide to give such decisions to the High Court, then you need to help the court in a variety of ways. You need to guarantee that it will not be punished for disagreeing with powerful politicians. You need to pay it enough so that the judges will not be tempted to take a bribe. You need to train the judges into a deep respect for the rule of law, rather than political power. And you need to give it enough respect so

that the country will follow its decisions, rather than disintegrate into civil war whenever people disagree over a constitutional question.

But it is not required that you assign the courts alone this task. It is possible to give other actors, such as the state legislature, the responsibility for interpreting the division as well and the Chin Forum has chosen to do so. If you pursue this course, however, it is important that the legislature exercise this power with the greatest care and balance, rather than acting merely for its political advantage. If you worry that the legislature will behave badly, it might be best to stipulate that it can invalidate federal legislation only by a super-majority vote, or it might, in the end, be better to give it no role in this particular process.

OK, so now imagine that you have made some important decisions. You have decided which comes first, the states or the union government. And you have decided which comes first, the local governments or the state governments. And you have decided which powers to give to each set of governments. And you have appointed someone to enforce that division of powers. None of that is worth anything unless you then create an administrative apparatus to ensure that each level of government is actually able to use its power to benefit its citizens. Federalism cannot be merely a theory; it must also be a lived reality. People must feel it in their daily lives. Local officials must have real power, and local people must take it upon themselves to make the system work. Only if people actually become fond of their local or state governments will they defend and support these governments. Federalism works because everyone in the system has a sense of how it works, and they are personally committed to the system.

So how does this happen? How do we make local government into a lived reality, instead of only a theory? There are several important parts to a good answer.

First, the constitution must give to the state and local governments a form, a body that allows them to function; in

other words, they need executive officials, legislators, and courts. And so your state constitutions need to specify the form of government, both for the states themselves and localities as well, if you are going to give local governments some constitutional protection.

Second, the constitution must not only give state and local governments power in the abstract; it must also specifically give them the ability to carry out those powers, to act in the way that governments generally act to pursue the goals assigned them.

Third, the constitution must give these governments some degree of immunity from the actions of higher governments. For example, state officials should not be punished by the union government for attempting to carry out their job. State institutions should not have to pay exorbitant federal taxes, so high that they cannot do their job. Similarly, the federal government cannot just take over the states and tell them what to do. That would destroy state independence. For that reason, you might want to block the federal government from forcing the states to carry out a federal policy, at least in certain areas. The job of the states is to carry out state policy; the job of the union is to carry out union policy itself. On the other hand, if the states want a role in carrying out federal policy, it is possible that they should have one, as they might be better able to execute policy near to the people. But the important point is that states cannot be forced to be mere instruments of the union government. And if you really are concerned to protect local governments, you could grant them similar immunities against the state governments.

Fourth and finally, if you want to give real life to local or state governments, you must give them an independent ability to raise taxes. There are several ways to do this. Some constitutions let the higher government raise taxes, but it must then pay a particular share to the lower governments. The downside to this procedure is that the higher government may never pay the monies out, or may pay out only a small fraction

of what is actually due. Another alternative therefore is to let the lower government collect all the taxes and pay to the higher government what is due to it. And then some constitutions completely divide the taxing powers of the various governments: they give certain taxing powers to the central government (for example excise taxes), other taxing powers to the state government (for example income taxes) and still other taxing powers to the local governments (for example real property taxes). Each level has its own ability to collect taxes as it will. Under the right circumstances, any of these schemes will work. The important thing is that the lower government be guaranteed a certain amount of money; otherwise, they will simply cease to function.

Finally, let us talk a little about the administration of local government. All of this wonderful federalist theory will be meaningless unless state and local governments have an administrative structure that will put it into practice. For federalism and local government to work, the people must actually experience it in their daily lives. When one is used to looking to the center for money, decisions, and initiative, it can be hard to imagine such a world. So even after you have designed a constitutional structure to create federalism, officials and citizens must still put it into practice. To this end, training and direct experience in federal systems are invaluable.

I cannot, of course, offer you such training or experience in this context. But perhaps I can offer a picture of how one federal system works by explaining to you the way that I spend a typical day back home, with reference to the way that my life intersects the various levels of government. I live in Monroe County, Indiana. The county has a government. Inside the county is the city of Bloomington, which has a separate government. Above both the city and the county is the state of Indiana. And above the state of Indiana is the federal government of the United States.

When I wake up in the morning, I am in my bed in my own house. I own this house under a system of property law

that is run by the state of Indiana but that is administered through Monroe County. The house is in the Lake Monroe watershed, which means that it is subject to environmental regulation run by the state of Indiana. I pay real property taxes on this house to Monroe County, and those taxes go to support the public school that my children attend. If I do not leave the house, there is no reason for me ever to interact with the federal government.

But I do leave the house: I drive my children to school. I drive on roads that are owned, maintained, and regulated by Monroe County. I arrive at my children's school, which is financed from local taxes. Most of the decisions about my children's education are made at that school, by the principal, teachers, and parents in association. Some are made at the county level, such as the school calendar and opening and closing times. A few are made at the state level, such as educational standards. And an even smaller number are now made at the federal level, though that is a recent innovation and many people are unhappy about it.

After I drop my children off, I might go to the post office. The post office is run by the United States Postal Service, which is a semi-private organization under contract to the federal government to run the postal system. Employees of the post office are therefore not exactly federal employees, but the federal government performs certain services through this organization. Today, I mail some packages, and I apply to have my passport renewed. The states have no role in the postal service or foreign relations, so for this moment I am really in federal territory. In my whole day, however, this is the only moment during which I interact with the Federal Government.

Now I drive into work in the city of Bloomington. I pass by a recycling center run by Monroe County, where I drop off some bottles and trash. If I commit a crime on the way, I will be arrested by the Monroe County police, or if I have reached Bloomington, by the city police. They will prosecute me under

state criminal law. The federal government prosecutes a few crimes, such as drug trafficking and political corruption, because it is thought that we need a uniform approach to those areas.

I work at Indiana University School of Law. The university, the most important in the state, is owned by the state of Indiana. Technically, the state can make law for the university, but it rarely does. Instead, the state leaves the administration of the university to the faculty and administration of the school. The university even has its own police force. Under the state constitution, the state must maintain a public university, but its primary role is to give us money. The law school also sets and collects its own tuition, and it raises money from private sources, so that we have an endowment that the state cannot touch.

At the law school, the faculty acts as the local legislature. We set policy by democratic vote in faculty meetings. In many ways, the university is the most important government in my life. This arrangement makes me quite happy, because it means that the important decisions about my life are made by people that I know and that are generally like me in their interests and values. I am eager that the state legislature should not become over-involved in the life of the school.

At the close of work, I pick my children up and go out to dinner with them and my wife. The restaurant must get a license from the state, and it must undergo periodic inspections by state health officials. Smoking is not allowed because the city of Bloomington has recently adopted a regulation prohibiting smoking in public places anywhere within the city limits. After a good dinner, I go home and go to sleep.

Now notice that over the course of this day, I have been subject to laws made by the federal government, the state of Indiana, Monroe County, the city of Bloomington, and Indiana University. Because the jurisdictional arrangements are generally clear, each government knows what it can do and

what it cannot do. They often work together to make sure that they are not intruding on each other's territory. Because I live under this system, I know which government to call if I have a problem. If I see a crime, I call the county sheriff. If I want to offer a new course, I bring it before the law school faculty.

Notice also that I am most affected by those governments that are closest to me, and as you go up the ladder, I am less and less affected. The result is that most of the decisions about my life are made locally, often by people that I know, people that live in the same place as me. In many cases, I can just pick up the phone and call these people. Because I am their neighbor, they are generally polite, friendly, helpful, and honest.

Now this system works well because it has been in place a long time, and everyone knows more or less what is expected of them. But it was not always so: once, there was no such system, and it had to be created, just as you are in the process of creating a federal system for yourself. The important thing to remember is that even if you design a good system, that is not enough. You must then make it work and live in the lives of your friends and neighbors. In addition, you need a fairly clear structure of responsibility, so you know that who is responsible for what. The day that I just described can occur only because the state government and the local governments keep that structure clearly in mind.

#### D. ELECTORAL SYSTEMS

In this session, we will be discussing electoral systems and their role in producing a stable, representative democracy. An electoral system is the method by which we elect our representatives. In particular, it refers to the way that we count votes to choose a winner. There are a number of different ways to do this, and different countries do it in different ways.

In other words, there is not just one legitimate form of democracy. Different electoral systems will produce different sorts of politics and will distribute power in different ways. Each electoral system will thus produce a slightly different kind of democracy, and each kind of democracy is good in different ways and for different purposes. And because each nation has its own particular problems, each nation may need its own particular democratic design.

For example, some nations might want to ensure that every group, no matter how small, has some representation in the legislature to make its views known. These nations think that the right to be heard is very important, and they also think that it's a good way to keep small groups committed to the system, because they have some stake in it. On the other hand, other nations might be concerned to have as stable, steady, and moderate a politics as possible. They want to encourage people to move toward the center of the political spectrum, and they want to discourage extremist groups from getting any real access to power. These nations may take this position because they have recently had difficulties with civil war or ethnic hostility or both.

The important thing to understand is that different electoral systems can help to produce different sorts of politics. And so different nations with different problems may need different electoral systems; there is no one-size-fits-all scheme. And for that reason, each of your states may want a different electoral scheme, and you may want still another and different scheme for the union government. But the way to start thinking about designing such systems is to begin by thinking about the problems that your states will face after the transition to democracy. Those problems will not necessarily be the same for each of your states, nor will they necessarily be the same for the union government. So there is no reason to think that your electoral systems all have to be the same.

There is an infinite variety of electoral systems, but let me offer you three general categories. The first is a family of

systems generally called majority/plurality systems. The second is a family of systems that use some form of proportional representation. And the third is a group of systems that explicitly guarantee various minority groups some amount of representation. All three of these kinds of systems seek to do two things, to ensure that minorities have some voice and some power, but also to promote a sense of the common good, so that minorities do not become warring factions. We need to recognize that we are different, and that's OK, but we are also the same in some fundamental sense, so that we have a unity to bind us together. The question is how best to balance these two desires, and the different systems answer that question in different ways.

In a plurality/majority system, whoever gets the most votes wins. In a majority system, you need to get 51% or more (the majority), and in a plurality system, you just need to get more than anyone else, so you could win with much less than half the votes if there are a lot of candidates who split the vote. The simplest form of plurality/majority election is one in which the voters are choosing someone for just one office: so, for example, in an election for President, the candidate with the majority or plurality of the votes will become the president.

The situation is a little more complicated when you are electing a body with many members, like the legislature. Then, most typically, a plurality/majority system divides the voters into geographical areas called districts. The voters in each district then choose one person to represent them in the legislature by majority or plurality vote. Again, what makes it a majority electoral system is that within each district, the majority chooses the representative, and the minority is left without any real control.

This system has one clear advantage: because it divides the people into relatively small geographical districts, each voter has a real opportunity to know and call upon his or her representative. For a people who are learning to govern themselves, who don't have a lot of experience making their

will known in a distant central government, it can be a great advantage to have someone close to home whom you know and who can make your views felt in the legislature. It is also easy to hold that person accountable for his actions: because you can keep an eye on him, if you don't like his performance in the legislature, you simply vote him out at the next election.

But there is an aspect of this sort of system that might be more troubling: plurality/majority systems tend to misrepresent the relative strength of different voting groups. In each district, the winners send their candidate to the legislature, but the losers get no representation at all. They just lose. So if we have an election in District A in which the voters divide 60/40, then 40% of the voters in that district feel that they have no direct representation.

Now suppose that we multiply this effect across the country. Suppose there are two groups, the pinks and the greens, and they don't like each other and share very little. Suppose that the greens are 60% of the voters and the pinks are 40%. And now suppose that they are both spread out pretty evenly across the country. In every district, therefore, the greens outnumber the pinks: the pinks are 40% of the population as a whole, and because they are spread evenly, they are 40% in every district. What is the result? In every district, the greens are a majority and the pinks a minority. Therefore, in every district, the greens will elect the representative in every district! The legislature will therefore be all green. Although they are 40% of the population, the pinks have no representation at all.

I have described an extreme case, but less extreme cases are very common. Majority/plurality systems almost always over-represents the majority, in the sense that they majority commands a greater share of the legislature than its share of the voters. This sort of misrepresentation gives rise to a number of problems. First, small groups are excluded from their proportional share of power, a situation that many regard as undemocratic. Second, those groups may grow so

dissatisfied that they will resort to civil unrest, making for an unstable country. And third, because they are so secure in their power, the ruling group may ignore the needs and interests of the minorities altogether.

Now to counter these problems, constitutional designers have developed slightly different versions of the plurality/majority system that will empower minorities somewhat more fully. The simplest of these versions is called alternative voting. In this system, you have relatively small geographical districts but with multiple candidates running for each office. Each voter then lists these candidates in order of his preference. After the votes are counted, very likely no candidate will have 50% or more of the first place votes. In that case, the candidate with the fewest first place votes is eliminated. We take all the ballots that put him first and we go down to their second choices and make them into first place choices, giving them to the appropriate candidates. Then we check to see whether anyone has 50% or more of the first place votes under this new distribution.

Now all that sounds complicated, but it is a lot simpler in practice, because it gives the candidates a clear incentive. If you are a candidate in a district with multiple groups, you realize that you will not be able to win with the first place votes of just one group. So you will need to appeal to other groups to get their votes as well. And even if they won't give you their first place votes, they may give you their second place votes, and those may be necessary for your election. Now that means that you can campaign primarily to pick up voters of your group, but you must also try to appeal to others, so you are unlikely to spread a message of division and hatred. And the result is commonly that you have legislatures that are trying to govern the country well, instead of legislatures that are always angry and divided against each other.

So alternative voting has a lot of promise: you can keep your small districts, so voters know their representatives, but minorities also have some influence because candidates need

their second place votes. But again there are drawbacks to alternative voting as well. Imagine that we have several groups, pinks, greens, blues, and greys. Now if the pinks are an absolute majority of the district and the pink candidate can count on their votes, then he has no incentive to appeal to other groups. So the system works best when no group has an absolute majority. Even then, however, if the animosity among these groups is severe, people from one group may simply not vote for people whom they regard as their enemy. Everyone knows this, so candidates may not even bother making appeals to voters from certain other groups.

But suppose that the system works as it is supposed to suppose that the animosity is not profound and no group holds an absolute majority, so you need some second place votes from voters outside your group. There is still a problem, or at least people could regard it as a problem. Here is the promise of alternative voting: candidates from the pink group will try to appeal to the greens to get some of their second place votes. Now if the pink candidate wins, we can hope that he will feel grateful and will support the interests of the greens in the legislature. But the greens have influence only through this legislator; they have not actually managed to get one of their own elected. In many cases, that influence may matter a great deal. But we can also imagine that the pink candidate will think of the pinks first, and he will help the greens only secondarily. And meanwhile, the blues and the greys are totally out of luck; they have no-one to represent them even partially.

So alternative voting may help reduce the tension between groups, but only to a limited degree. And it may help to make the system more representative, but again only to a limited degree.

Now the most significant alternative to plurality majority systems is proportional representation (PR). You create quite large districts, and each district sends multiple representatives to the legislature, let's say 100. Parties then run lists of candidates, generally one candidate for every slot open, and

they are ranked, 1 to 100. After the votes are counted, the party gets a number of seats in the legislature that is proportional to their share of the vote. So if the pink party gets 35% of the vote, then their top 35 candidates become members of the legislature. If they get only 2% of the vote, then they send two people to the legislature. And the result is that even very small parties can get their fair share of legislative power.

So the first big contrast with plurality/majority voting is that PR is more representative. In a plurality/majority system, in each district, only the majority sends any representatives to the legislature. In any given district, if you are in the minority, you just lose. If your party is in the minority in every district, it will elect no-one, even though nation-wide it may have 20 or 30 or even 40 percent of the voters. By contrast, with PR, even very small groups sometimes manage to send someone to the legislature, because if they have 1% of the vote, they will elect 1% of the representatives.

That kind of inclusiveness has several advantages. First, it more accurately represents the will of the people, which makes it more democratic. Second, even small minorities may feel that they have some influence in the current system, so they may feel more committed to the process. So if it is very important to include all voices in the discussion, this is a good system.

But this system has drawbacks as well. First, for this system to work, you need large districts because they will be sending a number of people to the legislature. In some states, the whole country is one large district. And the result is that people do not feel a close connection to their representatives. The legislators are not familiar with the people of their district, and they may not push vigorously for their interests. So you get more accurate representation, but you lose close connection and familiarity. And that does seem to be a real tradeoff.

Second, in traditional PR, the parties have a lot of control. They choose candidates, and they list them in order. The

people then just choose one or the other list. So the political elite have a great deal of influence. Now this arrangement can be good or bad. If you worry that your political party leaders may be corrupt or power-hungry or manipulative, then you want someone else to choose the candidates and their rank order. On the other hand, your political elites may be more moderate and responsible than the rank and file. Because they have to run the system, they may choose only candidates who will work responsibly within the system, and they may better understand what makes someone a good candidate. Because they want to appeal to a lot of voters, they may choose candidates who are moderate in their views. And for the same reason, they may develop a list of candidates with all different sorts of candidates on it, people from different groups, from different regions, and so forth. And when different sorts of legislators interact in the legislature, they may find ways to work together, even across their differences.

Third, some have claimed that unlike alternative voting, PR gives political parties no incentive to compromise with each other because all are assured their share of the legislature, so why should they bother? Again, however, it depends on the circumstances. As just noted, sometimes in a PR system, if the divisions are not too severe, the parties will put out candidate lists with people from all groups, in an effort to broaden their base of support. And if there are a number of groups in the legislature, none with an absolute majority, then they must form coalitions in order to form a government or to get legislation passed, so they must compromise and learn to live together. The one time that PR does not do much to encourage compromise is when one party, based on group identity, has an absolute majority; then it has no need to compromise or to build coalitions.

Some people think that PR has still another drawback: it makes governments less stable and more divided. Remember that in a majority/plurality system, you need to have a large number of votes to get any representation at all, because you

have to win a majority or plurality of votes in any given district. The result is that only large parties tend to have any power. Indeed, most often there are only two significant parties. By contrast in PR, you don't need a majority of the votes cast. In fact, you may need only 1% in order to send someone to the legislature. PR countries therefore tend to have a lot of parties represented in the legislature, and none may command a majority. As a result, to form a government or to pass legislation, the parties have to enter into coalitions with each other. But those coalitions are made up of people who have different views and agendas, and so they may be unstable, breaking apart on any controversial issue, which is precisely when they need to stay together to govern the country. (On the other hand, if they do stay together, then they all have to moderate their views, compromise with others, and move to the center. That pressure to the center makes the legislature less representative of the country as a whole, but accurate representation was the whole promise of PR to begin with).

In addition, because small groups may manage to elect representatives under PR, you may end up with extremist candidates in the legislature—candidates who are pledged, for example, to restoring the generals to their place of power, or something like that. And these people may make all kinds of trouble. Now remember that the promise of PR is accurate representation, and in sending these extremists to the legislature, it is simply delivering on that promise, because some voters want these candidates. So if you don't want these extremists in the legislature, you are really saying that you do not want the legislature to be that representative. But many people think that when it comes to representation, you can have too much of a good thing; in this view, irresponsible extremists should not have power in the constitutional structure, especially if they are pledged to the destruction of that very structure by unconstitutional means.

Empirically, it is not clear how great these problems are for actual PR systems. As to the claim that PR systems are

unstable, many PR countries turn out to be quite stable. In some countries, the political culture is centrist enough that they in fact have only a couple of major parties. In others, though they have many parties, the difference between them is not so great, so the coalitions tend to be fairly stable. So whether PR is in fact unstable will in part depend on just how politically divided the society is.

As to the worry about extremist parties, you can eliminate them simply by adopting a threshold requirement: in order to send anyone to the legislature, a party must get more than a certain percentage of the vote, 2% or 5% or 8% or something like that. So to elect a representative, you must appeal to a certain number of voters, and inevitably that means that you will be more moderate. But there is actually a question about whether you really want to keep those small parties out of the legislature. It may be better to allow them to send a couple of people, who will have little power anyway, but then they feel that they have had a chance to express their views, and the rest of the legislature can keep an eye on them.

So in practice, PR and majority/plurality systems may not differ very much when it comes to extremism and instability. Instead, the choice between PR and majority/plurality systems may ultimately boil down to one difference: because it uses small districts, a majority/plurality system allows a closer connection between voters and their representatives, but PR leads to more accurate representation of different groups, especially of minorities. So you need to decide what matters most to you. And again, that decision need not be the same for each state constitution or for the union constitution, because the people of each government have different issues and problems.

It is also possible to combine the two systems in different ways. I know that some of you have studied Germany's electoral system, and they use a combination. Some of the seats in the legislature are elected by plurality vote from relatively small geographical districts. And then some are

elected by proportional representation, and they are allocated in such a way that the legislature as a whole is roughly proportional.

And finally, there is one other kind of system that may be relevant to Burma: by formal law, one might reserve certain offices to people from certain groups or certain areas. So, for example, one might reserve a number of seats in the legislature for people of a threatened minority group: only people from that group may vote in elections for those seats, and only people from that group may be a candidate for those seats. You might adopt the same sort of system for the cabinet or the high court: under the constitution, these bodies would have to include people from a number of different groups.

Usually it is new democracies that choose this sort of system. These countries may have been wracked by civil war. Sometimes various minority ethnic groups feel that they have never had appropriate influence, and they are very concerned to ensure that they get a certain share of the power. Neither plurality/majority systems nor PR absolutely ensures that minority groups will get any significant representation. In a plurality system, minorities will elect someone only if they are geographically concentrated so that they are 50% of the votes in some electoral district. If they are evenly spread out, they will be a minority everywhere and so may elect no-one at all. In a classic PR system, minorities are more likely to elect someone, but even here there is no guarantee. They must organize, they must create a party to represent their interests, and they must get their members to vote. So if your overwhelming goal is to ensure that a particular group gets a particular share of power, you may want simply to guarantee that group a certain share of power.

But there is a risk in this method of proceeding: by law, it divides people into groups. As a result, they may come to think of themselves primarily as members of groups, and they will contend with other voters as members of other groups. Pretty soon you may have a deeply divided citizenry, with

different groups feeling that they are all in competition. As a result, the politics may be deeply divisive, and eventually the system may break down entirely, and you are plunged back into civil war.

So it is good to hesitate before you adopt this sort of practice. If you do adopt a system of reserved seats, it is perhaps best to view it as a transitional scheme. It may be necessary to guarantee traditionally oppressed groups some power, and those groups may insist on it. But you hope that as the country gains some experience with democracy, as the groups come to interact with each other, group lines will appear less significant. Even though group identities will not and should not disappear, people in different groups will not distrust each other or the government so much, because the system has worked for them. So, again, you hope that voters from one group will come to care about voters from another group, and vice-versa. And they will all come to think that what they have in common is as important as what they don't. All countries must struggle with this task: we need to allow diversity, but we also need to instill unity. Now the risk of a system of reserved seats is that it tends to institutionalize division, and so it can make it very difficult to move to a system characterized by trust and unity.

So you ideally want a system that will do two things at the same time. It should allow particular groups of people to express their identity as a people, to tell their story, but it should also allow people to form bonds between groups, so that you can create a unified nation. Now one way to do that is the way that the Chins have proposed in their constitution. Instead of reserving seats for particular ethnic groups, the Chins have proposed that the union constitution reserve seats for certain regions, the traditional states of Burma, Chin State, Shan State, Karen State, and so forth. So, for example, the Chins think that the government should include ministers from each of these states, and the High Court should include judges from each of these states, and the upper chamber of the legislature

should include an equal number of representatives from each of these states, regardless of their population. And all these provisions are designed to ensure that the people in each of these states are guaranteed a certain share of power.

But these provisions guarantee power to geographical regions, not to ethnic groups as such. To be sure, most of the people in Chin state are Chins, and so the effect of these provisions will, in the short run, be to guarantee ethnic Chins a certain share of power. But the constitution does not recognize this ethnic difference as such. It guarantees power to people in Chin state as citizens of that state, whether they are ethnically Chin or not. And that means that the law does not divide people into contending ethnic groups; it merely divides them into geographical areas. In some states, the population may be very mixed, and as time goes on, the ethnic composition of all the states may become increasingly heterogeneous. Yet regardless of their ethnic identity, the people in these states hold power based on where they live, not on their ethnicity. The result is that the law does not create hard and fast divisions between people based on their ethnicity. It guarantees to local communities some share of power, but it does not divide these communities based on their language or religion or ethnicity or clan. And the hope is that as a result, people from very different groups may learn to live and work together, to trust each other and support each other. So again we try to achieve unity in diversity; we recognize and allow for difference, but we also hope to create a state with enough unity to work.

And again, you must make these decisions at the level not only of the union government but also at the state. Even if you want some reserved seats in the union government, it may be that you want no reserved seats within your state governments, because you do not feel that there are any minority groups within your borders that need a guaranteed share of power. Or, on the other hand, maybe you do want to create some reserved seats, because your state contains a

particular, sharply defined and politically militant group, and they do not particularly want to be included in your state. One way to appease them, to buy their support, may be to give them some sort of special status through reserved seats. But at least until they come to trust you, so that the special status is no longer needed.

So where does all this leave us? For now, let us put to one side the union constitution and instead talk about your various state constitutions. It may be that you do not even want to prescribe a particular permanent electoral system in your constitution. Instead, you could prescribe some method to elect the first legislature and then leave it to them to choose the electoral system for the future, which may change with time. This approach has some advantages: the legislature is likely to know a good bit about conditions in the state, and they can easily respond as they learn more about what might work for the states. The drawback to this approach is that the legislature may prove resistant to change, because they will want to keep the system that put them in power, so that it will continue to put them in power into the future. If they change it at all, it may only be to make even more sure that they will retain their grip on power.

So if you are worried about the legislature's motives, you may want to prescribe a constitutional method of election, and if you need to change it, you can still do so by constitutional amendment. But which method? The conventional wisdom is that alternative voting may be a good choice if the divisions between your groups are not too severe and the groups are geographically intermixed. Remember that under alternative voting, voters rank order their preferred candidates, and the winning candidate may need some second place votes from people outside of his own group. Now if the groups are intermixed, then a candidate will have to appeal to a number of groups to get elected, so that people will start building bridges. And if the groups are not too divided, then people will feel comfortable listing candidates from another group as

their second or third choices. So alternative voting under these circumstances can lead to greater trust and connection among citizens. Even under these good circumstances, alternative voting still may not be very representative: in each district, some minorities may not be able to elect the person who is their first choice, but they may still have some influence on their representatives, because their second choice votes were essential to his election. So, in short, under these conditions, you may give up a little in representative accuracy, but you gain by giving candidates an incentive to appeal across ethnic divisions, and also by keeping the close geographic link between representatives and voters.

On the other hand, if your divisions are severe and/or if your groups are concentrated in particular areas, then alternative voting will not deliver on its promise of mutual accommodation. If minorities are concentrated in particular areas, so that they form a majority, candidates will not need to appeal across ethnic lines, resulting in so-called “ethnic fiefdoms,” where the majority always wins and the minority goes without any representation at all. If minorities are intermixed but the divisions are severe, then candidates just will not appeal across ethnic lines, so you will still end up with extremist politicians. And because the minorities are all spread out, they will be a minority in almost all districts, so that the majority group will win the election in almost all elections. The result is that under these circumstances, alternative voting will suffer from the primary defect of all majority/plurality systems: it tends to give the majority even more control than their numbers would suggest. So we end up with a legislature in which politicians appeal only to their own groups and the larger groups are over-represented.

So the conventional wisdom is that proportional representation is probably best if the divisions among your groups are rigid and intense, and/or if your groups are geographically concentrated in particular areas. Above all, PR will ensure an inclusive, broadly representative legislature. In

a divided society, it is critically important that everyone feel that they have a voice in government; otherwise, those who feel on the outside may just take up arms again. So PR is a good choice for countries with deep divisions or when groups are geographically concentrated. In those cases, if you use a plurality majority system, the dominant group will always win, and the minority will have no representation. By contrast, in a large PR district, those minority voters may still have enough of the vote, even if a minority, to send some representatives to the legislature. And so again they feel that they have a stake and a voice, and they may become committed to the system.

But even in this situation, PR is not without its faults. It still uses large districts, so the close connection between voters and representatives will become more attenuated. And because all groups have a real chance to elect representatives on their own, they may feel little requirement to build bridges beyond their groups. The party leaders may try to field lists with people from every group, so as to get a lot of votes, but if the divisions are severe, the leaders may be as unwilling to work with people from other groups as the voters are. So there are clearly drawbacks, but most feel that the benefits of broad inclusion are worth it.

In conclusion, let me say that I know that this material is technical, and it is something that you have to work with for a while before you become comfortable with it. But it really matters. We have good evidence that choosing an electoral system can make a big difference in how a democracy functions. It is never possible to control the future through constitutional design with perfect certainty, but getting the right voting method can really help.

## E. THE UNION CONSTITUTION

We come at last to perhaps the most important, most difficult, and most delicate question of all: the construction of a Union government. And the reason that it is important is also the reason that it is difficult, and the reason that it is delicate. And that reason is that Burma has historically experienced some tension between the center and the margin, and we must speak frankly about that tension.

I am told that those wounds have started to heal, as the ethnic Burmans and the ethnic minorities have built a common cause in opposition to the military government. And all agree that the primary goal here is to move to a democratic government in Rangoon. But at the same time, there are groups within Burma that want some control over their own future, with some independence from the center, even if that center is democratic.

Now a society like Burma is sometimes called a plural society, meaning that there are a number of groups within it, who have their own distinct life ways. I intend to use that term. I do not intend to use the term divided society, which suggests hostility and division between the groups. I will not use that term because I don't think we know whether a democratic Burma will in fact be divided. There is a history of tension, but there is also a history of struggling together against a common foe. So we don't want to assume that there will be bad feelings between the center and the margin after democracy arrives.

But even if Burma is not divided, plural societies always present special problems in constitutional design. Some believe that the best path is to encourage everyone to forget their differences and ignore their distinctive cultures. In this view, the overriding goal of a constitution is to dissolve difference. And in some places, where the anger between groups is absolutely poisonous, that may be the only possible course.

I think, however, that you have concluded that is not the best course for Burma. You have already had too much of the government demanding that everyone should be the same. Instead, I think that you have decided to try to strike a balance, and I think that you are wise in this decision. On the one hand, you want to assure local groups the right to measured self-determination and to a meaningful share of power in the center, because you do not want them to be swallowed up by the majority. But on the other hand, you are still one country, so you must create a common enterprise that binds you together. You want to be many, but you also want to be one.

And it is important to remember that both are important and that you cannot just choose one over the other. If you are only one, all the same, with no local control, local people will still feel out of control of their own future, and the peace may not last very long. But if you are not one in any way, the nation will surely fall apart in short order, and again the peace may not last very long.

Now in practice, as I understand the project in which you are engaged, you wish to do two things. First, you want some protection for the states, but second, you will want to encourage all groups to work together to form a common framework. You want local government, but you also want a central government that all experience as their government, as their agent. You cannot ignore either. The whole system has to work together to accomplish both.

And it is extremely important to remember this: you cannot design a constitution that makes anyone feel oppressed, because in the long run that sort of constitution will not survive. If any group feels that they have really been left out, then they will eventually start to resist the government.

Burma cannot afford to return to civil war, and that means that the ethnic Burmese must strive to make the ethnic minorities happy, and the ethnic minorities must strive to make the ethnic Burmese happy. If you are in one country, you

depend on each other, and you must therefore care for each other, and at the same time, allow each other to be different.

So let us take those two pieces in turn. First, you need to protect local government; second, you need to make the central government a place of unity and mutual regard. How do we do this?

Start with local government. We talked yesterday about federalism, and that discussion is of course relevant here. Your very method of proceeding rests on a federalist view, because each state is here drafting its own constitution to govern itself. Now when it comes time to create a union government, you will want to delegate certain powers to that government. You want to keep for yourself everything that is critical to your own identity, but you want to give away those powers that you think can best be exercised by one central unit.

And so I remind you that many countries have taken the view that a union government has advantages in putting together an economy, in waging external war, and in handling foreign relations. I will suggest shortly that you may also want to give the central government two other powers: first, the power to protect individual rights for all; and second, the power to equalize tax revenues between poorer and richer states. So the central government needs some powers of its own. But on the other hand, many plural societies have taken the view that local governments should retain powers over culture and education. On other matters, such as criminal law, environmental protection, and the like, different nations proceed very differently, and there is not one general answer.

So in the Union constitution, you want to insert some protection for local governments, so as to ensure that your own local cultures have a chance to rule. But you do not want these states to become hostile and angry at each other; you want them to feel some sense of connection. How do we accomplish this end? First, I believe that you may want to ensure that all Burmans are welcome in every state, regardless

of their ethnicity, so that a Chin can move to Burma proper, or a Kachin to Shan State, or an ethnic Burmese to Karen State, and they will feel safe and protected there. Now that means that in general the various states should not create legislation to favor their own primary ethnicity over other people. To be sure, the whole point in federalism is to allow a people to protect their own distinctive life way. And so the various states may be allowed to protect their own culture and preserve their customary law. But at the same time, each state constitution should protect the fundamental rights and opportunities of all people under its jurisdiction, regardless of ethnicity.

As always, the question is how to strike the balance. If you are from Arakan state and you are living in Chin state, you may inevitably feel a little out of place. People speak a different language, they have a different customary law, and they just do things differently. But you knew that when you moved there, and you may not feel too angry. Imagine, however, that the legal system systematically treats you worse than your friends and neighbors who are Chin: you cannot vote, you will be punished more harshly for crimes, you cannot speak your language in public, you are prevented from pursuing your occupation. Very soon, you may become very angry. And instead of making friends, you make enemies.

So the state constitutions need both to create a haven for local cultures and also to welcome those from outside these local cultures. The way that the Chin constitution tries to strike this balance is this: on the one hand, it allows the government to promote Chin culture and customary law; but on the other hand, it discourages the government from discriminating against outsiders, especially with regard to their basic rights. So again, you are different, but you are also connected.

Now to help realize this goal, you may want to empower the union government to protect people from one state who are living or visiting in a different state. For example, suppose

that someone from Mon State goes to live in Kachin state, and the Kachin government, for some reason, refuses to allow him to buy a house. The Kachin government is not supposed to do this under its own constitution, but they do it even so, and their courts go along with it. What can this poor Mon man do? One option is to say that we are very afraid of the union government, so we do not want them to intervene, so the man should simply go back home or go without a house. But remember this could happen to any of your people: they go to a different part of Burma for a job, and they need some protection there.

So another alternative is to conclude that the federal government must step in. Because we have structured it to represent everyone, we hope that it will not discriminate and it will stop the states from hurting outsiders. Now in this case, we may want to give the union government some power to protect individual rights against the states. One possibility is to include an expansive bill of rights in the union constitution, and then give the union high court the power to enforce it. Another is to give the union legislature the power to adopt legislation to ensure the well-being of all Burmese when they are in other parts of Burma.

Now if all this works, then Burma will look like this: each state will have its own culture and way of life, and the state legislature may promote those things. But people from every state will also feel comfortable going to other states, where they will be welcome guests or even equal citizens if they choose to stay. And so Burma will be many peoples but also one. Hopefully, over time, people from all over Burma will feel part of their own state, but they will also feel fondness and respect for Burmese people everywhere and for the union government as well.

But all of this will work only if the central government really does care for all alike and is not the servant of any one group. And so we must figure out how to structure the federal government itself so that you can all view it as your agent and

not as your master. I know that many of you are worried about any central government, and many might be in the mood to give it almost no power and to spend all your time protecting yourself against it. But in the long run, the experience of other countries suggests that such a deeply defensive mood will not work. It is critical that in addition to protecting the states, you find a way to create a union government that you can actually trust. This task is critical for several reasons. First, you will be giving the federal government a certain amount of power, and you really need it to perform its assigned works in a trustworthy way, such as creating a vibrant economy, equalizing tax revenues, and protecting your people when they are in other states of the union.

Second, if the union government is not trustworthy, it will simply ignore the barriers that you set before it in your constitution, and it will take all the power to itself. Third, in the long run, if people from all over Burma cannot trust each other when they meet in the center, then Burma may well dissolve again into war. So, in short, it is not enough to protect yourself from the central government; you must also remake the central government so that it does not cause such fear.

Now obviously the most important part of that remaking is that the central government must be democratic. But as we have seen, there are many ways to be democratic. Imagine again a plural society, a society with many different groups and peoples. In this society, there is a majority group with 60% of the population and several minority groups totaling 40% of the population. And imagine that these groups have different ways of life. Suppose now that we hold a simple election to decide whose way of life should win, and the election shall be decided by a majority vote. Well, obviously, the majority group here will always win, and the minorities will have very little self-determination. For them, this system is unlikely to feel like democracy. It is more likely to feel like prison.

So how do we change this system, so that we still keep it democratic, but we also protect these local groups? Well, the first piece of an answer is federalism, as we have seen: we create state governments and give them some power. But that's not enough: we must also ask how we make the central government itself more truly representative of all local cultures?

Many think that in a plural society, it is important to avoid majoritarianism, that is to say, a system in which you decide things by simple majority vote, so that the majority wins everything and the minority loses and has no real power. Now in the legislature, what this means is that proportional representation is probably better than a majority/plurality system. I remind you that in a majority system, you create districts and elect one person from each district by a simple majority vote. The result is that the majority wins everything, winner-take-all, and the minority loses everything. By contrast, in a PR system, you create large districts, with many seats, and you win a fraction of the seats that corresponds to your fraction of the vote. So if you win 10% of the votes, you win 10% of the seats. And that means that the minority is not wholly excluded from power; it has a say in the government that corresponds to its numbers. And so in a PR system, governments are often very inclusive, broad coalitions.

There is another implication to the idea that you should avoid majoritarian systems: parliamentarism is probably a better choice for a plural society than is presidentialism. I remind you of the difference. In a parliamentary system, the legislature chooses the executive branch from among its members. If there is no majority party, then various smaller groups must band together to form a coalition government. Usually, the government has ministers from all the different parties that went to make it up. And at the end of the day, the government is responsible to the legislature, which means that the legislature can dissolve the government by a vote of no confidence and choose a new government.

By contrast, in a presidential system, the president is elected independently of the legislature by a direct, majoritarian nationwide vote. He holds his office for a fixed term. The legislature does not choose him, and the legislature may not unseat him. So as a result, he has a great deal of independence. In presidential systems, rival groups find it very important to hold the presidency, because the president tends to be powerful and important. But remember that the president is just one person, elected by a majority vote. That means that only one party or one group will hold the presidency, and everyone else will be left with nothing. A minority with 10% of the votes will not have 10% of the presidency; that minority will have zero percent of the presidency. So we have here again, a winner take all system.

By contrast, in a Parliamentary system, the government often has more balanced membership, because it includes members from all the groups that together formed the coalition that put it in power. In addition, the various minority groups still have some influence over the executive, because if they don't like it, they can try to put together a vote of no confidence to unseat the executive.

A parliamentary system might have another advantage for Burma as well. In a presidential system, all the executive power is concentrated in one person, the president, who ultimately makes all the executive decisions. In a state like Burma, where the military government has tended to concentrate power in itself, it may be very important to make executive power broadly accountable and to break up the concentration of power. And parliamentarism probably does that better than presidentialism.

So in short: in a fairly large, plural society, it is very important to give everyone a share of power, and the best way to do that may be through a parliamentary system elected according to proportional representation.

But in the end, suppose that Burma breaks up into ethnic parties: these parties represent the interests only of their

groups, speak only for their groups, and are hostile to other groups. Now in this system, the ethnic Burmese party is still more than half the population.

Even with proportional representation, it will control more than half the seats in the legislature, and so it will be able to put together a government without entering into a coalition with anyone else. So if you have pure ethnic parties, even PR and parliamentarism will not save you from the tyranny of the majority. What is to be done? We must find some way to make the government accountable to all, and to make these groups interact with each other in a better way.

One path is to reserve some seats for the various minorities as such. Yet this course might harden the ethnic lines even further, as everyone comes to think of politics in ethnic terms, as us against them. A different and, I think, better plan may be to guarantee the states some share of power. Each of these states may have a core ethnicity, but they are not defined by their ethnicity. Anyone from Shan state may vote for the reserved representatives for Shan state, regardless of their ethnic identity. So this might be a way of protecting minorities without fueling the fires of ethnic hatred.

I should stress, however, that as always, there are both risks and promises in using reserved seats. The whole point in reserved seats is to recognize that in a plural society, majority rule is not the only value; in fact, majority rule can become oppressive. So the general use of reserved seats is to give minorities more power than their numbers would suggest in a purely majoritarian system. Used rightly, such an arrangement can give to minorities some real self-determination, and it can cause them to be committed to the regime. But used wrongly or too much, reserved seats can prompt anger from the majority, who feel that they have lost control of their own self-determination and who will therefore abandon the regime, causing, perhaps, another war. So for reasons of both justice and stability, it is important to get the balance right.

How might you reserve seats in the government for the various states? There are at least four possibilities, and they can be used together or separately. The Chins believe that all four should be present in the union government, and so we have included them in the draft constitution that you have before you. First, you might reserve seats on the high court of the federal union. The current Chin draft calls for one judge from each state, regardless of population.

Now this arrangement clearly gives the minorities more representation than their proportional share, but that does not seem much of a problem because judges are not supposed to represent voters anyway. Their loyalty is to the law, not to the political will, so presumably their origin should not make too much of an impact on their decisions. The reason to spread the power around among the different states is simply that they will keep each other honest and they may each bring a different perspective to bear. But they should not think of themselves as politicians representing a state. With luck, the High Court, committed to law and drawing from all groups, might become an institution trusted by all the peoples of Burma.

The second method is to create an upper house of Parliament designed not to represent population but the states as states. So, each state might send the same number of representatives to this body, regardless of actual population. This arrangement is not uncommon in the world; indeed, the United States Senate works this way. The idea is that in a legislature, you might want to represent two sorts of political actors: first, you might want to represent individuals on a population basis; and second, you might want to represent the states as states, on the view that different states have different interests, and you need to protect the smaller ones against the larger. Now usually, the upper house at a minimum has a role in making law: a statute must secure the approval of both the lower and the upper house, and so the states as states effectively have a veto over the content of the legislation.

Customarily, if the upper house represents states as states, then the lower house represents population. The Chin Forum was concerned, however, that if the country divides along ethnic lines, the ethnic Burmese would hold an absolute majority in the lower house. So, to balance the power, their current proposal is that the seats shall be shared fifty percent between the ethnic Burmans and all the other ethnic groups combined. To be frank, this is an unusual step, but it was based on the Chin Forum's concern that no one group should be able wholly to dominate any organ of government. And they particularly wanted balance in the lower house, because they are thinking that the lower house will form the government. In that case, if one group has an absolute majority in the lower house, then it will also be able wholly to control the executive branch.

And finally, just to be safe, the Chin Forum also would like to stipulate that the executive department should be balanced as well, such that every state has at least one minister in the government. Balance in the executive branch is surely quite important, as it prevents any one group from taking control of the government and bending it to its will. And again, in a country with a pattern of military government, it is particularly important not to concentrate executive power into one set of hands.

In truth, there are a number of ways to secure balance in the executive branch. The Chin Forum has adopted a method to make doubly sure: in their view, the constitution should require that the lower house, which chooses the executive, must be balanced between ethnic Burmans and everyone else, and it should also require that the executive be balanced. But it may be that in practice, you only need one or the other. If the constitution, for example, requires that the executive be balanced, then it is less important that the lower house also be balanced into halves. You might then make the lower house elected on a purely population basis. So in this arrangement, the ethnic Burmans would dominate the lower house; the

ethnic minorities would dominate the upper house; and the executive would be balanced.

Or, on the other hand, you could keep the requirement that the lower house be balanced, so that no group will hold more than fifty percent. As a result, in order to form a government, any group must form a coalition with other groups, so that the government will automatically be balanced between those groups. It is also possible to mandate that the upper house choose the government. Then, because the upper house gives power to the ethnic minorities, it will ensure that the minorities also have power in the government.

So there you have the four possibilities for reserved seats for the states: the high court, the upper house, the lower house, and the government. And now we have three elements that might go into a union government. We might protect state government through federalism; we might ensure that the union government broadly represents everyone through proportional representation and parliamentarism; and we might experiment with reserved seats to protect the states.

But there is one more piece. In some ways, it is the hardest of all, but perhaps the most important. In the long run, the only thing that will keep any constitution, any government, from dissolving is that the people of the country, all the people of the country, feel committed to each other. People in a country stay together because they want to stay together. To be sure, people often disagree, and they fight things out in the political arena. And that's fine—dissent and disagreement are a natural part of democracy. But at the same time, all these people recognize each other as fellow citizens, so that even when they are disagreeing, they feel closely connected.

Now in practical terms, to achieve this goal, the politicians in the union government must seek to serve all the people of Burma, not just their own ethnic group. And so it is important to build into the system some incentives for politicians to be moderate, to appeal to a number of groups, to work for compromise and mutual support. How do we do this?

Again, the first answer is that the constitution itself should not divide people into ethnic groups, we have local state government, for example, not ethnic government. Second, a system of proportional representation and reserved seats will ensure that minority groups have some power in the union government. We have some evidence that simply having minority people around and having to work with them helps to create good relations. If they hold key positions, it is harder to ignore them or treat them with simple hostility.

Third, we want to find a way to reward politicians who have support among a broad number of groups. Constitutional designers desperately search for ways to realize this ideal, but we know much less about this subject than we would like. One possibility is to design electoral systems that will encourage politicians to appeal for the votes of people other than their own ethnic group. The more that we can build this into the system, the better. For example, suppose that you choose to have some office filled by a majority vote.

You might use a majority vote, for example, in electing representatives to the upper house or filling legislative seats in your state assemblies or choosing a president if you decide to have one. In these circumstances, it is always better to use alternative voting rather than a simple majority vote. I remind you that under alternative voting, if no-one has a majority of first place votes, then you consult the second place votes and add them into the count. The result is that politicians will seek to get the first place votes of their own group but also the second place votes of other groups. To do that, they will have to develop a message that appeals broadly to people.

I noted another method earlier, you might choose to have the upper house elect the executive department. Because by definition the upper house includes equal numbers of all states, to get elected the executive will have to appeal broadly to a large number of representatives from a large number of groups.

In addition, proportional representation for elections to the union parliament might lead politicians to be conciliatory toward ethnic groups other than their own. If there is no majority party in the parliament, there is a built in requirement of compromise, because in order to form a government, the parties must put together a coalition. If there is a majority party, the pressure is much less, but there is always the possibility that dissidents within the majority party will split and make common cause with minorities.

It is also possible to create a PR system that directly gives incentives to politicians to moderation. For example, I have said that under classical PR, a party that gets 20% of the votes will get 20% of the seats. But you could add a rule that if any party gets a lot of support in a large number of states, they get some additional seats in recognition of their broad appeal. And if a party gets its only real support in just one state, they correspondingly lose some seats. Because they are aware of these rules, parties will try to develop a message that appeals to a lot of people, and they will seek to avoid calls for ethnic hostility.

And finally, it might be wise to create some independent commissions staffed with experts, especially in the area of economic policy. Expert commissions may set policy for the good of the whole, rather than for the political advantage of some political party, especially if you protect them from political pressure.

If they do good for the country, they will also make the system more stable, because people will feel committed to the nation, rather than to some narrow ethno-partisan ideology. And if the commissions are themselves multi-ethnic, then some of the leading people from every state may have the experience of working together for the good of the whole, and that experience usually causes people to be committed to each other, even across ethnic boundaries.

I am sure that there are other possibilities, and I am eager to hear your ideas. The important thing is to remember always

to be on the lookout for these possibilities, to try to build into the system an incentive to moderation wherever possible.

So those are the four elements of a constitutional structure that might promise real political freedom to all the peoples of Burma after the transition to democracy. The first is federalism, some constitutionally guaranteed self-government for the states. The second is a union government that is broadly inclusive, that has representatives from all the major groups, and this might best be achieved through proportional representation and parliamentarism. The third is some reserved seats, perhaps on the High Court and the upper house of the legislature, to give the less populous states some protection against the majority's sheer weight of numbers. And the fourth is a system that gives national politicians an incentive to moderation, compromise, and broad appeal, so that all citizens of Burma will feel committed to all other citizens of Burma.

## F. JUDICIAL REVIEW

We have this morning talked about the four structural elements of a safe, stable, and democratic union government for Burma. But lying under beneath all of them is a profound belief in the rule of law. The rule of law is an idea that people can govern themselves in accord with principles and ideals, instead of always pursuing only their own interests or desires. For any country to make a constitution work, it must embrace the rule of law. Otherwise, you may adopt a constitution, but then people will just ignore it, because they don't really believe that people can or should govern themselves according to law. There are new democracies where democratic constitutionalism becomes stable and reliable; there are other new democracies where democratic constitutionalism last for a few years and then dies. One of the biggest differences between these two is culture. In countries where democracy thrives, the people are deeply committed to the rule of law.

In this connection, the organizers of this conference have asked me to speak a little more about judicial review. I remind you that judicial review is the practice of having judges test government action, a statute, an executive order, or whatever, for its constitutionality. If the judges think that the government has acted unconstitutionally, then they strike it down. In this way, for those areas where judicial review applies, the court is the ultimate judge of the meaning of the constitution, and in a certain sense the ultimate authority in the country.

The rationale of judicial review is that judges are more likely to be faithful to the constitution than the political branches. Ultimately, of course, for the constitution to live and be significant, the people must embrace it and put it into practice. Judges therefore cannot be the only guardian of the constitution; all must be involved to some extent. But on a day to day basis, you need someone responsible for putting the constitution into effect, and many think that judges are a good choice.

Judges are a good choice because their ultimate fidelity is supposed to be to the law. In this sense, they are different from politicians, whose ultimate loyalty is supposed to be to their constituents. Sometimes, under pressure from voters or just their own ambitions, politicians might be tempted to behave in unconstitutional ways. But the whole point in a constitution is to limit the politicians, to bind them to a permanent structure. And so we ask judges to intervene and protect the constitution against the politicians.

But if we go down this path, it is important to ensure that judges really are faithful to the law, rather than to political pressure. How do we achieve this goal? First, it is important to give judges some structural immunity from political pressure. Most particularly, they need long terms in office, either for life or for a number of years, so that they need be re-elected or re-appointed for a long time. The hope is that they will therefore rule according to the law, rather than according to the whim of whoever would re-appoint or re-elect them. In addition,

many constitutions contain a guarantee that judges, salaries shall not be diminished during their term in office, so that regardless of how they rule, even if they displease powerful people, they will still have an income.

So it is important that judges structurally be immune from political pressure. But that's not enough, because that immunity has merely freed a bad judge to rule badly. So in addition to these structural measures, judges must be deeply acculturated into the ideals of the rule of law, the idea that everyone should receive justice according to the merits of the case, rather than according to favoritism or bias or power. It is infinitely valuable for a culture to prize the rule of law, and so it needs to be a daily part of everyone's life.

Mothers and father should instruct their children in these ideals and tell them stories about heroes who struggled and even died for the rule of law. So everyone needs to embrace these values. But judges especially need to embrace them, and in most countries judges believe that going to law school was an important part of acculturating them to rule of law ideals. I certainly believe that the primary goal of a law school education is to introduce students to the idea that they are servants of the rule of law, not of their own interests or ambition or greed.

OK, so for judicial review to work, for judges to be faithful to the constitution, you need them to have long terms in office, a guaranteed salary, and an acculturation into rule of law ideals. If you have all that, does judicial review work? Do judges remain faithful to the constitution even when everyone else has fallen away? Well, there is evidence both ways.

America is the country that created judicial review, and there, the practice is the subject of enormous controversy. There are many people who feel that the judges do not show the requisite fidelity to the rule of law. Instead, they are partial toward certain sectors of the population or certain classes or certain political parties.

On the other hand, outside America, judicial review is spreading very rapidly. More and more countries have introduced it into their system, and once they have gotten a taste of it, they apparently like it, because they have not since rejected it. So the judgment of the rest of the world is increasingly more positive than the judgment of America itself.

The reason for the difference may be a difference in expectations. For the rest of the world, judicial review is very new, and they notice that it improves their system for the better, on balance. In America, judicial review is so familiar and traditional that people expect it to be perfect, to satisfy the ideal and it may never do that. So it may be that Americans need a more realistic approach to the practice.

My own view is that judicial review is a critical piece in the constitution of any new democracy. New legislatures are often turbulent, and they sometimes do things that they later regret. New democracies are often fragile, as people are not yet fully committed to the system. In this sort of situation, a high court can serve many functions. It can remind people of the importance of the rule of law; it can place limits on the legislature; and it can act as a stabilizing factor in this unruly time. In the end, if the country is really committed to getting rid of the constitution, the judges cannot stop that. But if the people are on the court's side against a corrupt legislature, judicial review can help to keep the country attached to its constitutional system and thereby avoid a renewal of civil war.

Having said that, however, I should also stress that judicial review is not appropriate for all types of cases and subjects. For that reason, I think it best that a constitution should specify which parts of it are judicially reviewable and which not. Otherwise, if the constitution does not say, you are setting up a conflict between the courts and the other branches for control of the constitution.

So let me summarize the general view on when judicial review is appropriate. Most people think that judicial review

is clearly appropriate to protect individual rights, because individuals need a guardian to stand against the legislature. Most people think that judicial review is not appropriate for foreign affairs, because the judiciary does not know enough about that field to have good answers. For the same reason, many people would say that military affairs should not be reviewable, but in the special case of Burma, I think there is a strong case that military matters should be governed according to the rule of law, not the will of the officer corps.

On federalism, people are divided on how strong the judiciary's role should be in policing the boundaries. In America, the tradition has been that the Supreme Court has been active in defining the relative powers of the states and the federal government, because it has been thought that the justices could serve as an outside, neutral umpire. More recently, some have begun to argue that federalism is like foreign affairs: the Court understands little about the real workings of the different governments, and so it is not in a position to judge where their boundary should be. Despite this argument, the Supreme Court continues to hand down federalism decisions. I suspect that in a democratic Burma, federalism will be politically controversial, and it might be useful to ask the court to act as a neutral umpire, so that arguments can be settled short of war.

Let me again reinforce one idea. The most important function of judicial review may be broadly cultural: the court stands as an icon for the possibility of the rule of law. It reminds us that life is not just about the pursuit of money or power or fame. Instead, it can be about a commitment to deciding questions according to general rules, for the common good, without bias or hatred or partisanship. The broad diffusion of this hope is one of the most important elements in constructing a new democracy.

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**CONSTITUTIONAL DESIGN FOR BURMA**  
**[The Second Lecture in 2004]**

## **CONSTITUTIONAL DESIGN FOR BURMA**

**[The Second Lecture in 2004]**

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**Bloomington, Indiana, USA**

### **A. Introduction**

It is a great pleasure to talk with you about writing constitutions for a democratic Burma. I just finished an eight month visit to Europe, where I spoke about you to many people. I found that everywhere I went, people knew about your movement, your courage, your resolution to live according to democracy and the rule of law. Your hope gives them hope that the world can be a better place, because there are people striving to make it so. Hope is one of the greatest gifts that people can give to each other, and so I bring you thanks from people that you have not even met.

Over the last couple of centuries, one of the things that has made the world better is the ideal of the rule of law. In politics, people are often selfish: they want their own way, to rule others. But now and then, a miracle occurs: people get together to proclaim that government should rule for the good of all, rather than just the good of the rulers. In this view, rulers are obligated to care for all, without favor, because they receive their power on trust and only so long as they govern well. One way to express this idea is that government should govern according to the rule of law (meaning a set of general impartial principles) not according to the mere wishes of the powerful. Of course, it is difficult to put the rule of law into effect, and no country has ever honored it perfectly. For that reason, many are cynical about the possibility that governments can ever govern well. But that view is a self-fulfilling prophecy: if you are convinced that governments will always be bad, then you will never do anything to make them good, and governments will stay bad.

I have said that living according to the rule of law requires living according to general principles for the good of all. But what are these general principles, and how do we discover them? Constitutionalism is one way that people have tried to discover these principles and put them into practice. A constitution is a set of political and legal ideals that is regarded as more fundamental than any other set of ideals. The citizens of the country and the government promise to pursue these ideals. In writing a constitution, then, we are trying to identify those principles that we hope will allow us to live according to the rule of law, rather than the mere whim of our rulers.

For many years, constitutional theorists imagined that you could develop one perfect constitution that would work equally well for everyone—all countries, peoples, and provinces. Constitutionalists strove to discover that one perfect constitution, the Holy Grail of constitutional theory. Once it was discovered, then constitution-writers the world over could just adopt it as their own. I am sad to say that the United States government has often insisted that the United States constitution is perfect for everyone. Sometimes the US government has tried to force other countries to use the US constitution as the model for their own constitution, without considering whether it was right for them.

But in more recent years, most constitutionalists have denied that you can discover a one-size-fits-all constitution. It is true that all around the world, people have much in common, so some constitutional principles may be important for everyone—such as liberty, equality, impartiality and the like. But every country will understand these principles in a somewhat different way, and each country will likely add some principles to this basic core, according to its own traditions. As a result, the world's constitutions are somewhat diverse. This diversity is quite a good thing. It is good for each country, because each governs itself in its own way, rather than trying to live under someone else's constitution. And it is good for the world, because countries can learn from each other's

constitutions only if they are different; and they might even learn to respect each other across their differences.

Let me offer one illustration. The constitutions of the world have different arrangements for dividing power between the center and localities. Some constitutions are unitary: they give all power to the center. Local governments are servants of the center, which can give them power, take it away, or eliminate them altogether. Some constitutions, by contrast, are federal, which means that they divide power between the central government and the more local governments, such as those of provinces or states. In a federal constitution, the central government has some powers, and the states have other powers, and neither may invade the others'. Now neither system is right for everyone: unitary constitutions are right for some countries and federal constitutions are right for others. So what is right for India or Thailand may not be right for you.

Two countries offer good examples of this difference: the US and France. The United States is often seen as the paradigm of a federalist country, and federalism suits us well because we value our diversity at the local level. By contrast, France is often taken to be the paradigm of a unitary country, and this arrangement suits the French well, because national unity is deeply a part of their culture. Perhaps France sometimes over-emphasizes national unity, and perhaps the United States does not care enough about national unity, but by and large each has picked the right system for itself. Unfortunately, the people of each country, even the lawyers, have difficulty understanding the constitutional system of the other. And because they don't understand it, they tend to dislike it. Too many Americans imagine that the central French government is dominating and oppressive, and too many French people imagine that American federalism is chaotic and irrational. I wish that we could manage more respect.

In short, then, we must fit the constitution to the people: we must design a system of principles that will work for a

particular country. When I think about Burma, one of the things that I first note is that Burma has a magnificently diverse range of local cultures: the Shan, Karen, Chin, Kachin, Arakanese, Karenni, Wa, Pa-O, the ethnic Burmans themselves, and all the others. Each has much to teach the others and the rest of the world. To live in its own way, each culture may need its own constitution and an appropriate degree of self-determination. With luck, the people of each constitution will love the people of the other constitutions—not despite their differences but because of them, as differences bring richness to our lives. Sadly, people in Burma have sometimes hated or feared people different from themselves. This problem afflicts the whole world, and no place is free of it. But hatred can destroy a country, and we need to find ways to reduce it. Constitutionalism has long struggled with this problem, and many believe that the right constitution can help to lead a country away from internal division and toward the rule of law.

## **B. State-Building and Nation-Building**

To understand the way that constitutionalism can help with task, let us begin by talking about two concepts: the nation and the state. As a quick summary, the state refers to a sovereign government—the legislature, the army and so on. The nation by contrast, refers to a group of people who believe themselves to share a common destiny, as members of the same people or culture or kin. A nation-state is a sovereign state whose citizenry is largely composed of people who share a nationality, so that the state is the alter ego of the nation. In this case, the purpose of the state is to promote the good of the nation, by allowing it to express its will through sovereignty.

In the past, many Europeans have claimed that all nations should have their own states, and all states should grow from a single nation. In other words, all states should be nation-states. But in fact, this common claim is false. A state need

not contain just one nation. Indeed, most states are multinational: they contain a number of nations. The state may have one dominant nationality with a number of smaller ones, or it may have two nationalities of roughly equal numbers, or it may have many, many nationalities, all so small that none could ever dominate by force of numbers. In all these cases, we have not a nation-state but a multi-national state. And a multi-national state need not be—and usually should not be—the alter ego of one of its nationalities. Because the state governs all, it would be unfair for it to find its soul in the traditions of just one group. And so such states do not exist for the good of just one nation, nor do they express the sovereign will of just one nation.

States always face tensions and conflict. When that happens, we need to find some unity to help us stay together in peace. In nation-states, leaders often hope to find unity by nation-building: they hope to reinvigorate the national culture, so that everyone feels connected to it. In other words, they try to make everyone more the same, because more strongly identified with the nation. A constitution in this kind of state might try to express the national identity of the state, by establishing a national religion or one national language or the like.

But in a multi-national state, nation-building can spell oppression. If the state contains many cultures, but the state tries to impose just one national culture on all, then the minority groups will inevitably be forced to give up their national identity, which commonly they prize highly. For multi-national states, then, nation-building may not be the answer. Instead, the way to find unity may be state-building. What the citizens of a single state all share, despite their different cultures, is that they live under one scheme of law and governance. In such a state, unity can be found only in that very scheme of state organization. Citizens do not share a culture, religion, or language, but they are committed to the structure that allows them to live together in peace. The constitution creates that

structure, and so constitutions are central to state-building in multi-national republics. A good constitution in a multi-national state therefore must ask for unity where it is essential for the groups to live together; but it must otherwise allow the different cultures to govern themselves in their own ways. In this kind of state, we are bound together in one framework of basic law, but one of the main goals of that framework is to allow us to be different.

What goes into this common framework of basic law? This is a complicated question, and we will spend a great deal of time contemplating a possible answer for Burma. For now, the most important point is what it does not include: the constitution does not pledge the state to be the servant of its most powerful group. Indeed, the constitution may forbid the state from becoming the servant of its most powerful group. Instead, when it strives to create a common framework of law, the constitution may pursue one of two strategies: it may take pieces from each of its cultural groups, so that it is really a blend; or it may try to create a national law that does not come directly from any of its groups, so that it, so that it stands on its own feet. Now if the state's identity is not yoked to one of its groups, then it can allow all the individual nations to govern themselves, within the general framework of federal law. And because the nations together form the state, then the individual nations need not fear the central government. In other words, because the state is unified in a way that gives no group pre-eminence, then state unity need not involve the elimination of all difference. The state can find unity in the resolution of all its parts to accept each other's differences.

Here then is a quick summary: a state is a government; a nation is a people; in a nation-state (a mono-national state), the state represent only a single nation, and the leaders look to nation-building; but in a multi-national state, the state must not serve just one nation, and so it cannot look to nation-building; instead, it must build a state that allows all of its groups to live together and also to keep their differences.

So that's the point in a nutshell. Any constitutional system for Burma must address how you want the nationalities to relate to the state and vice-versa. Outside Burma, people have strong views about how state and nation should relate, and they will press their views on you. One French law professor, for example, told me that Burma needed to be unified around a single national identity, so that it won't disintegrate. My own view is different: I think that multi-national states must find unity in something other than a single national identity. Imposing one national identity will likely lead to real disunity, because the nationalities will fight to protect their identities. Paradoxically, to get unity, you must allow for diversity: if the nationalities feel that the state permits them their differences, then they will feel committed to it. They will support and protect the state that in turn supports and protects them.

So there you have two different views about the relationship between state and nation in the context of Burma. But in the long run, it matters not at all what some law professor thinks about your future. What matters is what you think, because this is your constitution: you must live under it, and it will work only if you feel attached to it. And because the relationship between state and nation is so controversial, I would like now to outline the controversy about states and nations. I hope that with this information, you will be better able to navigate the storms of opinion. That way, when people throw advice at you, you will know that even the experts disagree among themselves, so no-one's view is incontrovertible.

### **(i). States**

Let us start with the idea of the state, which refers to a sovereign government and its agencies. Concretely, the concept refers to the legislature, the executive, the judiciary, the regulatory agencies, the military, the public schools, the diplomatic corps, and so forth. At the level of theory, the state refers to a

sovereign body. Sovereignty has two dimensions, internal and external. Internally, sovereignty refers to the ultimate authority to govern. In other words, the sovereign is the one who has the final say in decisions about how society shall be ruled. Many think that for this reason, the sovereign must have a monopoly on the legitimate use of force. This means that only the sovereign can rightfully decide how force shall be used in society. The sovereign may allow someone else to use force: for example, the state may authorize you to defend yourself. In practice, many people do use force without state permission. But in this theory, only the sovereign may rightfully decide how force shall be used.

Externally, sovereignty means that states have a right to govern themselves without outside interference. In other words, sovereign states may not intervene in each other's internal affairs. For this reason, many groups want to claim to be a sovereign. That way, they can insist that others leave them alone. Many people think that this principle began with the Treaty of Westphalia in Europe in 1648, and the background to that treaty gives a sense of why people think that states should not interfere with each other. Europe had been engaged in a great war, called the Thirty Years' War, which caused great misery. Eventually, the European nations decided that henceforth, they would leave each other alone to determine their own affairs, so that such a war would never recur. They agreed in the Treaty of Westphalia to respect each other's sovereignty, and that idea has been a cardinal principle of international law ever since. Of course, nations sometimes ignore this rule, so war occurs. But in truth, most states obey this rule most of the time, and in theory it binds always.

The principle of non-interference has limits. For one thing, it requires only that states stay out of each other's internal affairs: for example, you may not invade another nation because you don't like its ruler. But states may and do interfere with each other in their external affairs. For example, if a nation invades you or a third country, you may invade the aggressor

so as to restrain it. In addition, international law has recently come to allow nations to interfere in each other's internal affairs, but only to a very limited extent. For example, there are now international conventions protecting certain human rights, so that governments are theoretically required to respect those rights, even in their internal affairs. But international law is struggling to find ways to enforce these provisions. Suppose that a sovereign state simply decides to ignore these requirements: can the United Nations or another country force it to comply? It is not entirely clear what can be done, either legally or practically.

Obviously, this idea of external sovereignty has implications for Burma. At present, many states regard Myanmar as a sovereign, which means that they feel required to keep out of its internal affairs, even if it is oppressing its people. Theoretically, it is illegal for Myanmar to violate the human rights of its people, but it is unclear how this rule could be enforced. On the other hand, whenever Burma becomes democratic, it will still be sovereign, so other nations may not interfere in its internal affairs. The ousted generals could not, for example, enlist the support of the Chinese to overthrow the democratic government of Burma.

Defined in this way, the state is a relatively recent phenomenon of European origin. There have always been governments, but the state is a special kind: it claims ultimate authority over everything that happens in its territory, and no other polity may intervene. But if the state began only recently in Europe, it has since come to sweep the globe. We now live in a world of states, and because states recognize only other states, there is tremendous pressure to organize yourself that way. But that pressure has sometimes had bad effects for countries outside Europe. Many such countries were not traditionally states. First, they did not assert internal sovereignty: the ruler did not assert absolute control over everything that went on in the state; instead, there were multiple authorities, each with its own claim to power, such as local

warlords or religious authorities or the like. Second, they did not enjoy external sovereignty, because the Westphalian states did not recognize an obligation to stay out of their affairs. Commonly, European states colonized countries like this for decades or even centuries. But eventually, they withdrew, generally after World War II, and they left the newly independent states in a problem

Imagine for a moment that we live in such a decolonized state, and you may not have to imagine very hard, as Burma fit this description in 1947. We have suddenly been plunged into international society, a world of states that expect us to behave as a state. To claim sovereignty—which we very much want—we must get organized. We have a lot of state-building to do and little time to do it. We must develop a legislature to make laws, a diplomatic corps to pursue our interests in the world, a military to defend our borders, schools to educate our children in the rights and duties of state citizenship, agencies to keep the environment and our workplaces clean, courts to apply state law in complicated cases, and so forth. It seems a daunting task, because it is all new. In the midst of all this pressure, the citizens of new states often fall to squabbling. In response, leaders look for ways to unify the people for the difficult time ahead. Remember that our task here is state-building, but to find the unity necessary for state-building, the leaders often look to nation-building. They try to pull the citizens together into a patriotic effort by encouraging them to sacrifice for the nation. If citizens are devoted to the nation, in this view, they will support the state, because it is the alter ego of the nation. In other words, in this program, we achieve state-building through nation-building. We become a powerful, healthy, affluent, harmonious state by becoming a nation-state.

## **(ii). Nations**

And so we return to the second of our concepts, the nation. The exact meaning of the nation has been the subject of an

enormous amount of recent writing. For a while, many thought that nations and nationalism might die out, but in the last two decades, nationalism has gained a new lease on life, especially in places where it seemed to have gone to sleep, such as the Soviet Union. Two decades ago, for example, Kazakhs mostly thought of themselves as part of the Soviet system. Now, with independence, many ethnic Kazakhs think of themselves as belonging to the Kazakh nation. Because non-Kazakh citizens of Kazakhstan identify with other nations (such as Russia), the state faces problems in getting these nations work together. Because of places like Kazakhstan, many more scholars have begun again to study nations and nationalism. But as always, they disagree: on where nations come from, how they function, how long they have existed and will exist, what role they play in the lives of their members, and even what they are. As a result, no matter what I tell you, someone somewhere will disagree, and you need to know that. But I will try to outline the areas where people are mostly in agreement.

Fundamentally, a nation is a group of people who identify with each other. When I look at others of my nation, I see people that are like me in some way that is important to me, so that we belong together in a way that we don't belong with other people. The idea of a nation therefore has two parts: first, some people believes that they are similar; and second, because of this similarity, they believe that their fates are intertwined. We might call the first element a perception of common identity; we might call the second element a belief in a shared future through collective action.

As to the first element: students of nations and nationalism have struggled long and hard to determine exactly what nations have – or are supposed to have – in common. Many nations share a language or religion or ethnicity or common origin. Yet clearly you do not have to share any of these to be a nation; there are famous examples of nations with multiple religions, races, languages and so forth. After all, similarity is in the eyes

of the beholder. What makes you a nation is that you think you share something so fundamental that your identity is bound up with others of your nation. But different nations may think that different characteristics are fundamental. Some nations may think that language ties them together, even when they have many religions: perhaps the French fit this description. Others may think that religion unifies them, though they have different languages: perhaps the Arab world fits this description. Arabs tend to be committed to the welfare of other Arabs, and French citizens to the welfare of other French citizens. But the two groups feel united on different characteristics. As another example, closer to home, some Chins regard the Chin people as a nation, but Chins are both Baptist and Buddhist, and they sometimes have trouble understanding each other's dialects: neither religion nor really language forms their national identity.

So the point in the first element is really to set up the second: because we think we have something in common, we believe that we share a future. We define ourselves collectively; I know who I am by seeing what I have in common with you. Membership in a nation tells me something about my identity. It gives me a home and people to whom I belong. And because my nation provides me with a home, I want to be able to make that home with my fellow nationals. By definition, then, members of a nation do not just perceive a commonality; they also want to act on it. Through common action, they want to create a common future, where they can live out their distinctive life-ways in freedom, safety and dignity. If we are a nation, then, we are jointly committed to creating a space for people like us. In this sense, the Chins are a nation insofar as they believe that they share a public culture different from the public culture of those around them, so they need self-determination.

In other words, though nations need share neither language nor ethnicity nor religion, they must share a sense of themselves as an actor in history. They must imagine that as a group, they have acted together in the past, are acting together

in the present, and will act together in the future. They must be able to tell a story about themselves as a collective agent – not strangers but participants in a common venture. Commonly, people think of their nationality as similar to their family in that they come from the same place and feel permanently bonded. We imagine that we are the descendants of our national heroes, kin to our fellow nationals, and we give birth to those who will come after us. So we feel as though the nation is our family. But it is important to understand that this is only a feeling. The nation is not literally one big family or kin group. The members of a nation are not necessarily related, and they do not necessarily come from the same ancestors. Many members of current nationalities came in from the outside. Often, they brought great resources to the nation, and sometimes, they revitalized the nation by changing it. In fact, there are long-standing nations composed primarily of the descendants of those who were once outside. To belong, then, what is required is not birth but participation in the common culture of the nation. Nations that start excluding people because they do not have the right ancestors pretty soon become rigid, oppressive, and inflexible. They die or explode in civil war.

### **(iii). States and Nations**

What is required for a nation to tell its common story and create its common home? Some claim that by definition, nations must desire separate sovereignty for themselves. In this view, if a group does not desire self-government – if it is happy to live within a larger state – then it is not really a nation but something else, such as an ethnic group. For similar reasons, many argue that a national group must have a claim to an ancestral homeland: after all, if the nation is to claim statehood, it must have a territory over which it can exercise sovereignty. In fact, when Europeans first started to talk about the nation as a concept, they commonly insisted that every

nation was entitled to its own state on its own ancient territory. Only a state would allow each nation fully to realize its own destiny. Many European nationalists wrote stirring poems on the importance of statehood for their peoples. Some of these are quite moving, and they testify to the courage and hope of a nation long oppressed. And thus was born the idea of the nation-state.

In fact, some historians believe that most nations are not very old; instead, they were imaginatively created just at this time precisely so that they could claim their own state. For thousands of years, people were divided into much smaller groups, and they were ruled in different ways. They certainly did not recognize bonds of nationality with people who lived hundreds of miles away. But in Europe in the eighteenth century, nationalist leaders tried to convince these scattered people that they were really part of one larger nation. The motives of these leaders were complex, but at least one was that at this point, becoming a nation meant getting a state. And getting a state meant that local people could throw off foreign rulers and choose their own leaders – who would presumably include the very same nationalist elites pushing for national unification. In other words, in this view, the conventional account has the causality wrong for many groups: the nation did not exist before the state, calling for its own sovereign state; instead, the prospect of statehood galvanized people to make themselves into a nation that could then call for sovereign rights.

But whether nations are old or new, statehood and nationhood have often gone hand in hand for at least the last two centuries. Nonetheless, it is not true that every nation must have its own sovereign state, nor that every state must have only one nation. To be sure, nations desire to work out their shared destiny in a home of their own. But that desire does not always and everywhere require full sovereign self-government. As we will see, different constitutional structures allow nations to govern themselves, to some degree, within a

larger overarching state that includes other nations as well. Whether a nation really needs full sovereign government depends on circumstances. For example, imagine a nation that has always hated and feared all the other groups in the vicinity, who feel the same way back. All these nations feel that part of their fundamental identity is to hate the other nations. Without some change, it is hard to see how these nations could live together in the same state. They may all need independent sovereignty. Sometimes, however, conditions are not so dire. Today, many nations can and do live together in a single state. There may be some tension between the different nations, but every state has its tensions. There are many prominent examples of multinational states: Switzerland, Canada, Belgium, the United States (with its Native American nations), Spain, Italy, and even France itself. All these states are successful in the sense that though they may have tension, they are stable, affluent, mostly peaceful democracies, in which the member nations are mostly committed to the state apparatus.

It is a good thing that nations can live together in a single state, for a number of reasons. First, the globe does not have enough space for every nation to have its own viable state. To be viable, a state cannot be too small; otherwise, it cannot stand on its own. There are of course some very small states—such as San Marino, Andorra, and Vatican City. But in truth, those are not really sovereign nations; we just call them that. They are really part of the surrounding countries, and they retain independence in only very limited ways. The second reason that multinational states are important is that many states in fact contain multiple nations, so they must find a way to live together. Commonly, when the European nations rolled up their empires, they left behind them new states that contained multiple nations. These states then had to find a way to make a multi-national republic work.

In this regard, we must distinguish two moments in history: the moment that European nations first began to claim

statehood, and the moment that colonized states outside of Europe began to claim independence. At the former moment, European nationalists believed that each nation could have its own state because European nations inhabited discrete ancestral territories, were readily distinguishable from each other, and mostly were large enough to make viable states. Even at this moment, many thought that some European nations were too small to make viable states, and even the larger nations seldom had such clear ancestral territories or such discrete cultures as the nationalists claimed at the time. Still, let us concede for a moment that the ideal of the nation-state might have been appropriate for Europeans in the eighteenth and nineteenth centuries. Conditions, however, were very different when colonized nations managed to free themselves of European domination and to establish their own states in the twentieth century. Many of these states contained a number of nations. Some were traditionally hostile to others. Often they had different goals, ideals, practices, and theories of government. When they all merged into one government, they often fell to squabbling. Sometimes they even fell apart in civil war. Many of these nations looked to Europe for an answer to their problems (though they often refused to admit that they were actually looking to their former colonizers). Following European ideas, they concluded that they needed nation-building. Even if they were not one nation, they needed to become one so that they could live together in one state. And they began to use the state apparatus to make themselves into a single nation.

Notice that there is an irony in this strategy. Europeans first claimed that wherever there was a nation, there needed to be a state, so that the nation could express itself through statehood. There is a nation, so there must be a state. But the leaders of these newly decolonized states reversed that order: in their view, wherever there was a state, there had to be a nation to support it. In other words, the Europeans claimed that because of their unity, nations had to have sovereignty.

The new states claimed that because they had sovereignty, they had to have unity – even if they had to force people into it.

Fortunately, states do not have to be composed of people from a single nationality; indeed, few are. Unfortunately, when leaders do not realize that fact, they often do bad things to their people in the attempt to make them all alike. And so nation-building, which can be a good thing under the right conditions, can also be a bad thing under the wrong conditions. What is involved in nation-building? In the sense in which I am using the term, it refers to forcing everyone to be more the same, to share a single cultural identity. Sometimes these leaders come from the dominant nationality in a state, and they try to achieve unity by forcing the minority peoples to become like that dominant group. Sometimes, nationalist leaders instead try to impose a culture borrowed from some other state: they may insist that everyone become pious Russian communists or American capitalists. But wherever they find their preferred culture, the important point is that nation-builders choose one way of life, anoint it as the only loyal way, and try to force everyone to follow that way.

When a dominant nationality tries to force the minority nationalities to give up their culture, the result is usually tragedy. Everyone must now speak the dominant language, practice the dominant religion, identify with the dominant culture, and forget their old ways. The leaders of the dominant nationality (who are often military officers) claim that the true soul of their country is the dominant nationality: people from other groups are grudgingly tolerated at best, persecuted at worst. They are always seen as potential traitors. The leaders may even use the army or law enforcement to force people to adopt their ways. The irony is sad and savage. A group of colonized people managed to throw off a foreign master, only to become subject to a local master; they went from external to internal colonization. The two great ideas – nationalism and decolonization – promised liberation, but instead they led to a new form of oppression. Nation-building became another

name for nation-destroying, as those from one group tried to destroy the cultural identity of those from another group.

Multi-national republics should therefore eschew nation-building, at least in this extreme and oppressive form. But all nations need unity. To find it, multi-national republics might look not to nation-building but to state-building. All states must build the apparatus necessary for the government to function and for citizens to participate. Building up the courts, the legislature, the executive, the agencies, the military, the schools, the roads, the rail, air, and communications systems, and so forth – all these are part of state-building. But in a multi-national state, state-building also involves the creation of a general scheme of law and governance that allows nations to relate yet also to keep their differences. Frequently, the people entrench this scheme in a constitution. Such constitutions take a different approach to creating a stable nation from that pursued by the nation-builders. Nation-builders try to remake the citizenry so that they are all one nation. Multi-national constitutionalists instead try to create a shared legal and political framework that will allow people to live together, with all their differences. They share, not their language or religion or any of the other things that characterize a nation, but instead a common body of constitutional principle and a public culture associated with it.

Good multi-national constitutions must therefore accomplish two things. First, they must allow enough internal diversity, so that their various cultures can govern themselves in their own way. But second, they must also find some basis for unity across the various cultures. This unity is necessary to allow people from all parts of the country to participate in national politics, to relate to each other in positive ways, and to have some control of the federal government. If the nations isolate themselves, then the state will likely fall apart. To make the whole work, everyone needs to agree on some basic ways of relating across difference. So it turns out that some unity is necessary after all, and the nation-builders were not wrong

in thinking so. They were wrong only in the way they went about the task, by trying to make everyone alike. Nationalists strive for unity; multi-nationalists strive for diversity within unity and unity within diversity. The attempt to find a good balance between these two principles is most characteristic of multi-national constitutionalism.

To put the point another way, we can think of the state in terms of layers, from the most local to the most central. Each of these layers needs some amount of unity, some shared culture and common ways of relating. But as you go from the bottom to the top, the amount that is shared goes down, and the cultures become thinner, so as to allow more diversity. At the very base we might find families, whose members are probably much alike, at least when compared to other people. When we move up the ladder to villages, people still share a great deal; they mostly have the same language, the same family structure, perhaps the same religion and so forth. But then when we move up to the level of state governments – such as Shan state, Karen state, and the others – we run into more diversity. Within each of these states, people speak different languages, practice different religions, follow different styles of government, etc. At this level, we must allow for a good bit of diversity, because people cannot be expected to share as much. They still need unity, but thinner. And when we jump to the federal government, we should thin the public culture down even more. We must still share enough to participate in the governance of the country, so we cannot be strangers or enemies. But we must also be careful not to demand more unity than the country needs to work. At every level, we balance unity and diversity, but at each level, the balance will be different. Unity matters more as we move closer to the ground, and diversity matters more as we go up the ladder. The trick is getting the balance right. Because every group is different, the balance will not be the same everywhere, even for everyone at the same level. For example, some states may be quite homogeneous, and they may look for a good bit of unity; but

others may be very diverse, and their public space must be accordingly thinner.

At the federal level, people must share at least one thing: a shared devotion to the principles of the constitution, such as democracy, free speech, separation of power, voting rights, and the like. They may have different languages, religions, ancestors, myths, cultures, and so forth. But because they must live together, they must agree on a framework to allow them to interact in peace. If this constitutional system is secure, it frees us to be different in every other way; in fact, the structure of the constitution should explicitly protect our freedom to be different in ways that do not touch on constitutional stability. In that sense, it might be said that our difference actually depends on our unity: without a shared constitutional structure that protects our home rule, our right to be different would be in peril. And in turn, our unity depends on our difference: because the constitution protects our rights of home rule, we join together to support it and the state; if it did not protect our difference, we would likely fall apart in civil war, losing whatever unity we might have had. And this truth holds even at the global level. Even sovereign states must work together to create a global culture of international law. This project is important not only to restrain war, clean up the environment, expand human rights, eliminate genocide and so forth. It is also necessary precisely so that states can be sovereign, to control their own destinies. In order to be different (that is, to have the sovereign right to govern themselves), states must be unified in a scheme of international law that protects their right to be different.

Many people think that America illustrates the possibility of a state unified primarily in its constitution. America contains all different sorts of people, and we tend to be very individualistic. We have no sense of belonging to the same ancestral group, even metaphorically. Yet despite these differences, America somehow hangs together. Why? Many believe that America's unity is provided by just one thing: the

reverence that Americans feel for their constitution, which they venerate precisely because it protects their right to be different within a shared framework of law.

There is a germ of truth here. Most Americans are devoted to their constitution, and that devotion has gotten us through some difficult times. For example, you may remember that in the year 2000, the presidential election in America was very close, and for months, no-one knew for sure who had won. Democrats and Republicans were angry at each other, and in a few places, there was rioting. But most Americans assumed that the Constitution would somehow carry us through this mess. They believed that as long as we stuck with the constitutional system, we would find a way to settle the election despite our differences, and everyone would go on with their lives. And the two presidential candidates – Mr. Bush and Mr. Gore – repeatedly insisted that they would go along with the result of the process, even if they lost.

So clearly the American constitution is an important part of our unity, perhaps the most important part. But Americans do not just share a set of legal rules codified in the constitution. They also share a public culture, however thin it might be and however reluctant we are to acknowledge our similarities. Overwhelmingly, we speak English; we follow the same market economy; we desire many of the same things from life, and so forth. And in truth, our constitution depends on this public culture to work: if we did not have this culture, we would probably fall apart. No set of legal rules – even constitutional rules – without firm roots in the public culture can long survive. When we say that we find our unity in the constitution, therefore, we must have in mind a specific meaning of the term. Constitution, in this context, refers not just to a set of legal rules administered by courts and addressed to government. Instead, it refers broadly to the country's shared public culture, its ideals and commitments, its mutual devotion and its acceptance of difference. This culture expresses itself in the constitution, and the constitution in turn depends on it.

But of course how much shared public culture you need will depend on circumstances.

To this point, I have fairly strictly defined the terms nation-building and state-building, for the sake of clarity: nation-building refers to cultural assimilation to one national identity, and state-building refers to building a scheme of governance that allows people to live together without assuming the same nationality. But in fairness, it must be said that some nation-builders really espoused a nation-building that was not far from state-building, as I have used the term. They believed that building a nation involved developing a civic culture shared across the state – constitutional principles, political practices, a shared vocabulary, and so on. In my view, these civic nationalists were right to think that every state needs such commonalities. They were wrong only in thinking that the state could tolerate no more than one public culture, and this conviction too often led them to force their minority populations to give up their own life-ways. If they had kept the state-level culture thin enough to allow for local variations, they might have been more successful in creating a stable state – because the minority populations would have felt committed to any state that treated them so fairly.

Finally, the relationship between state and nation highlights a basic principle of constitutional design, so important that every constitutionalist should engrave it on his front door and read it every day. The principle is that good constitutions balance multiple values; they rarely make simple choices. Many political leaders would like for a state to have only unity, and others would like only diversity, as they distrust any talk about the need for unity. But good constitutions must balance both diversity and unity, and because states are different, they will strike the balance in different ways. There is no magic formula that you can just adopt, and so no constitutional consultant can tell you what constitution is best for you. But constitutional design theory can offer some guidance as you think your way through. It can point to the major questions that you must

ask and some of the considerations to ponder as you answer them. And in a multinational constitutional republic, the first place to start is federalism.

### **C. Federalism**

Traditionally, constitutional design has four primary parts: separation of powers, federalism, electoral systems, and individual rights. Separation of powers refers to a division of power between the various parts of a government, such as the executive, the legislature, the judiciary, and perhaps the bureaucracy and the military. Federalism refers to a division of powers between different geographical levels of government, such as the central government and more local governments. Electoral systems refer to the process by which the people elect their leaders, such as rules about who can vote, when, where and how they vote, and how their votes are counted to decide a winner. Individual rights refer to the sphere of autonomy guaranteed to each individual which the government may not invade, even if it really wants to.

For Burma, federalism has been a particularly burning issue. A federal system is one in which the constitution divides power between a central government and more local governments. (Across the world, these local governments have different names; they are variously called provinces, states, territories, lander, and so forth. Following American practice, I will call them states.) Federalism thus means that the constitution divides power between levels of governments. Placing this division of power into the constitution has an important implication: constitutions, as we have seen, contain rules that the people regard as fundamental to themselves. Usually, it is difficult to change, or amend, the constitution, because the point in a constitution is to entrench certain rules, to make them durable. If we put federalism in our constitution, then, we are saying that we regard it as fundamental to us, and

we do not wish it to change.

All truly federal states thus believe that federalism is fundamental, not merely convenient, to them. But there are many different sorts of federalisms. To be a federal state, your constitution must divide power between state and federal government, but there are many ways to divide power. Some federal systems are very decentralized: the constitution gives most power to the states. Some federal systems are very centralized: the constitution gives most power to the federal government. And there is everything in between. So once you have decided to adopt a federal system, you must still decide what kind. To answer that question, you need to examine why you want federalism, because your particular style of federalism should serve the purposes that you have in mind.

There are at least three goals that a federal system can serve. First, federalism can help different groups to live together by guaranteeing some self-government to each. We might call this the “plural societies” rationale for federalism, because a plural society is one which contains multiple groups, each with its own way of doing things. Second, federalism can promote local democracy. Local people often understand their problems better than does the central government; they can respond more quickly; and people are often more willing to get involved in the local government than in the central government, because it is closer and filled with their neighbors. As a result, giving power to local governments can encourage people to participate, to initiate projects, and to believe that they really can govern themselves. Let’s call this the “local democracy” rationale for federalism. Third, federalism can allow state governments to keep the central government from getting out of control. It is well and good to write a nice constitution, but if the federal government decides to ignore it, then it is worth nothing. So it is a good idea to give the states some tools to keep the center in line. Usually, state leaders are professional politicians, with the expertise and time to keep track of the central government. They often command

the loyalty of their citizens, so they can serve as a rallying point for resistance. We might call this view the “checks and balances” rationale for federalism, because the idea is that state governments can check and balance the central government.

The way that you divide power in your federal system should reflect your reasons for dividing that power. For example, if you pursue the plural societies rationale, you need to identify those areas in which it is important for the various groups to govern themselves. Your constitution should guarantee those areas to the states. If, by contrast, you pursue the local democracy rationale, you need to identify those areas in which local democracy will work best: areas that the local authorities know better, or that don’t need a unified approach for the whole country, or that are likely to attract citizen participation. Again, the constitution should reserve those areas to the states. Finally, if you pursue the checks and balances approach, you should determine which powers the state governments will need to check the central government. For example, state officials might need a right to federal information, so they know what the federal government is up to. State governments might also need way to attract the loyalty of their citizens, such as the power to regulate areas in which citizens feel themselves to be directly affected, such as property rights.

And of course you may want to create a federal system for all three of these reasons, and then you will need to give the state governments all these sorts of powers. Indeed, in my view, a federal system might help to correct Burma’s problems for all three of these rationales. The SPDC has tried to make everyone live according to one centralized system. In so doing, it has repressed the self-government of local cultures—so we have grounds for federalism on the plural societies rationale. Because the SPDC has quashed local democracy, everything gets handled from the center, government has become unresponsive, and people assume that the central government will control everything, so they don’t

bother to get involved. Ergo, the local democracy rationale for federalism might demand a shift in power to more local governments. Finally, although the military government has created various states and divisions, they are really just servants of the central government. As a result, they cannot stand against the government when it is oppressive. The people are left without an official rallying point for resistance. They must therefore look to “unofficial” groups (“unofficial” in the eyes of the regime) such as the Karen National Union and the Shan State Army. The checks and balances rationale for federalism would set the states up to keep an eye on the central government in the future.

Burma might therefore benefit from all three rationales for federalism. I intend, however, to devote most of my remarks to the plural societies rationale, for three reasons. First, Burma is an uncommonly plural society. Second, many of Burma’s problems for the last half century have grown out of its pluralism. Third, crafting a federal constitution for a plural society is one of the hardest tasks in constitutional design, so it needs particular attention.

As a technical matter, you must do three things when writing a federal constitution. First, you must decide why you want to be unified. Second, you must decide why you also want to be different. And third, you must figure out how this new federal government can work, without falling apart into angry squabbling. Let me take those up in turn.

First, you must determine why you want to be in a single country with all these different groups in the first place. There are important reasons to join in a government larger than your own nation. Across the world, democracies have tried to organize themselves into larger organizations, because they see the benefits of unity. The European Union is the best current example, but other regions have started down that path. Again, I stress that everyone is different, so the reasons for unity need not be the same for all. Nevertheless, across the globe, people tend to unite for two remarkably consistent

reasons: power and productivity.

Power: a central government is stronger and can better protect your interests in the world. For that reason, almost all federal constitutions give the central government the primary role in foreign affairs: when a larger country speaks with one voice, other countries are more likely to listen. For example, the international community tends to pay a lot of attention to what the United States says. But if my home state Indiana tried to set its own foreign policy, the world would pay it very little heed. As a result, Indiana is glad to be part of the United States when it comes to foreign policy – even though people in Indiana do not always agree with what the central government is doing. Relatedly, almost all federal constitutions give the central government primary power over military matters. Again, the reason is that a relatively large, united country can field a more powerful military force than can smaller republics. If the rest of the world knows that the country will be able to deploy that military in a unified way, speaking with one voice, they will sit up and take notice.

Productivity: a good central government can make your society more efficient and productive by organizing larger systems of activity. For example, a single large market can allow people to concentrate on their own area of expertise: some people can produce good, cheap rice, and others can produce good, cheap computers; if they are all in a single market, they can just exchange goods freely, and then everyone will have access to good, cheap rice and good, cheap computers. For a large market to work, however, a single government must have the power to regulate it, so as to keep trade free and to create a single set of rules by which everyone must live. When the economy is divided into different jurisdictions with different rules, people find it hard to plan, to compete fairly, to know the law and obey it. Foreign companies are less likely to invest, because it is harder for them to know the rules and to calculate the likely return on their investment. For similar reasons, countries usually find it more efficient to create unified

regimes for transportation (particularly an interstate road system) and communications (particularly telephone, internet, and television). Those networks in turn help make the economy more efficient, because it is easy to communicate and to move goods and people around.

To summarize: the first of your three tasks is to identify those areas where you need unity, and for reasons of power and productivity, most federal constitutions give the central government primary responsibility over foreign affairs, the military, the economy, transport, and communications. But the second task is to identify those areas where you need diversity, because the point in federalism is to allow local cultures to govern themselves. So you should identify those areas where it is particularly important that local cultures play the dominant role. Again, every country is different, but across the world, people commonly find that a few areas are especially important. In plural societies, the states are concerned to protect their own cultures, so constitutions often reserve cultural matters to the states. Because education is important to acculturation of the young, many constitutions give the states the power to set much education policy. Because nations often want to speak and preserve their own language, multinational constitutions sometimes give the states some power over language policy, particularly the power to keep the local language from dying out. Similarly, because religion is an important part of cultural identity for many, some constitutions give the states the power to regulate religion as well. Many other constitutions take a different approach: to protect local regions, they deny all governments the power to regulate religion, so that believers can make up their own minds. In this case, the states have no power to regulate religion – but importantly, the center has no such power either, so it cannot impose one religion on the whole country.

In short: first you decide which subjects demand unity and so should belong to the center; second, you decide which subjects demand diversity and so should belong to the states.

But third, you must decide how the states and the center should relate to each other in practical ways; in other words, you must figure out how to make this system work in practice. Inevitably, plural societies face strains and stresses. The different nations may try to dominate each other; or the center may try to dominate the states; or the states may try to prevent the central government from fulfilling its responsibilities. It is not enough simply to give some power to the central government and some to the states; you must then set up a structure to enforce that division, so that people have an incentive to make it work. The key is getting all of the actors to feel committed to the system as a whole: the central government must want to allow the states their self-government; and the states must want to allow the national government its unifying functions; and all must feel that they are in a common venture.

To accomplish these ends, the constitution might pursue two strategies. First, it should give people a concrete incentive to do the right thing. And second, it should cause people from different backgrounds to come into regular contact, so they can learn to understand and trust each other. Let me offer you three ways that a constitution could pursue those strategies. First, to keep the center from over-reaching, the states themselves should have some place in the structure of the federal government. Second, to keep the states from becoming closed and hostile, the state constitutions should require the state governments to treat all their people well, regardless of national identity. And finally, when disputes arise – as they inevitably will – over who has the power to regulate something, the constitution should contain detailed instructions about how to settle them.

Let me elaborate. First, the states need to have a role in the federal government itself. The reason is that when the two levels of government are kept rigidly separate, they may become hostile toward one another. They get the idea that they are separated because they are opposed. The constitution itself seems to confirm this view, because it assigns them

radically distinct spheres, as though they were competitors. But when two governments are hostile toward each other, they tend to invade each other's space. As a result, you may write a wonderful constitution, but the government may just ignore it. In particular, the central government may overlook all the limits on its own power and do whatever it wants, invading the sphere reserved to the states. The constitution may order the federal government to stay in its own space, but that barrier is made only of paper. If it wants to, the center will have not trouble demolishing a paper barrier. So we need to structure the federal government in such a way that it will not want to invade the sphere reserved to the states.

One way to control this problem is to design a constitution under which each level of government wants the other level to succeed, because each is convinced that the other serves important constitutional goals. One way to ensure that the central government cares about the states is to ensure that the central government is full of people who come from the states, identify with the states, and are politically beholden to the states. For example, in every draft constitution for Burma that I have seen, the legislature has two houses. Members of the lower house are to be elected by the citizens of the Burma considered as a whole, from districts created by the federal government. But in the upper house, each state of the union will send an equal number of representatives – say, two. In this house, the legislators will likely identify with the states, because they are elected by the people of a particular state to represent the interests of the state. To be re-elected, the legislator will need strong roots in the state. Also, each state no matter how small has the same amount of influence in this assembly, because each sends the same number of representatives. As a result, the larger states should be unable to dominate the weaker. Finally, once you have created this assembly, you can assign it tasks that you feel the states should influence. For example, you might assign the upper house the role of ratifying treaties, so as to give the states a role in foreign affairs that they might

not otherwise have.

You can give the states this sort of role in any branch of the federal government. We just discussed the legislature. Regarding the executive branch: Switzerland has a group executive that must include members from different cantons. It is also possible to have one chief executive, but with ministers in roughly equal numbers from the different states. One could also require that high-ranking military officers come from different states. And finally, the constitution could require that the highest court of the Union of Burma include equal numbers of judges from the different states. As always, however, the key here is balance, and it is important not to get carried away. The more that you require that the federal government contain representatives from different states, the more that it will feel tied to the interests of the states. But if you go too far in this direction, it could backfire. If the federal government includes only representatives of the various states, then there may be no-one to think about the interests of the whole. People might start to think that the states are opposed to each other, and then they might try to hurt each other. As a result, some people in the federal government will again become hostile toward some of the states. So the goal is balance: you want to fill the federal government with people tied to the states, but you also want some people looking to the interests of the whole country.

In making federalism work, then, the first goal is to give the states some role in the federal government: the whole needs to care about the parts. But the second goal is to ensure that the states do not become closed and hostile toward each other or toward the federal government: the parts need to care about the whole. When we look at the experience of the world, the great risk here is that if a state has a dominant nationality, such as the Shans in Shan state, then the state will see itself as existing just for the benefit of that nationality. The slogan will be Shan State for the Shans. Again, a balance is appropriate. If the point in federalism is to allow nations to govern

themselves, then the Shan nation should be able to make law based on its own cultural values. But it is one thing to govern the state according to local cultural norms; it is another thing to enact legislation that turns some people – i.e. non-Shans – into second class citizens or unwelcome guests. To varying degrees, all of the states in Burma contain more than one nationality. It would be tragic for one of these groups to throw off the SPDC, get control of the state government, only to turn around and oppress some smaller group in their midst. Over time, such treatment will also lead to hostility between states: if Shan State hurts local Chins, then Chin State will likely hurt local Shans. In short order, no-one will feel safe living anywhere except in a state dominated by their own nationality. And then the union will slowly – or maybe violently – fall apart at the seams.

In short, then, the goal of federalism is to allow local cultures to govern themselves, but those cultures cannot become closed, hostile, or rigid. They must work to open themselves to all of their citizens, regardless of background. One common way to strike this balance is the following: the state government has power to nurture local cultures, including the culture of the dominant nationality if there is one; but it may not erect an official religion, language, or ethnicity for its citizens, nor may it discriminate against people on the basis of their nationality, nor may it infringe the basic human rights of any of its citizens. Each state constitution might protect these rights for its own people. In case the state supreme court fails to protect them, the union constitution might also include similar protections for all the citizens of Burma. That way, if Shan State hurts one of its Chin citizens, he can appeal to the Union supreme court for a remedy. If that court is made up of judges from all the different nationalities, he should be able to trust it. The result is that each state expresses the values of the local culture, offers a special home for the local culture, but also strives to welcome others. If a Chin goes to work in Shan State, he can be assured decent treatment, and the same

for a Shan who goes to work in Chin state. (I should mention that I have used the Shan State as my example because I know that it is particularly heterogeneous, and I have observed that the Shan leaders have been very sensitive to this problem).

Another way to achieve the goal of diversity in unity and unity in diversity is to draw state boundary lines in such a way that you have a good population mix in each state. Each state might have a core culture, because the point in federalism is to allow local cultures to express themselves. Ergo, Chins might make up the majority in Chin state and so forth. But it is also important that each state include more than trivial numbers of people from other cultures. The reason is to keep the states from becoming closed and xenophobic. If the state includes people from multiple nationalities, the politicians may have an incentive to appeal across ethnic lines. As a result, politics might not become ethnically divisive. In the state or states populated primarily by the ethnic Burmans., it may be especially important to include people of other nationalities. It may also be good for the Union of Burma to include more than one state in which Burmans are the majority, but always mixed with different minority populations. That way, politicians in all the Burman states will have reason to appeal to people from other groups. As a result, Burman politicians will be less likely to unite on a nationalistic platform of Burma for Burmans. Instead, there will be many different kinds of Burman leaders with many different kinds of views, because they must respond to different political incentives in the different states. I know that the boundary lines for many of the states and divisions may be traditional, and so it may be hard to move them. But actually, the existing states and divisions may already be sufficiently heterogeneous. (When we discuss electoral systems, we will return to this issue, because even with heterogeneous states, you need the right electoral system to encourage politicians to reach out to people outside their own group).

The third requirement for making a federal system work

is that there must be clear mechanisms to resolve disputes, and people must be committed to living by the outcomes of those mechanisms. Even if you write a clear constitution, with a sharp division of powers, there will still be many uncertain cases, in which you just cannot be certain who has the power. Let me give you an example. Imagine a constitution that gives the states exclusive jurisdiction over education, gives the federal government exclusive jurisdiction over the military, and gives both governments concurrent (or shared) jurisdiction over the economy. Now the central government passes a law requiring all schools in Burma to provide mandatory basic education in military science. The states claim that this is a law about education, and so it is beyond the union's power. But the central government claims that it is really a law about military preparedness, so that Burma will have a citizenry well grounded in military matters. Which is it? In truth, it is both, and you need some way to decide who wins these mixed cases. As another example, suppose that the federal government prohibits child labor, but one of the states affirmatively protects it. These rules are about the economy, which all agree belongs to both the states and the federal government concurrently – but when they disagree, who wins?

To resolve these cases, you need a rule of decision and also an authoritative decision-maker, like a court. In cases of concurrent power (like the child labor case) or in cases of exclusive powers that overlap (like the military science case), who wins? Different federal countries have adopted different rules to resolve such cases. In the US, so long as the federal government is acting within one of its enumerated powers, it wins—even in cases where the states might also have some constitutional power. In other countries, in mixed cases, the courts try to determine whether the state or federal elements predominate. In our military science case, they might decide that the issue primarily involves curriculum in the public schools, rather than military preparedness, so the states win. But the important point is that because you will face hard cases, the constitution needs to specify some such rule of

decision. When the states and the federal government are locked in a turf battle, tempers flare. To the extent possible, you must ask people to be loyal to the system, even when they lose. One way to earn that loyalty is for the constitution to adopt a clear rule of decision and assign it to a clear decision-maker. That way, people may believe that the issue is being fairly decided, even when they don't agree on the outcome of particular cases.

#### **D. Federalism in Foreign Affairs**

We now come to the subject of federalism in international relations – how power may be divided between the states and the union government in setting foreign policy. In all federal states, the federal government holds the dominant role in this area, and usually it has exclusive power. As a result, the states play little part in foreign affairs. Some have observed that federal states exhibit a kind of schizophrenia: for internal matters, they carefully divide powers, but for external matters, they behave as though they were unitary states.

There are several reasons for this federal dominance. First, people join federal states in part because they want to present a united front to the rest of the world. They want to speak with one voice, because they think that they will command more respect. But then it is important that foreign policy be controlled by only one government – necessarily, the federal government as it can speak for the whole. In fact, many constitutions concentrate foreign affairs powers not only in the central government, but particularly in the executive branch of the federal government, because it can act in a decisive way. In the United States, for example, the Supreme Court has insisted that the President is our sole agent in foreign affairs; Congress can set policy but not conduct our international relations.

Another reason for federal dominance is that the

international system is more comfortable with unitary states. International law presumes that the world is composed of sovereign states. Legally, sovereignty means that no state may interfere in the domestic matters of another state. But in order to respect this rule, states must know exactly who holds the sovereignty in any given country. For that reason, international law has insisted that over any territory there can be only one sovereign—the central government. In addition, for practical reasons, states prefer to deal with unified governments. It is often difficult for one state to understand the legal system of another state. When you conduct business with a foreign country, before you even get started, you want to know who can speak for this country. Ideally, you want a simple answer, and you never want to guess. Most states are unitary states, with limited understanding of federal systems, and so they like to deal with other unitary states. Even federal states like to deal with unitary states, because they are easier to understand. As a result, the international system puts pressure on federal countries to behave as though they were unitary states. For example, many states are unhappy with the United States, because we cannot speak with an entirely unified voice. The president negotiates treaties, but they do not become law unless the Senate ratifies them. Sometimes, the president agrees to a treaty but the Senate afterwards rejects it; commonly, the other country feels that we have reneged on the deal. Imagine their consternation if not only the Senate but also the state legislatures had to approve a treaty!

For all these reasons, state participation in foreign affairs has never been common, and it has become less common over the last hundred years. It is an uphill battle to carve out a place for the states in foreign affairs. But there are good reasons that member states might wish to participate in foreign affairs. For one thing, states might have different views about foreign affairs process. For example, once Burma becomes democratic, the government will have to decide how it wants to relate to three major nearby powers – India, China, and

Thailand. The different states of Burma may feel differently toward each of these countries, and so they will want some influence over Burma's relations with them. Similarly, Burma will need trade agreements with other countries, and these will have different effects in different states. If Burma decides to allow the importation of cheap rice, for example, it will help consumers feed their families, but it will hurt rice producers, who may not be able to produce such cheap rice. If the rice growers are concentrated in a particular state, then it will be particularly burdened by the agreement. Again, it will want some role in foreign affairs to protect its interests. Or, as one last example, in order to secure international grants of money, Burma may have to hold free and fair elections, and the funding agencies will send in observers. But some of Burma's states may not be well organized enough to hold the kind of elections that these observers will demand. In the long run, Burma will need to apply that money, but the timing is critical. If Burma takes an international grant, promises to do something, and then fails to honor that promise, it may be harder to get another international grant. It would have been better to hold off taking the money until all the states were ready. For that reason, the states will want to have a role in the foreign affairs process, so that they can express their concerns about not being ready. In the long run, if the states feel that the federal government is ignoring their worries, the union may experience great strain.

Luckily, though it may be hard to create a role for the states, it is not impossible. In fact, in many federal systems, the states do have a role, though usually only a limited one. I would like therefore to outline the different ways that a constitution can allow for state participation. There are two basic methods. First, each state might conduct its own foreign policy: it might make its own treaties or wage its own wars or receive its own ambassadors, and so forth. Second, even if the state cannot conduct its own foreign policy, it might participate in the making and implementation of federal foreign policy: before signing a treaty, the federal government might

have to consult the states or get their permission, and so forth.

**(i). The States' Ability to Make Their Own Foreign Policy**

Even in federal systems, states are usually prohibited from making their own foreign policy. Generally, the constitution itself gives plenary power to the central government over foreign affairs and denies the state any power. Sometimes this rule is explicit in the constitution; if not, constitutional interpreters usually infer it. This conclusion is not surprising because of the pressures on states to act in a unified way. If the states had the power to formulate their own policies, that unity would disintegrate. In fact, one definition of statehood is unified authority in international affairs. If each member state could formulate its own foreign policy, then the union would not really be a state at all, but a treaty association. Most of the prominent federal states – the United States, Canada, Australia, and Switzerland, for example – deny their subdivisions (provinces, states or cantons) the power to make treaties independently of the federal government. By contrast, the European Union, which is not yet a true state, makes its own treaties but also allows its member states to make treaties. Sometimes the EU makes mixed treaties, in which both the EU and the member states sign a treaty made with states or organizations outside the EU. In mixed treaties, the EU pledges to honor the treaty in its sphere of power, and the member states promise to do so in their theirs. The states of Europe are therefore still independent sovereign states, not part of a single sovereign state. In Europe, some would like for the EU to have a common foreign policy, so that only the Union can make treaties or wage war, but they are not there yet, and they may never be.

In the foreign arena, then, states may not generally go off on their own. On the other hand, it is fairly common for member states to make international agreements so long as they have federal permission. In this case, the risk of disunity is not present, because the states are acting as agents of the

federal government. For example, the United States Constitution forbids the states from making treaties, but it allows them to make compacts or agreements with foreign states if they have federal permission. The Supreme Court has never clearly told us the difference between a treaty (which states cannot make) and a compact or agreement (which states can make, so long as they have federal permission), but presumably it has to do with the significance of the issues. A treaty would be a large-scale attempt to deal with matters of some moment; a compact would be a relatively small-scale attempt to deal with matters that primarily affect just one state and its foreign neighbors. In practice, Americans have followed that distinction: the federal government negotiates all the agreements with important effects for the nation as a whole, but the states have entered into compacts with neighboring countries to govern border issues, such as waterways or bridges that connect the two countries. In fact, sometimes, the states do not even bother to get federal permission in advance on such issues. They just go ahead and make the compact in confidence that Washington will approve it after the fact. In truth, they are right to have this confidence, because the central government always ratifies. This system works pretty well: the states never try to make large-scale treaties, and the federal government always authorizes the states' small-scale agreements.

In short, federal constitutions generally do not allow the states any international power. But suppose that a federal state wanted to give such authority to its member states: could it? Clearly, as a matter of domestic constitutional law, it could: constitution-makers can put anything they want in a constitution. But here's the harder question: would international law allow these states to enter into foreign relations? The short answer is that because so few states have tried this practice, we don't really know. There is no definitive answer, partially because it has not come up very often and partially because international law does not speak with one

voice on this question. On balance, however, the most likely answer is that international law would not permit states to make treaties against the union's will.

International law rests on both formal documents (treaties, UN resolutions, and the like) and state practice (just what states do). The formal documents of international law suggest that the subdivisions of federal states cannot maintain their own foreign policy. The Vienna Convention on the Law of Treaties is probably the most important instrument, and Article 6 is the relevant section, as it recognizes the right of sovereign states to make treaties. The article does not speak explicitly to whether units of federal states can create treaty obligations. For guidance we must therefore look to the Reporters' Notes for the convention. In 1953, the reporter claimed that member states may make international treaties, but in 1958 the reporter held that member states could make treaties only as agents of the central government. In 1962, the reporter explained that only the central government possesses in principle the capacity to make a treaty. He did leave open one possibility: member states could enter into binding international treaties if the federal state recognized their power to do so and the other contracting state agreed to recognize that power. So in this view, it all depends: whether Chin State can make a treaty depends on whether the Union constitution and also the other contracting state agree to recognize that authority. That makes Chin State's power to make a treaty depend on the discretion of other states, but at least it is a window of opportunity. That window seemed to close, however, as the 1960s wore on. The International Law Commission proposed a revision of the Vienna Convention that would allow member states to engage in foreign policy so long as their own federal constitution allowed. In other words, your international power would depend on your own domestic constitution. The Vienna Conference, however, severely criticized this provision on the familiar ground of uncertainty: if you were thinking about making a treaty with a member of a federal union, you would

have to parse that other states' constitution to determine whether the member had treaty-making authority. In other words, the participants in the conference rejected the idea that units of federal states should have power to make treaties, even if their own domestic constitution gave them that power.

International law does not come just from pronouncements of legal conventions; it also comes from state practice. Overwhelmingly, the practice of federal states is not to allow their member states to make independent foreign policy. There are only two possible exceptions – Germany and Quebec. But because their situation is confused, they are only possible exceptions, and probably not reliable evidence of state practice. In Canada, Quebec has claimed power to make its own international policy, largely because it feels closer to the French-speaking world than does the rest of Canada. So Quebec has entered into cultural ententes with France and Gabon, and it has participated in meetings of franco-phone states. The federal government of Canada has denied that Quebec has this power, without federal permission, and most people think that the Canadian Supreme Court would agree. This conflict might have created some real tension, but the governments of France and Canada found a solution. They signed their own agreement allowing Quebec to make these concordats. As a result, even if Quebec needs federal permission, it now has it. For that reason, we have no definitive answer whether the Canadian constitution gives Quebec the power to make its own foreign policy; the matter has never been forced to a head.

The situation in Germany is even more confused but more significant, because Germany has probably gone the farthest toward giving its member states independent authority in foreign affairs. In the 1950s, the German Constitution seemed to give the treaty-making power to the federal government in some areas and to the states in others. It also seemed to require, however, that the states get approval from the central government before concluding any treaties, though some

experts thought that the federal government was required to give approval. But mostly, the whole area was murky. No-one really knew what the law required, and everyone needed some clarity.<sup>1</sup>

1. For those who want all the details: In most federal constitutions, the federal government has the power to make a treaty on any subject, even on subjects reserved to the states under the constitution. It would be illegal for the central government to pass domestic legislation on the subject, but a treaty is different. Germany may be the single important exception to this rule. I say that it “may” be the exception because German constitutional law is not very clear on this point. Article 32 gives the central government the power over foreign relations, including a power to make treaties. The constitution does not, however, explicitly tell us on which subjects the federal government may make a treaty. Some experts take the view that the Federation’s treaty power is plenary; others opine that the central government may make a treaty on any subject of great political moment; and still others argue that the federal government may make treaties only on those subjects that fall within its exclusive or concurrent powers. The German High Court has not offered a recent, clear opinion on the question.

(The Concordat case is now old, written in 1957, and was never very clear. It seems to hold that if the federal government makes a treaty on a subject of exclusive Lander power, then the Lander would not be bound. It does not seem to decide, however, whether the treaty would be wholly invalid, such that, for example, federal courts could not apply it in an appropriate case).

One reading of the German constitution, then, would confine the federal treaty power to those subjects over which the federal government has been given power. And since the central government can make treaties only on some subjects,

it seems logical that states have the power to make treaties on other subjects. In fact, another part of Article 32 gives the Lander power to make treaties in their own areas of exclusive and concurrent authority. We could thus interpret the German constitution to give the federal government power to make treaties on subjects given to it, and to give the states power to make treaties on subjects given to them, and to give both of them power to make treaties on subjects that they share. So the German constitution seems to give the states some independent power in foreign affairs.

To clear up the problem, the states and the federal government entered into an agreement in 1957, called the Lindau Compact. In the years since, state and federal governments have followed this compact, rather than the confusing constitution itself, in this area. Under the compact, the states delegated to the federal government broad treaty-making power over consular relations, commerce, navigation, residence, trade, financial transactions, immunities and privileges, and adherence to international organizations. These subjects cover an enormous amount of ground, so the central government can make almost any treaty that it wants. But—and this is another large but—the federal government has given the states a very important role in the process of treaty-making. Under the compact, the central government has agreed that whenever a treaty implicates the interests of the Lander, the federal government will not sign unless the Lander agree to the treaty as well. These days, the Lander even have permanent representatives to the central government to advise it of the states' views on particular treaties. And although the Lindau compact does not require it, the federal government generally includes Lander representatives in the teams sent out to negotiate treaties.

Despite its complexity, this system seems to work well for Germany. The states feel that they have a role, and the arrangement is even fairly efficient. Importantly, whenever Germany enters into a treaty, both the states and the federal

government have already consented, so both are prepared to stand behind it. But note that the Lindau Compact allows the states to participate in making federal foreign policy – our next topic – rather than to make their own independent foreign policies. Under the current arrangement, the federal government must work with the states, but in the end, there will be only one foreign policy for Germany. The Lindau Compact does not allow states to go off on their own. The states still do make some foreign agreements, but they have been on the decline since the Compact. And these state agreements involve local issues, such as the management of bridges, boundary rivers, or parks that fall across an international border. Such agreements are small-scale and uncontroversial, and if federal permission were needed, the central government would surely give it. In practice, then, German states behave much like American states in working out international agreements, even though federal permission is clearly required in America but not so clearly in Germany.

It is time to summarize. We asked whether international law forbids states within a federal system from making their own treaties. We have seen that the Vienna Convention on Treaties indicates that they may not do so. We have now seen the state practice is confusing to all concerned. Quebec claims to have the constitutional power to make its own treaties, but that claim is dubious at best. The German constitution appears to give the states some independent treaty-making power, but it is so murky that it was effectively replaced by the Lindau compact. Under that compact, the Federation makes treaties with state participation. In practice, the states make only uncontroversial agreements on issues that are geographically localized and with implicit federal permission.

At last, let us go to the bottom line. Suppose that the drafters of Burma's constitution wanted to give the states power to conduct their own foreign policies. Could they? We can offer several conclusions. First, the states certainly could make international agreements so long as they were acting with

federal permission. Such an arrangement would not violate international law, and it would not even be unusual. Second, however, international law probably would not recognize treaties made by the states in defiance of the wishes of the central government. Third, in addition, the international community would bring a great deal of pressure to discourage states from making treaties in defiance of their central government. In all probability, no foreign state would be willing to make such an agreement with one of Burma's units. In short, then, even if the states somehow managed to secure a constitutional power to make their own foreign policies, international law would probably reject that authority, and no other state would be willing to deal with Burma's member states anyway.

It is therefore probably not worthwhile for Burma's states to struggle for a constitutional power to make their own foreign policy. But it would not be at all unusual – and it might be very wise – for the states to have a constitutional right to participate in the making of federal foreign policy. And that is the subject of the next section.

### **(ii). The States' Participation in Federal Foreign Policy**

How could the states participate in the making of federal foreign policy? To understand the possibilities, let us begin with two basic models of federalism: “competitive federalism” and “co-operative federalism.” In competitive federalism, the states and the federal government imagine each other as a rival for power. They fear the other, and so they compete with it to seize as much power as possible. In the constitution, they divide power as clearly as possible so that the limits of the other's power will be sharp. And they look for a neutral umpire – like a court – to police the division of power, to make sure that everyone stays within the bounds. The key device is the boundary line, to mark off the property of the central

government from that of the states. The chief worry is trespass, that one government should intrude on the others' preserve.

Sometimes competitive federalism is necessary. When the elements of a federal state deeply distrust each other, they naturally want protection for their own separate domain. But competitive federalism has costs: if the system is based on distrust and separation, the parts may end up fearing each other ever more, until the country falls apart. Sometimes it is better to structure a constitution so that the parts must depend on each other. To get what they want, they must co-operate, and as they work together, they develop a shared history of mutual support. As a result, the country becomes stronger as a whole, and the parts even become more secure because the federal government is less likely to invade their spheres. This strategy thus has two pieces: we should structure the constitution so that (1) people from different states and the union all interact regularly under conditions that (2) give them an incentive to do the right things, i.e., to care for each other.

For states, the idea of co-operative federalism may be especially important in the field of foreign relations. Because the federal government will be dominant in this area, states cannot expect to go their own way. If they think of international policy in terms of competitive federalism, they will try to erect a border between their own turf and the union government's. But in this field, if you draw a line, then all of foreign affairs will fall on the federal side of the line. The union will end up with all the property, and the states will be homeless wanderers. In other words, all that a boundary line can do is to wall the states off from any role. Instead, the goal should be to create a co-operative system, under which the parts rely on each other and the states have a real role in the federal foreign relations process.

More concretely, countries have experimented with three different approaches to giving the states a role in foreign affairs. In the first, the federal government sets foreign policy by itself,

but the states have a lot of political power, so they can influence federal decisions. Let us call this the political pressure model. In the second, the federal government sets foreign policy, but it must rely on the states to implement it. Let us call this the state implementation model. In the third, the federal government does not set foreign policy on its own but must consult the states or even get their permission. Let us call this the direct participation model. The political pressure model is most associated with the United States, the implementation model most associated with Canada, and the consultation model most associated with Germany.

**(iii). Political Pressure**

In the political pressure model, the constitution gives the central government plenary power over foreign affairs, and it gives the states no formal role. The government is structured, however, so that the states can put a lot of political pressure on the federal government, which will therefore try to make a foreign policy that will please the states. Under this model, the states' power in foreign affairs is just part of the general power that they have in a federal system. This style of governance is particularly associated with the United States. For example, the President will hesitate to sign a treaty that would hurt some or all of the states, because it would be politically unpopular. State governors might denounce the President and urge state citizens not to vote for him next time. Remember also that before a treaty becomes binding, the Senate must ratify it, and that Senators are supposed to represent the collective interests of the states as states, rather than as collections of individuals. As a result, the Senate will seldom ratify a treaty that the states find objectionable. The President knows this, so he will seldom even propose such a treaty. Many draft constitutions for Burma propose an upper house in the Union legislature that would be similar to the United States Senate, and it might have a similar effect on

foreign affairs.

**(iv). Implementation**

In the implementation model, the constitution gives the federal government plenary power over the making of foreign policy, and it gives the states no formal role in the process. After a treaty has been made, however, it must be implemented. Often the government must pass laws to enforce the treaty against its own citizens. Imagine, for example, that the union government agrees to a treaty banning child labor. To make this treaty effective, the government must then pass a statute to ban child labor, and it must assign investigators and prosecutors to the task. May the federal government pass such legislation implementing the treaty, or must it rely on the states for that task?

Different constitutions offer different answers. To understand this variety, we need to review some background. Remember that a federal constitution may reserve some powers exclusively to the federal government (say, A, B, and C), some exclusively to the states (say G, H, and I), and some concurrently to both (say D, E, and F). Now suppose that the constitution gives the federal government a general treaty-making power. This arrangement faces us with two questions: does the constitution give the federal government the power to make a treaty on any subject it likes? And does it give the federal government the power to enforce a treaty on any subject it likes?

Let us start with the first question: can the central government make a treaty on any subject? On the face of things, the constitution generally gives the federal government power only over certain subjects; in fact, the constitution is careful to indicate that the union has power only over those areas. So clearly, the union can make a treaty in areas where it has exclusive power – A through C – because those areas belong to it alone. And presumably it may make a treaty in

areas where it has concurrent power – D through F – because it has shared authority over them. But may it make treaties in areas that are reserved to the states under the constitution—areas G through I?

Let us use a concrete example. Suppose that the constitution gives the federal government exclusive power over the economy, the military, and foreign affairs, including the power to make treaties. The constitution gives the states exclusive power over education. The federal government makes a treaty with a nearby country: in the interests of regional solidarity, the two countries agree to teach regional history in all their schools. They think that students will feel more connected to nearby countries, if they understand how their histories have entwined. In form this agreement is a treaty, so it appears to fall within federal power. But in content, it is all about education, which the constitution reserves to the states. May the federal government regulate education so long as it does so through a treaty? Would this destroy federalism?

As another case, suppose that the constitution gives the states and the union share authority over civil rights. The federal government has been pushing for protection of more civil rights, but the states like things the way that they are. Now because the states and the union have concurrent authority, the constitution must specify a process for resolving cases where they disagree. But the federal government does not want to use that process, either because it fears that it will lose or because it's too time-consuming. So what does it do? It signs a multilateral treaty under which it agrees to protect a whole range of civil rights. It claims that the constitution gives it exclusive power to make a treaty, and that's all it has done, make a treaty. But the states will respond that the treaty is on the subject of civil rights, over which the federal government and the states share power. By using a treaty, the federal government has made the field of civil rights its own exclusive arena, rather than one in which it has only concurrent authority. Would this destroy federalism?

How do we deal with such cases? The general answer is that in most federal constitutions, the federal government has the power to make a treaty on any subject, even on subjects reserved to the states under the constitution. It would be illegal for the central government to pass domestic legislation on the subject, but a treaty is different. Whenever the union signs a treaty, the subject automatically has international implications. And when we are in the international sphere, we want to speak with one voice through the federal government. Many federal countries have adopted this rule, including the United States, Canada, Switzerland, and Australia. The most famous case to articulate this rule is an opinion by Justice Oliver Wendell Holmes, called *Missouri v. Holland*. For that reason, the rule is sometimes called the *Missouri v. Holland* rule. In technical terms, the way that lawyers express this rule is to say that the federal government has plenary treaty-making power. Plenary power has a precise meaning: the power is not limited to certain subject matters but can instead reach any issue that the central government would like to put in a treaty.<sup>2</sup>

But we are not done. Even if the federal government can *make* any treaty it likes, it does not necessarily follow that it can *implement* any treaty that it likes. Perhaps it can make certain treaties but must rely on the states to enforce them. If we allow the union to make a treaty on any subject, we have obviously allowed some intrusion on the states. But if we allow the union to enforce a treaty on any subject as well, we have perhaps given it the power to do anything that it wants, even in the domestic arena. First, it negotiates a treaty on any subject that it wants, and then it passes law to implement the treaty. As a result, the central government can reach anywhere. Some have predicted that such a reach would mean the death of federalism. So how have federal countries responded to this worry?

In all federal states, the central government may implement treaties in those areas over which it has exclusive or concurrent authority—in our hypothetical, subjects A through F. For

example, if the constitution gives the federal government power over trade, then it may enforce a treaty governing trade. But here is the harder question: may the central government enforce a treaty in areas reserved to the states? For example, if education is reserved to the states, may the central government enforce a treaty mandating a certain curriculum in the schools?

Different countries have adopted different rules to answer this question. In fact, the United States and Canada have adopted polar opposite answers. Under the rule of *Missouri v. Holland*, the United States government can enforce any treaty, on any subject. It can therefore regulate areas that it might not be able otherwise to reach, so long as it uses a treaty to get there. According to Justice Holmes, the author of *Holland*, for the federal government to make international promises, it must be able to follow through on those promises. If it cannot implement treaties – if it must rely on the states to do so – it will make few treaties, and the national interest will suffer.

Canada's constitutional law is somewhat unclear on this subject, but it appears to take the opposite approach: the federal government may make any treaty, but it may enforce only those on subjects within its exclusive or concurrent power. If education is reserved to the provinces, for example, then the federal government may make an education treaty, but it must rely on the states to enforce it. According to the Canadian judiciary, this rule is necessary to keep the federal government from gaining unlimited power. This rule is often called the Labour Conventions rule because the Supreme Court most notably propounded it in a case of that name. (Australia's practice is someplace in between the United States and Canada: the federal government can make treaties on any subject, but it can enforce them only when they address "external affairs.")

So here we have two opposite views, and each predicts that if the other is rule is adopted, dire consequences will follow. In point of fact, both America and Canada are still alive and well, despite having such different rules. In America, the rule

of *Missouri v. Holland* theoretically would allow the federal government to rule all of American life, but in practice that doesn't happen because the states have enough political power to stop it. In Canada, the Labour Conventions rule theoretically threatens the federal government's ability to develop a coherent foreign policy: it can make promises, but the states might refuse to enforce them, to Canada's great embarrassment in the international sphere. (In fact, Canada would then be in violation of international law, because at international law, it is never a defense that your domestic constitution forbade you from complying with your international obligations). But in practice, the states do voluntarily enforce federal treaties, because the Labour Conventions rule has forced Canada into a kind of co-operative federalism.

Let us examine how a system like Canada's works at its best. In a federal constitution, the states receive powers over subjects that the framers think belong with the states. But the Framers also think that treaties belong with the federal government, and sometimes treaties must address matters reserved to the states, because of international demands. So we have a tension here: on the one hand, some subjects belong to the states, but if they are in a treaty, they also belong to the federal government. How to split the difference? If we insist that the federal government rely on the states for enforcement, the states gain several significant powers in the foreign affairs area.

When the states enforce treaties, they actually have some power to control the meaning and scope of the treaty. From one thing, the state must make choices about how aggressively to enforce the treaty. To implement a rule, you must commit resources to it, such as prosecutors, investigators, and judges. No government ever fully enforces any law; they don't have the money. Every government must of course enforce the law in good faith, but they have some discretion about how enthusiastically to do so. If a state disagrees with a federal treaty or thinks it unimportant, then the state may decline to

dedicate many resources to it. In fact, the state could in practice choose not to enforce the treaty at all – though this would probably be illegal. When the states does enforce the treaty, state officials will likely be more sensitive to local people and local ideas, and local people will accept them more since they are more like neighbors. Because it has the power to implement the treaty, therefore, the state has the power to oversee how it affects the lives of its citizens.

In addition, before the state can implement a treaty, it must decide what it means: it must interpret the treaty's terms. But treaties are not always clear; their language will sometimes bear several meanings. If the state has the responsibility to enforce the treaty, in practice it has the power to choose which meaning it prefers, because it has the power to enforce the treaty according to its own interpretation. For example, suppose that the federal government wants to encourage the harvesting of timber throughout Burma, but the states want to restrict it. The union makes a treaty with Thailand to allow Thai companies to cut down Burmese trees above thirty meters in height; clearly, the central government is trying to win its disagreement with the states by adopting a treaty, which it has plenary power to do. Remember, however, that the treaty allows the Thai companies to take only trees over thirty meters in height, and the treaty does not say how the trees are to be measured, before being cut down. The states take the view that someone actually has to measure the trees with a tape rule to make sure. . The union government and the Thai logging companies believe that using this method would be too expensive; if they have to use it, the companies will not harvest any trees. So, the companies and the union take the view that Thai loggers may just estimate the height of the trees by sight, based on their experience. The treaty does not tell us in so many words which method is required; it will bear either meaning. So who wins? Under the Labour Conventions rule, the state wins in this case, because it is charged with implementing the treaty. To implement the treaty, the states

must allow the loggers to take tall trees—but only if they actually measure each one by hand! The federal government may make a promise for the country, but it falls to the states to decide how to fulfill that promise. When states receive the power to apply the rules, they have some discretion in deciding what the rules mean.

In short, if the states have the power to implement foreign policy, they also have some power to make foreign policy. This state power will in turn change the behavior of the union government itself: because the union knows that it must rely on the states for enforcement, it will make no treaties that the states find truly objectionable. The union knows that the states can read treaties very narrowly or even decline to enforce them. The country would then suffer serious international embarrassment, maybe even sanctions. As a result, the union will adopt only those treaties that it feels confident the states will enforce. So to give the states an implementation role is to give them an indirect influence over the making of federal foreign policy.

#### **(v). Direct Participation**

Our last model allows the states directly to participate in making federal policy. In our first two models the federal government has plenary power in the field of foreign affairs. The states have some influence, but only by way of a threat: if the federal government makes bad treaties, then the states may turn the federal officials out of office (political pressure), or they may refuse to enforce the treaties (implementation). Knowing this, the federal government will hopefully control itself, adopting only good treaties. But that's only a prediction about federal behavior. If they really want to, federal officials can still ignore the views of the states. By contrast, the direct participation model requires the federal government to involve the states directly in the formulation of foreign policy. In this model, the state cannot make their own separate policy, so the country

still speaks with only one voice. But the constitution guarantees the states some direct say over what that voice has to say.<sup>3</sup>

How do we secure this interest? Again, Germany provides the most instructive example, as the Lindau Compact suggests four primary ways that states can participate in making foreign policy. First, they might have a veto over some federal actions; in other words, the union must get state permission before it acts. For example, the constitution might prohibit the union from going to war without the agreement of a majority of the states. There is a risk in such a rule: because other countries know that the union must get permission to wage war, they might not fear its anger. But there is also a benefit to this rule: the federal government is unlikely to get involved in a conflict without widespread support. As another example, the constitution might provide that a treaty becomes law only when a majority of states approve it.

The second possibility is that the states have consultation rights: before it can act, the federal government must inform the states and ask for their input. Even when the states do not have a veto power, they might have the right to be informed and consulted. In other words, the federal government might be required to inform the states about almost all its international activity, even when the states have no power to block that activity. In a scheme of co-operative federalism, the federal government should always listen to the states' concerns and respond appropriately. Of course, with no state veto power, the union could theoretically listen politely and then ignore the states' advice. But at some level, constitutional democracies must believe that sometimes people actually listen to rational arguments. For that reason, consultation requirements are quite common: government agencies very often must listen before they act. And we must hope that if the union listens and discovers widespread resistance, it may actually change its mind. If the union is negotiating a treaty that only the states may implement, then the union has a particularly good reason for listening. If the states implacably

oppose the treaty, the union might worry about whether they will enforce it. As a result, the union might decide not to sign the treaty in the first place – but only because it asked the states for their views. Finally, as a general matter, it is good for the government to be as open as possible about its actions. The people cannot govern themselves unless they know what the government is doing.

In short, the constitution might give the states the right to veto some actions and to give their views on more. But as good as they are, these rights empower the states only to react to federal moves: the federal government initiates policy, and the states merely have a chance to criticize or block it. But it is also possible to give the states a more pro-active role by including them in the commissions that formulate foreign policy in the first place. For example, states could send representatives to the federal teams that negotiate treaties. Or the states could send representatives to national security agencies to consider whether the government should start a war or target a group of terrorists. If the states already have veto, consultation or implementation rights, any sensible union government should include the states in this way, even if the constitution does not require it. After all, if the federal government must eventually inform the states, get their approval, or ask them to enforce the treaty, it is just more efficient to do it early on by including them in the negotiations. And if the states participate in developing foreign policy, they will more likely be committed to it down the road. That's good for the federal government, because that way, the policy will more likely be successful and win broad popular support. And if it ultimately fails, the federal government will not have to bear the blame alone.

For the states, inclusion on foreign policy teams offers two important opportunities. First, the states can keep watch on the federal government to protect the states' constitutional prerogatives. Second, if the states are in the negotiations from the beginning, they can have an early, directive influence. If

they have the right only to veto after the fact, then they have much less flexibility. A veto right allows you only to accept or reject the federal policy as it stands. But what if the states really want to keep part of the federal policy but reject other parts? For example, suppose that the federal government has made a treaty with China agreeing to free trade and mutual military support. The states might really want free trade but not entangling military alliances. If they have the right only to veto, then they cannot pick and choose; they must either give up both or swallow both. Neither option is good. But if the states had been included from the beginning, they could have pushed for a different strategy – to get free trade without a pledge of military support.

#### **(vi). Permanent Staffs**

Finally, the fourth way that states might participate in foreign affairs is by sending permanent delegates to the union for foreign policy. The primary job of these delegates would be to carry out the functions described in the first three options: the federal government would keep them informed, get their permission when necessary, appoint them to negotiating commissions, and so forth. In that sense, this fourth device is just a way of carrying out the first three. Nonetheless, I list it as a separate method because it adds two elements to the first three methods. First, if you have a staff that permanently resides in the national capitol, devotes itself to foreign affairs, acquires expertise and long-term contacts in the foreign ministries of Burma and other important countries, then the states will be able to exercise their constitutional prerogatives much more effectively. Second, even apart from the states' formal constitutional roles – that is, even in a case where the states have no consultation, veto, or direct participation rights – a permanent staff can keep track of federal initiatives, make sure that the union government has the benefit of the states' views, and inform the people of troubling federal projects. In

other words, a permanent staff can serve as a kind of catch-all to keep the states involved even where the other three devices are not relevant. And so the constitution might explicitly allow the states to maintain such permanent delegations.

In short, if the states want to have a role in foreign affairs, they would probably be ill-advised to agitate for the right to make their own policy. They would be much better advised to ask for a way to implement or participate in the creation of federal foreign policy. There are federal systems that include such features, Germany being the best example. It may still be an uphill battle for Burma to work this way. Federalism in foreign affairs is very uncommon. For that reason, if you give the states a substantial role, other states may be unhappy with you. But increasingly, foreign policy affects the states. It is no longer possible – if it ever was – to discern a bright line between international and domestic affairs. The world is becoming globally integrated. The SPDC has kept the country relatively aloof from that integration, but only at great cost in health, wealth, and openness. A democratic Burma will likely want to become part of the global order. As a result, events in Bangkok, Beijing, Brussels, Berlin, New York, and Washington will have direct and substantial effects in all the states of Burma. In order to govern themselves, the states of Burma may need to participate in foreign affairs. But doing so will take courage, imagination, and a willingness to experiment, because you will be marking your own path.

## **E. Electoral Systems**

An electoral system is the system by which voters elect their representatives. Because electing representatives is virtually the definition of democracy, choosing an electoral system is at the heart of creating a democratic state. There are many electoral systems; different countries, all stable and successful, structure their process in quite different ways. In other words,

there is no one right way to elect people; you must choose the way that is right for you. All these systems have different advantages and disadvantages, so you must consider which system best suits your particular circumstances. In constitutional design, it is never possible to predict exactly the effects of a particular constitutional provision. But these days, constitutional designers know a fair amount about the likely effects of different electoral systems, and the choice of an electoral system is clearly important to the success of a new democracy. It can have dramatic long-term effects on the kind of politics you have, the degree of commitment to the constitution that different groups feel, and the general level of harmony between different groups. Unfortunately, electoral systems are technical and complicated, so we will use many examples in explicating these systems.

#### **(i). Majoritarian Systems**

The most basic distinction in this field is between majoritarian systems and proportional systems. I will explain the difference, describe their respective advantages, and then talk about the ways that people have tried to combine the two to get the best of each.

The essence of majoritarianism is winner-take-all: whoever gets the most votes wins (he is elected to office), and the loser gets nothing (he goes home). In a classic majoritarian system, the country is divided into electoral districts, and the people in each district elect one representative: we call them single member districts, because each elects just a single representative to the legislature. The candidate who wins the most votes in the district becomes the representative, and all the other candidates have no role in the government. The great advantage of this system is that because each district elects only one representative, the districts can be fairly small. Each city or county or town can be its own district, and it can elect its own representative. As a result, the representative and the

voters have a chance to forge a close bond. Many of the voters may know the candidates personally. If they have a problem, they know where to turn. In fact, representatives usually keep offices in their home districts, so people need only show up there to get some attention. Because the representatives are from a particular place, they are likely to be sensitive to the concerns of people from that place. In a new democracy, when people are trying to figure out how to make democracy work, this bond can be important, because it shrinks the gap between the people and the government. I want to emphasize this upside to majoritarian systems, because I am now going to explain the downside at length.

### **The Majority Premium**

There is a large drawback to majoritarian systems, usually called the majority premium. Let's imagine a district – call it District One – with two major parties, the pinks and the greens. The pinks have 52% of the vote, and the greens have 48% of the vote. The pink candidate therefore wins, and the green voters are left with virtually no influence on their own representative. Theoretically, the pink representative might pay attention to the green voters out of the goodness of his heart. But remember that he has just gone through an election in which the greens voted against him, maybe said insulting things about him, and generally did everything they could to block his power. He is likely to be somewhat hostile towards them. When they ask for help, he is likely to say no.

Let's make this more concrete. Imagine that you are a green voter, and the pink candidate has just won from your district. In the legislature—and this could be either the state or the national legislature—there is a proposal to allow construction of a paper plant on a river near your home. You find out that in other places, this company has built paper plants that have polluted the environment and injured the health of people nearby. So you want it stopped, and you ask your representative

to stop it. It turns out, though, that almost all the people who live near the site of the plant are green voters. It also turns out that many important pink voters have investments in this company, and they own the land that the company wants to buy for the plant at a premium price. So when you go ask the pink representative – your representative – to stop the plant, he ignores you, because the plant is good for pinks and bad for greens. You are left without direct influence over the legislature, because no-one feels accountable to you, the green voters of District One. Worse, your own representative now goes off to the legislature, and he tells the other representatives that the paper plant is good for the people of District One, so they should all vote for it. Those other representatives know that in the future, they may need the support of your representatives for their own pet projects, so they all vote for the plant to help him out. The plant is built, the environment becomes polluted, and pretty soon, your family becomes sick, just as you feared they would.

So the problem with majoritarian systems is that they tend to under-represent the minority in a given district. That's why we call it the majority premium: these sorts of systems give the majority a premium, an added influence over and above their numbers. That premium can become even more exaggerated than the example that I have given you. Suppose that instead of two candidates, there are five: the pinks, greens, purples, blues, and reds. The vote is split between all of these candidates, so that the front-runner (the pink, let us say) receives only 23% of the vote. Although he has not received a lot of votes, he has still received more than anyone else, so he is elected. In this case, 77% of all the voters in District One voted for someone else, and they are left without any real influence over the legislature. It is even possible that those other voters would have preferred anyone to the pink candidate, because he has based his election on a promise to oppress anyone outside his own party. The pink voters – with 23% of the vote – have effectively become the rulers of this district.

This example is not just hypothetical: in the United States, when there have been three-way races for the presidency, the winning candidate has often received less than 45% of the vote. Although less than a majority of the country voted for him, he became the president.

Situations like these are so troubling that some countries now require that the winning candidate must receive at least 50% of the vote. How do we arrange that? The usual solution is called a run-off or double ballot system. In this system, we hold two sequential votes. In the first, all the candidates run, and if one gets a majority, he becomes the representative. But suppose no-one gets a majority: then we take the top two, and we run a second vote with just these two on the ballot. Everyone votes for his preferred candidate as between these two.

As there are only two, one will receive more than half the vote and the other less than half. The winner then goes to the legislature with the support of a majority of his constituents. We have language to describe this system: if you can be elected with less than half the vote, then you are in a plurality system; if you must have more than half to win, then you are in a majority system.

The run-off system helps to limit the majority premium, but only to some extent. Suppose that on the second vote, the winning candidate gets 52% of the vote. In this situation, 48% voted for someone else, and they are left with very little influence. In addition, even among the 52% that voted for the winner on the second ballot, we know that many voted for someone else on the first ballot – someone other than the top two who went on the ballot in the run-off. As a result, for them, the second ballot just offers a choice between the lesser of two evils.

In short, within each district, majoritarian systems over-represent the majority. But now let us consider the country as a whole, rather than just each district at a time. Suppose that

we have only four districts, for simplicity's sake. Suppose that in the country as a whole, 48% of the voters are green, and 52% are pink. And finally suppose that in each district, the proportions are the same as for the country as a whole, 48% green and 52% pink. So in District One, who wins? The pink candidate, with 52% of the vote. And in District Two? Three? Four? In each case, the pink candidate wins. So let us now imagine the legislature. How many pink representatives? Four – out of how many? Four. In other words, the pink party holds all of the districts. How much power does the green party have? Essentially none; this is one-party rule. But how many of the voters support the green party? 48%. So, by the magic of the majority premium, 48% of the voters hold zero percent of the power. Again, this situation is not merely hypothetical: in most majoritarian countries, the majority has far more than its proportional share of the legislature, because they are a majority in most districts..

How in the world does this happen? Remember that in each district, the minority elects no-one; they just lose. If that happens in each and every district, then they elect no-one in the whole country, because they are a minority everywhere. In every electoral system, the minority will receive only a minority of seats in the legislature. But in a majoritarian system, the minority usually gets a disproportionately small fraction of the legislature – smaller than their fraction of the voters. In some cases, the minority may receive virtually none of the legislature.

Now suppose that the minority and the majority believe that they have systematically different interests and concerns, so that the lines between them are rigid. The majority – the pinks – will therefore govern wholly in the interests of the pinks, with some hostility to the greens. If this continues for decades, the greens may come to feel that the electoral system allows them no power. Democracy is supposed to be about self-government, but for the greens, it has begun to feel like a prison. If they get angry enough, they may resort to armed

resistance. And Burma, of course, cannot afford a return to violence.

### **Districting**

Can majoritarian systems limit this majority premium? Can they find a way to give minorities a proportional share of power? Most majoritarian systems have tried to find an answer by drawing district lines in such a way that each group holds a majority in its fair share of the districts. In other words, if you are 48% of the electorate, we can try to draw district lines so that you are a majority in 48% of the districts. That way, you have a chance to elect your fair share of the legislature. For example, imagine that we have four districts, 25 voters in each, 100 voters in all, 25 green and 75 pink. Is there a way to give each party its proportional share? Sure. We put 15 green voters and 10 pink voters in district one—who wins? The greens. In District Two, we put 15 pink voters and the ten remaining green ones—who wins? The pinks. And the last two are therefore all pink—who wins? The pinks. So pinks have three districts to the greens' one—75% to 25%, exactly their share of the electorate. In this case, through careful districting, a majoritarian system has resulted in proportional representation, with no majority premium. Here is the way that majoritarian systems can correct the majority premium: they can deliberately group minorities into their own districts, so that they control roughly the same percentage of districts as their share of the citizenry. Abracadabra! The majority premium goes away.

But we must also remember that we can draw district lines in a bad way, to further increase the strength of the majority. When district lines are drawn for bad reasons or in a bad way, we usually call it gerrymandering. Gerrymandering is named after Elbridge Gerry, a Massachusetts politician who figured out how to use district lines to keep his party in power for a long time, even against the wishes of the voter. How did he manage this feat? Again, imagine a country with four districts,

and 100 total voters, 75 of them pink and 25 green, with 25 voters in each district. We have already seen that you could draw the lines to give the greens their own district, so they would have their proportional share of the legislature. But now suppose that the pinks are in control of the districting process. They divide voters in the following ways: in District One, 10 green, 15 pink; in Districts Two, Three, and Four, 5 green, 20 pink; in each. Who wins in District One? Two? Three? Four? In every district, the pinks are the majority, so the greens have no representatives in the legislature at all. As we have already seen, this result could occur by accident in a majoritarian system, but it is far more likely to happen if a political party is allowed to draw the lines for their own interest.

And we can do even more amazing things with districting. Suppose that the country has four districts, 100 voters, 25 voters in each district, but now there are 60 green and 40 pink voters overall. The pink voters, though a minority, get control of the districting process. In District One, they put 25 green voters and no pinks, so the greens win that district. But in District Two, they put 12 green and 13 pink; in District Three, 12 green and 13 pink; and in District Four, they put 11 green and 14 pink. Who wins Two? Three? Four? The pink voters control all three, compared to only one for greens. In other words, the pinks control 75% of the legislature – even though they are only 40% of the electorate. Though a minority, they will run the country, and once in power, they will keep drawing district lines to keep themselves in power. How did this happen? The trick is called packing. We pack a lot of green voters into District One, so they win that one, but there are few to go around in the other districts. As a result, the other districts are dominated by pinks. In truth, the greens do not want 25 voters in District One, because it only takes 13 votes to win the district. If they have 25, 12 of them are wasted as far as the greens are concerned. They would rather take those votes and distribute them elsewhere, so that they might control other districts.

In short, districting is magic. It can take a majority and make it a minority; it can take a minority and make it zero; or it can give everyone their proportional share. It turns out that your share of power depends not only on how many votes you have but on how those votes are grouped into districts – in other words, it depends on who is doing the districting. If you are beginning to think that people can abuse and manipulate districting for their own selfish ends, you are right. And that is one of the great problems for majoritarian systems: someone has to do the districting in a way that is fair. To district well, we need some standard of fairness for dividing people into districts. But when their share of political power is on the line, people are likely to disagree over the proper standard of fairness.

Let's ponder what it would take to devise a standard for fair districting. One possibility is blind districting: we don't pay attention to who is going in each district; we blind ourselves to the identity of the voters; we simply draw arbitrary lines on the map. The advantage is that because they are blind, people cannot to manipulate the process. But the disadvantage is that if you district blind, in practice, the majority will usually get more than its fair share of the legislature. Even if you don't mean to do so, it just happens. Imagine that your voters are split 60 pink and 40 green, and they are randomly distributed across the country. In that situation, even if you draw your lines at random, you will on average include 60% pinks in every district—which means that they will win every district. The greens will still control much less than their proportional share of the legislature.

So most majoritarian democracies do not district blind. Instead, they intentionally district so as to divide power in a fair way. But to know what is fair, we need to decide which groups have legitimate claims to control some districts, and how many districts each group has a right to control. But of course many different groups will apply. In fact, you will find not only many groups but many different types of groups:

not only political parties but also racial, religious, language, and ideological groups all want their slice of the pie. It is not possible to give them all districts of their own, because there are simply not enough to go around. So you must decide which types have legitimate claims, and then you must deny the others. And this process of exclusion will prove terribly acrimonious.

For example, suppose that you are districting Shan state into legislative districts. You decide to have four districts, and you decide to divide power between the political parties on a proportional basis. There are three major parties: the pinks have 50% of the vote, so you give them a majority in two districts, and the other two parties—the blues and the greens—each have 25% of the vote, so they get a majority in one district each. You have worked out a map of district lines that will divide power in this way, and you are proud about how fair you have been. But now a group of believing Catholics arrives on your doorstep. They tell you that they are not part of any political parties and do not believe in political parties. They think that religion really matters, and they want to be the majority in a district so they can choose a good Catholic representative. You want to give these people a district of their own, because you think that democracy means that people get to choose what matters to them, religion or party affiliation.

But here's the rub: as soon as you start to change your district lines to create a new Catholic district, you upset your careful plan for dividing power among the parties. It turns out that your Catholics live partially in the green district and partially in the blue district. So you carve out a new district from those two districts. But now you have five districts – the Catholic district, the two pink districts, what is left of the blue district and what is left of the green district – and you only wanted four. So you combine what is left of the blue and green districts into one district. In that new blue/green district, the greens slightly, so they control the district. The blue party now has no district of its own, so it feels powerless. To make

matters worse, in the new Catholic district, the voters are about equally divided between the three political parties, but the pink candidate usually wins because of better funding. So the Catholic district elects a good Catholic who is also pink. What's the net result? The pinks now have three districts, 75%, although they are only 50% of the electorate. The greens have 25% of the districts and of the electorate. And the blues have 25% of the electorate but zero percent of the legislature. You have managed to give the Catholics some power, but only at the cost of under-representing the blues and over-representing the pinks.

And it gets worse: if you give the Catholics their district, then other groups will ask for theirs. Pretty soon you have religious groups, language groups, occupational groups, and so on, all clamoring for their fair share of power. Groups like these put designers of electoral systems into an impossible position. On the one hand, no electoral system can recognize all of these groups without unraveling. But on the other hand, all these groups have a powerful claim. They say that they have waited a long time for democracy in Burma. They say that democracy means self-government, so they must be given a place. They insist that part of governing one's self is to decide for one's self what matters most to one – whether it is political party, language, religion, or what have you. So when you tell some of these groups that they will receive no districts just for them – as you must – you are telling them that they cannot share control of government in the way that they think matters.

When you decide which type of group gets how much power, you have a heavy effect on the future of Burmese politics. For one thing, you must decide how many districts to give each group, and obviously this division will determine just how much political power they have respective to other groups. But in deciding what types of groups to recognize, you also have a big effect on the issues that will dominate your politics. For example, imagine that there are two parties, the

Free Marketeers and the Communists, with about 50% each, so you give them each 50% of the districts. Now, if you want to get a political campaign going in any of these districts, you need to appeal to what the voters have in common, so as to get a lot of votes. In each of these districts, there are people with different religions, languages, ethnicities, and so forth, but they all share an economic ideology – communism or capitalism – because we have districted them that way. As a result, predictably the representatives from the communist districts will be pushing for a communist economic plan, and the capitalist representatives for a capitalist plan. But nobody will be pushing hard for a particular religious agenda, because all of these representatives have constituents of all different religions. Politics will be about economic ideology, therefore, because we have grouped voters into districts according to their economic ideology.

And we could have grouped them differently, to create a different sort of politics. Imagine, for example, that the state is divided 50% Buddhist, 25% Christian, and 25% Muslims. We intentionally group people so that the Buddhists are clumped together in two districts, the Christians in one, and the Muslims in one – perfect proportionality. What will the politics now be about? Religion, of course. What unites each of these districts and distinguishes it from the others is religious identity. To generate a political movement, it will be most effective to appeal to the voters' religion. You could try to get a capitalist crusade going, but it won't work as well, because the voters have many different economic ideologies. Again, we witness the electoral designers quandary: democracy is supposed to allow the people to choose their own politics, but in fact, the districter has chosen it for them, by deciding whether they should be arguing about religion or economic ideology. And the districter must district on some basis: there really is not another choice. So the districter ends up deciding, before democracy even begins, how the democracy should go.

Now let us suppose that we have somehow decided which

groups should get districts and how many districts each should have. For example, we will allow only political parties to claim districts, and we will hand them out in proportion to their numbers. For a moment, we get the balance just right. But then we hit another problem: things change. People move from one district to another; people shift their allegiance from one party to another. Some groups have higher birth rates than others. People in some groups (particularly minority groups) may fail to register to vote in the same proportions as other groups. Pretty soon, your careful balance has gone completely out of kilter. If you want to keep the balance, you must tinker constantly with the boundaries. But if you shift the districts that often, you create still other problems.

Remember that the great advantage of majoritarian systems is that they create a stable, close link between the voters of a particular area and their representative. But if the borders of a district constantly shift, this relationship breaks down. This year, you are in District One, but next year, you may be in District Four. The representative of District One may get to know her constituents quite well, but then the borders shift and she must get to know a new group, who may have little in common with the old ones except their party allegiance. Because of these problems, most majoritarian systems do not shift their borders very often. As a result, with district boundaries stable, the voters and their representatives have a chance to forge bonds. But the balance of power becomes ever more skewed, usually in favor of the majority.

In fact, in many countries, including the United States, the legislature has broad discretion to district in whatever way it likes. It can give districts to the minority party, or it can withhold districts. Sometimes, the legislature overtly admits to gerrymandering: the Indiana legislature, for example, is often controlled by Republicans, who routinely admit that they draw district lines to ensure that Republicans remain in power. To many Americans, this practice is shocking, and they think that it should be unconstitutional. But if the Court strikes down

this gerrymandering, it must put something in its place. It must, in other words, have some standard of fairness for dividing power among groups. And as we have seen, people are likely to disagree on of such a standard. So mostly the courts just stay away and let the parties fight it out.

Majoritarian electoral systems have therefore brought us to an impasse. Let me rehearse the steps, so you can see that this impasse is inherent in majoritarianism:

1. In a majoritarian system, the winner takes all; the minority receives nothing.
2. As a result, majoritarian systems tend to over-represent the majority: because they are the majority in almost all districts, they win almost everything, and the minority loses almost everything.
3. The only way to counter-act this majority premium is intentionally to draw districts in which the minority dominates, so they can control their fair share of the legislature.
4. But if you are going to draw district lines so as to allocate power fairly, then you need some standard of fairness according to which you can divide power between groups.
5. But people tend to disagree over how you should fairly allocate power, so districting battles become heated, with no obvious right answer.
6. And as a result, some political decision-maker – like the legislature – will have to decide how much power to give each social group. But at this point, we must begin to wonder what has happened to the promise of democracy. The point in democracy is to allow people to govern themselves, not to have the government tell them how much power they are supposed to have. Is there a way out of this impasse? Not from within pure majoritarianism. And many people find this problem so vexing that they adopt a very different electoral system:

proportional representation.

## **(ii). Proportional Systems**

The great advantage of proportional systems is that they tend to give groups a proportional share of power, without a majority premium. How? In majoritarian systems, the voters of each district elect only one person, and the winner takes all. In a PR system, the voters from each district elect a large number of people, and those people are divided proportionally between the different parties. If your party polls ten percent of the voters, then it will elect ten percent of the representatives from your district. The winner does not take all; the winner takes only its fair share, and the smaller parties all take their fair share too.

Let us take the simplest form of PR, generally called closed list PR. There are five steps in this process.

1. First, we create large districts that elect many people to the legislature, called multi-member districts. At the most extreme, we could make the whole country one large district, so there are no subdivisions. Small countries like Israel often use this arrangement, and it may be possible in some of Burma's states. So in our hypothetical example, let us imagine that our state is one large district. All by itself it elects the whole legislature – let us say, one hundred representatives.
2. Next, the parties nominate lists of candidates to be elected from the district. Ideally, the parties nominate as many candidates as there are places to be filled from that district. In other words, if our district has one hundred representatives, then each party will run one hundred candidates, in the hopes of capturing the whole legislature. These lists will be ranked in order of the party's preference: the people that they most want to elect will be near the top of the list, and the people that they care less about

will be near the bottom.

3. Each voter in the district then votes for one of the party lists. Note that they don't vote for one hundred individuals. Instead, they vote for one of the party lists as a whole, for all one hundred people on that list.
4. We then count the vote and determine what fraction of the votes was won by each party. In our hypothetical, imagine that the pinks won 37%, the blues won 30%, the greens won 14%, the purples won 11%, the oranges won 6%, and some very small parties split the remaining 2% among them.
5. Now, each party receives its proportional share of the legislature: they get the same percentage of legislative seats as the percentage of people who voted for them. For example, if the pinks won 37% of the vote, then they get 37% of the legislature. Since our hypothetical parliament has one hundred people in it, the pinks get 37 places, and so the top 37 people on their list become legislators. Most PR systems have a threshold: to win any places, you must gain more than a certain percentage of the vote—usually around five percent. In our example, the smaller parties split two percent of the vote among them, so none of them receives any places in the legislature.

Notice the end result: even relatively small parties will receive some representation in proportion to their actual numbers in the population. The purples, for example, command 12% of the votes, and they will receive 12% of the legislative places. In a majoritarian system, by contrast, the winner takes all, so that if you won only 12% of the vote in a district, you would elect no-one. You would just lose. And if you were only about 12% in every district, you would elect no-one at all in the whole country. So people generally think that PR is much better at giving small groups their fair share of the parliament.

How do the two systems produce such different results?

Remember that majoritarian systems use small districts. That small size, as we have seen, is one of the great advantages of majoritarianism. But it has a drawback: with small districts, you can usually only assign one legislator to each district. If you assigned more, then the legislature would become too huge. But if each district elects only one representative, then the majority will win that one place, and everyone else is left with nothing. You cannot cut the one representative into pieces and give a proportional share to each party. The result is the majority premium. By contrast, PR uses large districts with many members. The large size, as we will see, creates its own problems, but it allows more accurate representation. If you elect one hundred people from one district, then small groups do not have to be shut out: they can receive some small fraction of the seats, comparable to their fraction of the votes. When everyone is competing for only one place – the single great prize – then the largest party will win everything. But if people are competing for a large number of prizes, then it is possible to divide them in a more proportional way.

In a new democracy, especially one with a history of tension, it can be especially important to represent every group in proportion to its numbers. In a new democracy, people are often not very committed to the system; they are not sure whether it will work out. If small groups find that they are shut out from any voice in the system, they may become alienated, even insurrectionary. What new, fragile democracies need above all is broad support, so they can become stable. That way, people won't try to overthrow it as soon as times get hard. Happily, PR can help even small groups to feel that they have a voice and a place at the table. After being forced into silence for years, they can suddenly speak. This experience can be deeply empowering, so they become great supporters of the new constitution.

But PR has a down-side as well. Its large size allows it to represent groups accurately, but it also breaks down the relationship between the people and their representatives.

Remember that at its most extreme, PR systems designate the country as one large district. No legislator represents any place in particular; instead, each legislator represents all the people of the country. All of the legislators may keep their offices in the capitol, and they may know little about conditions in rural districts. Voters may know little about them, and they may not know where to turn for help. And the parties make up the party lists: they choose the candidates and place them in a rank order. People get on the list by being servants of the party, not by being close to the people of a particular area. Indeed, in pure PR – what we call closed list PR – the people do not even vote for candidates as such; instead, they vote for a party, which chooses who will represent them. As a result, the central party organization tends to be powerful, and people sometimes feel that they have no more influence over the party than over the government itself.

There are ways to limit this downside, but they have their own problems. First, you could impose residency requirements: the parties put together the lists, but they are required by law to include a certain proportion of people from all different parts of the country. For example, you might require each party to list at least one candidate resident from each state of Burma in the top twenty spaces on its list. That way, it is more likely that someone from, say, Chin State will go off to the national legislature. In my own view, PR with residency requirements may be a good electoral system for the Union of Burma. But residency requirements are not a perfect fix for PR's ills. For one thing, although they make it more likely that there will be legislators from the various states, they do not guarantee it. For example, suppose that the pink party wins 10% of the vote for a legislature of 100 people, but their Chin candidate is number 11 on the list. For another thing, to get on the list, a candidate from Chin State must above all earn the favor of the party leadership in Rangoon, rather than the Chin voters themselves. As a result, the Chin candidates may not even keep an office in Chin State, and they

may well be more concerned with developments in the capitol than in the country.

To make representatives more responsive to people from the various states, the states might choose to organize their own state parties and run them in national elections. The Shan State Party, for example, might field its own list of one hundred candidates. Now you can be fairly sure that a lot of people from Shan State will vote for the Shan State Party, so it will end up with, say, 8% of the national vote. If the legislature holds one hundred people, the Shan State Party has won 8 seats. And, because these candidates were selected by the Shan State Party, you can be fairly sure that they will be responsive to the needs of Shan State and its citizens. But there is a risk in creating regional, perhaps ethnically identified, parties of this sort. They can damage the union by creating regional division, without the broad unifying structure of truly national parties. And regional parties may not even help the citizens of the regions themselves: if everyone is organized into a regional party, then the party from the largest region will inevitably dominate the legislature. The citizens of the states might do better to create large, nation-wide parties through which they can exercise real influence. But, then, of course, the problem remains: because under PR these large parties will elect candidates from large districts, there is still no guarantee that the legislature will contain even a single person from your state.

Finally, in order to mimic the strong local bond created by small majoritarian districts, you could create smaller districts for your PR system. In our example, instead of one district with one hundred members, we could create twenty districts with five members each. These districts will be closer to the people, so they will have some of the advantages of a majoritarian system. Unfortunately, they will have some of the disadvantages as well. With fewer members – only five in each district – it will be hard to divide the legislature proportionally among the parties. To see this point, let us

return to our hypothetical example. First, the pinks have 37% of the electorate: out of the five representatives, they should get two, which is forty percent, as close as possible to their 37% share. Next, the blues have 30% – but what do we do with them? We could give them two, which would be forty percent of the legislature, or one, which would be twenty percent of the legislature. Neither option accurately mirrors their electoral strength. And whether we give them two or three, we create other imbalances. Suppose that we give them two – forty percent of the legislature, more than their share of the vote. Notice that the blues suddenly have as many representatives as the pinks, who actually received many more votes than they. In effect, the pink victory at the polls has been stolen by the PR system, which was supposed to be accurately proportional. And if we give the blues two representatives, then there is only one left; remember that we gave two to the pinks, two the blues, and now we have one left over. That one will have to go to the greens, who got only 14% of the vote but will thus receive 20% of the legislature. And then all five representatives have been given away – so there is nothing left for the purples and the oranges, who are now completely frozen out of the system, just as they would have been in a majoritarian system.

So let us suppose instead that we give the blues only one representative. But that's only twenty percent, much smaller than their fraction of the vote. And if we give the blues only one representative, then we still have two more representatives to allocate; we have given two to the pinks, one to the blues, and so we have two left over, out of five. What do we do with these two remaining? Clearly, one must go to the greens, who received 14% of the vote, and one must go to the purples, who received 11% of the vote. Notice then this result: we have three parties, each with one representative – the blues, greens, and pinks. In the legislature, they have equal power. But in fact, the blues are far more popular than the other two: 30% as compared to 14% and 11%. Meanwhile, the pinks – who only received 7% more than the blues – have twice as

much power as the blues in the legislature. In this situation, the blues are likely to become angry and frustrated. Pretty soon, your second most powerful party may be threatening separation and insurrection, because they don't think that Burmese democracy is working out for them.

All PR systems, no matter how big the district, face these problems. And they all have rules for allocating representatives in confused cases like these. But those rules cannot eliminate the inaccuracy that gets worse and worse as the districts become smaller. People like PR because it represents people more accurately, but only in large districts. But as soon as you move to large districts, you create a distance between voters and legislators. As between pure PR and pure majoritarianism, there appears to be a real tradeoff. Apparently, you just have to choose what matters more to you.

### **(iii). Combined Systems**

Is there a way to combine the two systems so that you get the best of both? People have devised such combined systems. Though each has its own problems, to many, they seem a distinct improvement over the pure systems. But it is important to remember that there is no perfect system. The tradeoff is real: to the extent that these systems divide power more proportionally, they tend to move the representatives further from the people; and to the extent that they move the representatives closer to the people, they tend to divide power less proportionally. But it is important to know that these compromises are possible: instead of choosing either proportionality or a close bond, you can have some of each. There are an infinite number of systems to strike the compromise in different ways. Some offer a lot of proportionality, but not so much closeness; and others reverse that priority. It's good to be aware of all these systems so that you can choose the one that offers the right compromise for your particular needs. I will offer just two examples here.

One possibility is to divide the legislature so that some legislators are elected from small single member majoritarian districts, and others are elected nation-wide by proportional representation. The idea is that the majoritarian representatives would have close ties with geographical districts, and constituents would know where to turn for help. As we know, however, these seats will likely suffer from the majority premium: members of the majority party will win a disproportionate number of them. How do we correct this imbalance? We elect some other representatives by PR, so that overall, the legislature is fairly split between the parties.

It turns out, though, that making this sort of system work is more complicated than it might first appear. Let us take a concrete example. Suppose that we have two parties, the pinks with 60% of the vote and the greens with 40% of the vote. Suppose further that our legislature has one hundred seats. To balance the two systems, we provide that fifty shall be elected from small majoritarian single member districts, and the other fifty according to a nationwide PR election. What result?

By hypothesis, the fifty PR seats will be divided 60/40 between the pinks and the greens. The pinks will therefore receive thirty seats (60% of the 50 PR seats), and the greens will receive twenty seats (40% of the 50 PR seats). But then we have the fifty majoritarian seats, which will predictably skew to the majority. Suppose that the pinks form a majority in eighty percent of these districts. Even though they are sixty percent of the voters, they win eighty percent of the races. In that case, they win forty of the majoritarian seats (that's 80% of the fifty seats), and the greens only win ten. What is the end result? The pinks receive seventy seats (30 from the PR race and 40 from the majoritarian districts), and the greens receive thirty (20 from the PR race and 10 from the majoritarian districts). But that's not proportional after all: the division should have been 60/40, not 70/30.

How did this happen? The PR seats were perfectly proportional, but the majoritarian seats still skew to the

majority. Half the seats, in other words, are allocated in a proportional way, but the other half still suffer from the majority premium. As a result, the legislature as a whole is still skewed to the majority, because half of its seats are skewed to the majority. Adding in the PR seats reduces this skew by half (as half the seats are truly proportional now), but does not eliminate it. It's a step in the right direction, but we would like to do better.

Luckily, there is a way to eliminate the majority premium in a mixed legislature of this sort. Germany uses a system like the one that I am about to describe, though I am offering you a simplified version for the sake of clarity. Let us keep our example parallel to the one that we have just worked through. Imagine that the legislature has one hundred seats. Fifty are elected from single member majoritarian districts, so that voters feel they have a close connection with someone in the legislature. But of course these seats will skew to the majority: although the country is divided 60/40 between the pinks and the greens, the pinks capture 80% of the single member districts, and the greens only 20%. How do we rectify this imbalance?

We hold a second election. This time, people vote not for a person to represent their local district but for the party that they would like to govern the country. These are two separate questions, so it is good to separate them. A voter might, for example, want the greens to run the country because they have the best ideas, but for his local district he prefers the pink candidate because she is more honest. Holding two elections allows you to vote on these two separate questions separately.

Now suppose that in this second election, the citizenry divides its votes between the pinks and the greens 60% to 40%. In other words, to reflect the people's wishes, the legislature should be divided 60/40 between the pinks and the greens. To do so, we now allocate the second round seats in such a way that the legislature overall is proportional. In other words, at the end the pinks should have 60 seats and the greens

40. Remember that out of the first fifty seats, the pinks got 40 and the greens 10, because of the majority premium. So, out of this second group of fifty seats (the PR seats), 20 go to the pinks, so that they can have 60 total, and 30 go to the greens, so they can have 40 total. And the legislature is now proportional to the overall vote. Because the pinks got a super-proportionality in the first vote, we now give a super-proportionality of the second election seats to the greens, to balance the scales.

The advantage to this system is that some legislators have a close tie to a particular place and particular voters, but overall the legislature is proportional. It seems, at first glance, that this system therefore combines the best of both worlds. And it is a very good system – but not perfect. It has at least two flaws. First, remember that the pinks have captured almost all of the single member districts because of the majority premium. Those seats are important, because only those legislators are likely to have a close relationship to their constituents. Green voters still suffer from having disproportionately fewer people to represent their local views and interests. To have any real power, they must work through their national party, rather than a local representative – and that can be hard to do. Second, this system is quite complicated and difficult to understand – as we have just seen. Complicated systems can hurt democracy because the people might not understand how to work them, and so might lose faith in them. For example, there is evidence that most German voters do not understand that on the second ballot, they are deciding the overall balance of power in the legislature; instead, they think that they are just voting for a second group of legislative seats.

Some have tried a different approach to combining the systems: they have developed majoritarian systems that do not over-represent the majority quite so much. In other words, though majoritarian, these systems are supposed to be more proportional – so in that sense, they are like a combination of

majoritarian and proportional systems. There are many different varieties of these systems. Most of them are called cumulative voting systems or alternative voting systems. In every case, the goal is to allow the minority to have a greater voice in the legislature, while retaining the advantage of relatively small districts.

To illustrate the type, let me give you one concrete example. In this system, each voter is asked to rank the candidates in the order of his preference. If there are three candidates, the voter gives three points to his first choice, two points to his second, and only one point to his third. We then total all of the votes given by all of the voters, and the candidate with the highest number of total points wins. To win, therefore, you want to attract a lot of first place votes, but you would also like to attract a number of second place votes as well, because they will help you. What you really don't want is a lot of third place votes, because they are worth only one point each. So you have an incentive to appeal not only to your committed support but also to people who might give you their second place votes. In other words, you have an incentive to be moderate and broad-minded, not narrow and angry.

Let us take a concrete example. Suppose that we live in a district in Shan State. In our district, there are one hundred voters divided into three groups: 25 Karens, 35 Shans who are friendly to the Karens (the Friendly Shans) and 40 Shans who have decided that they hate the Karens and would like to hurt them (the Hostile Shans). Each group runs a candidate for the legislature. In a simple majoritarian system, the Hostile Shan will win, and the Karens will be in trouble. Again, this result is typical of majoritarian systems: the majority tends to dominate, and the minority tends to worry. But now let us consider how this election would work with our new rank-ordering scheme. We now count not just the first place votes but also the second place votes. And now the Hostile Shan has a big problem. Precisely because he is so hostile, everyone else puts him last. He gets no second place votes, and so he

cannot win.

Let us plug in some numbers. The Karen voters all place their Karen candidate first: 25 votes at three points each totals 75 votes for the Karen. The Karen voters all list the Friendly Shan second: 25 votes at two points each totals 50 votes for the Friendly Shan. And the Karen voters all place the Hostile Shan dead last because they fear him: 25 votes at 1 point each totals 25 points for the Hostile Shan.

The Friendly Shan voters all place their Friendly Shan candidate first: 35 votes at three points each totals 105 points for the Friendly Shan. The Friendly Shan voters then all list the Karen second because they also fear that the Hostile Shan will destroy the peace: 35 votes at two points each totals 70 points for the Karen. And then the Friendly Shans all place the Hostile Shan dead last: 35 votes at one point each totals 35 points for the Hostile Shan.

And the Hostile Shans? Of course they put their Hostile Shan candidate first: 40 votes at three points each totals 120 votes. They are not happy about their second place choices: they hate the Karens, but they hate the Friendly Shans about as much because they view them as traitors and view them as a more formidable enemy. So we get a split vote. Twenty-five give their second place votes to the Karen candidate (so that's 25 votes at 2 points each, for a total of 50 points for the Karen) and their last place votes to the Friendly Shan (so that's 25 votes at one point each, for a total of 25 for the Friendly Shan). And then the other 15 Hostile Shan voters do the opposite: they give their second place votes to the Friendly Shan (so that's 15 votes at 2 points each, for a total of 30 votes for the Friendly Shan) and their last place votes to the Karen (so that's 15 votes at one point each for a total of 15 points for the Karen). So in total, the Hostile Shans give the Karen 65 points and the Friendly Shan 55 points.

And when all is said and done, where does that leave us? The Hostile Shan gets 120 points from his own people, 35

from the Friendly Shans, and 25 from the Karens, for a total of 180 points. The Friendly Shan gets 105 points from his own people, 55 from the Hostile Shans, and 50 from the Karens, for a total of 210 points. And the Karen gets 75 points from his own people, 70 points from the Friendly Shans, and 65 from the Hostile Shans, also for a total of 210 points. So the Hostile Shan comes in dead last and the Karen and the Friendly Shan tied for first.

How did this happen? If we look only at the first place votes, the Hostile Shan would have won, as indeed he would have in a simple majoritarian system. But because we also look at second place votes, he lost. Instead, the Karens and the Friendly Shans swapped second place votes, and that made all the difference. The Karens and the Friendly Shans, who would have been voiceless in a regular majoritarian system, now have some real influence in the legislature. Depending on the tie-breaking system, one or the other will go off to the legislature, where they can push for a program of building friendship rather than hatred. Whoever goes, they all win. This system thus gives candidates an incentive to do the right thing: to win, they must get the second place votes of people outside their own group. The method of counting votes automatically encourages candidates to reach out.

But again, this system has some serious drawbacks. It may give the minority some influence, thus reducing the significance of the majority premium. But when all is said and done, it is still a winner-take-all system, not PR. In our example, suppose that the Friendly Shan wins the tie-breaking procedure because he got more first place votes than the Karen. He then goes off the legislature, and everyone else just goes home. The Karen voters may have some influence over the Friendly Shan, because their second place votes were necessary to his success. If the Karens had given their second place votes to the Hostile Shan instead of the Friendly Shan, then the Hostile Shan would then have thirty points more (because the Karen would have given him thirty two point votes instead

of thirty one point votes), and the Friendly Shan would have thirty points less (because the Karen would have given him thirty one-point votes instead of thirty two-point votes). The point totals would then be Friendly Shan 180 points, Hostile Shan 210 points, Karens 210 points. The Hostile Shan and the Karen would be fighting it out for first place, and the Friendly Shan would be out of the running. So the Friendly Shan must try to keep the Karens happy. But even so, the Karens have only indirect influence on the Friendly Shan. When the interests of the Karens and the Friendly Shans, he will likely choose the Shans. So, with 25% of the vote, the Karens have only a limited influence on someone else's candidate. The Hostile Shans are in an even worse situation. The Karens and Friendly Shans both voted against the Hostile Shan candidate because they fear him, so we can imagine that the new Friendly Shan representative will work hard to defeat Hostile Shan. With 40% of the vote from this district, the Hostile Shans end up with essentially zero percent of the political power. Maybe they deserve to be disempowered, but still the system is not working in a very representative way.

The proponents of this and similar systems, however, predict that they will have important long-run consequences that will reduce this winner-take-all quality. Notice that in our example, none of the candidates is likely to win without some support from another party. By giving their second place votes, the Karens decide the winner as between the two Shan candidates. So the candidates have a pressing reason to appeal to the voters of the other parties. They are unlikely to become rigid and hostile. Parties, voters, and candidates will seek out areas of common ground and emphasize those. They may even find that they change their own understanding of their own interests so as to build bridges. Old angers and prejudices may melt away in pursuit of shared political advantage. And because parties shift around in search of a better deal, even the new alliances will stay fluid. After our hypothetical election, the Hostile Shans know that if they remain hostile to other

parties, they will always lose. So they soften their message in an effort to court the Karen voters. If the Friendly Shans ever let the Karens down, the Karens may turn to the Hostile Shans (though we should not probably describe them as the Other Friendly Shans, since all are now seeking out common ground) and let them back into power. Pretty soon, everyone is playing a game of compromise and mutual support, not angry competition.

In other words, the system of representation is still winner-take-all, but that fact no longer matters so much, because to win, you must reach out to as many voters as possible. The legislator does not just go off to parliament and pursue the interests of his own party members, to the exclusion of all others. Instead, he will take account of everyone's interests, because he cannot afford to overlook the desires of any group whose second place votes may be critical to his re-election. In a certain sense, then, this system is proportional in that each legislator himself will represent the interests of every group in something like proportion.

But all this works only if the factual prediction is accurate, that representatives will appeal outside their own party, because they need the second place votes of others. For that scenario to hold, at least three things must be true. First, the district must be divided between a number of different parties, with none holding a majority. If one party holds a majority, then it can usually win just with the first place votes of its own members. As a result, it need not pay any attention to the interests of voters from the other parties. Second, within the district, voters from different parties must in fact share some common ground. Their interests cannot, in other words, be implacably opposed. To put it another way, the promise of this form of alternative voting is that it will give rise to a politics of the common good. But that will happen only if the voters share a truly common good. Finally, for this system to work, the voters must not only have a common good; they must also be able to see it. And they will see it only if they are not

blinded by inherited hatreds. In some places, members of different religious or ethnic parties will never form alliances with another. In this case, the candidates have no incentive to appeal across party lines because they know that they will never get their votes anyway. In short, the promise of this system is that even if the election method is winner-take-all, the resulting politics will not be, because the candidates will look out for everyone's good. But that will happen only under particular circumstances: the district has no clear majority, the voters possess a common good, and the parties do not feel deep hostility toward one another.

In other words, no system completely escapes the essential tension: small districts help create close ties, but large districts help create proportionality. We can carefully design modified systems that try to get us small districts and proportionality, but inevitably we end up compromising one value or the other or both. No system does both things perfectly, so the task is to decide where you want to strike your compromise: relatively greater local ties or relatively greater representative accuracy. To decide that question, you need to consider what particular challenges will be facing you in the next several decades. Your answer must grow out of your own circumstances.

## **F. Conclusion**

It is important for Burma to draft the right constitution, because it really can help Burma to remain democratic even through difficult times. In truth, countries that have had civil war tend to return to civil war, and countries that have lived under autocracy tend to return to autocracy. But the longer that a country remains democratic, the more that democracy becomes entrenched as a way of life. So the first decade of democracy is critical, and the right constitution can help contain conflict long enough for democracy to take on some staying power.

But as important as it is to design the right constitution,

what matters even more is that the people of Burma seek to make the constitution work, after it has been drafted. Constitution-writers hope that if they write the right constitution, then they will make a better future for their country. Constitutional scholars hope that it is possible to know something about the likely effects of particular sorts of constitutions. But the truth is that in the end, the constitution is what the people make it. To be sure, constitutional structure can affect behavior by giving people the right incentives. But those incentives will work only by touching something already present in the souls of the people: a desire to make the country work for the good of all. If you have written a bad constitution but the people really want to make it work, they will find a way. If you have written a good constitution but the people don't feel connected to it, it will disintegrate. Countries work because the people want them to work; constitutions just give them a fighting chance.

We've been talking about a constitution as a structure of rules, a framework for government, to run the country. But there is an even more fundamental definition of the term: a constitution is what creates a country, what knits people together. Constitutions are always therefore based on hope – the hope that people can assemble in peace to build a common future. The only way this ever occurs is that people resolve to work things out together. At the end of the American Constitutional Convention, a woman asked Benjamin Franklin: “Doctor Franklin, what kind of government have you given us?” And he replied: “A republic, if you can keep it.” The point in this story is that the women wanted to know what the Framers had given her; but Franklin wanted to remind her that in the end, it was her responsibility to make this project work.

So stable countries never just happen; they must be built, by people. Constitution therefore refers not just to the document of rules that you are writing. It also refers to the process in which you are engaged, of trying to come together,

to forge bonds, to imagine a shared future. As you talk and learn and write, you are constituting yourself a nation. In other words, the process through which you are going matters as much as the end result, the paper that you produce. This is hard and grueling work, but noble work, almost holy work. Constitutional states survive because their citizens realize that they depend on each other to make a good life. Because they depend on each other, they realize that they need each other. In the end, they may even love each other, because sharing hopes for a future is a great gift. Doing this is deeply gratifying; human beings were created to do this. Yet too seldom do they have the chance: history imposes on them and drives them apart. When the opportunity happens to come back together, it is a miracle. And when you are given a miracle, after all the words about constitutional design are spoken, you can finally offer only grateful silence.

**Notes:**

1. For those who want all the details: In most federal constitutions, the federal government has the power to make a treaty on any subject, even on subjects reserved to the states under the constitution. It would be illegal for the central government to pass domestic legislation on the subject, but a treaty is different. Germany may be the single important exception to this rule. I say that it “may” be the exception because German constitutional law is not very clear on this point. Article 32 gives the central government the power over foreign relations, including a power to make treaties. The constitution does not, however, explicitly tell us on which subjects the federal government may make a treaty. Some experts take the view that the Federation’s treaty power is plenary; others opine that the central government may make a treaty on any subject of great political moment; and still others argue that the federal government may make treaties only on those subjects that fall within its exclusive or concurrent

powers. The German High Court has not offered a recent, clear opinion on the question. (The Concordat case is now old, written in 1957, and was never very clear. It seems to hold that if the federal government makes a treaty on a subject of exclusive Lander power, then the Lander would not be bound. It does not seem to decide, however, whether the treaty would be wholly invalid, such that, for example, federal courts could not apply it in an appropriate case).

One reading of the German constitution, then, would confine the federal treaty power to those subjects over which the federal government has been given power. And since the central government can make treaties only on some subjects, it seems logical that states have the power to make treaties on other subjects. In fact, another part of Article 32 gives the Lander power to make treaties in their own areas of exclusive and concurrent authority. We could thus interpret the German constitution to give the federal government power to make treaties on subjects given to it, and to give the states power to make treaties on subjects given to them, and to give both of them power to make treaties on subjects that they share. So the German constitution seems to give the states some independent power in foreign affairs.

But things are not so clear. By its terms, Article 32 gives the states power to make treaties only with the permission of the federal government. In other words, Article 32 mandates something like the American system: the states have power to make agreements only under federal permission, as though they were federal agents. But there are still two more wrinkles. First, according to some court cases, when the states make a treaty within a subject of their exclusive authority, the federal government must give permission unless it has a compelling reason to refuse. In addition,

some have argued that even if the federal government withholds permission, a Lander treaty would still be valid within an area of its exclusive authority. So perhaps, after all, the states do have a power to make treaties without federal

supervision.

If that story has left you confused, you are in good company, because it has confused German lawyers and lawmakers themselves. No-one knew what the law actually required, and everyone desperately needed some clarity. That's the reason for the Lindau compact.

2. Even under *Missouri v. Holland*, the federal treaty power is not without limits. For one thing, though it can *make* a treaty on any subject, the federal government does not necessarily have the power to *enforce* any and all treaties, as described in the text. In addition, although the plenary power allows the union to make treaties on any subject, it must still respect all other constitutional limits. For example, although the government can make an agreement on any subject, it may not agree to violate its citizens' individual rights. Imagine that the federal government makes a promise to exclude people of a certain religion from the public schools. In our hypothetical, the constitution gives the subject of education to the states, but the federal government may still reach it with its plenary treaty power. The treaty would, however, be unconstitutional for a different reason: it violates the constitutional rights of those excluded from school, because it discriminates against them based on their religion.

3. There is a question whether the states should have the right to participate in making all federal foreign policy or only on those subjects that the constitution gives to them in exclusive or concurrent power. Because the states have power only over certain subjects, it might make sense to limit their participation to treaties that address those subjects. For example, if the states have exclusive jurisdiction only over education, then they would be able to participate in negotiating education treaties – but only those. In practice, however, it is difficult to distinguish education treaties from other sorts of treaties. For one thing, a treaty might start out about trade but end up about education. For example, Burma might ask Thailand for importation rights, but Thailand will agree only if Burma reforms its educational

system. Suddenly this treaty has become an issue of great interest to the states, who will have to do the educational reforming. For another thing, even treaties that may not directly address education may nonetheless have dramatic effects on education. For example, suppose that the union signs a treaty committing Burma to new programs that will cost a lot of money. Federal taxes will therefore go up, so the states may feel required to cut their taxes to help their citizens – but then, with less state money, education will inevitably suffer. Cases of this sort occur all the time. As a result, it is probably best to act on the assumption that the states have a legitimate interest in all foreign policy. They therefore need to be included in the process across the boards.

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**CONSTITUTIONAL DRAFTING AND  
FUNDAMENTAL RIGHTS:**

**The Example of Religious Freedom**

**Constitutional Drafting and Fundamental Rights:  
The Example of Religious Freedom**

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**A Framework for Analyzing Religious Freedom: Outline**

- I. Threshold conditions
  - A. Religious diversity
  - B. Economic stability
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- II. Freedom from interference with religious liberty
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  - A. A continuum of positions and legal issues
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  - C. Relationship to independent legitimacy of state and religion
  - D. Relationship to culture and history

Thank you for inviting me to speak to you today. I am pleased and honored to be here. David has been talking about the structural issues in constitutional drafting: the division of powers between state and federal levels, electoral systems, and so on. I will be speaking about a different aspect of constitutions: their role in protecting fundamental rights. Structural issues ask about the basic arrangements of government power: who has power over what and how they get it. Fundamental rights ask about the limits placed on the exercise of government power in the interest of protecting individuals and groups. In this first session, I will use rights of religious freedom as an example of fundamental rights and in the second session I will use rights to gender equality as an example.

Religious freedom is one of the oldest fundamental rights to be recognized by the drafters of constitutions. Both the United States Constitution and the French Declaration of the Rights of Man include protection for religious freedom. The right to religious freedom has also been widely acknowledged in international treaties and conventions and in the constitutions of most countries. Despite this fact, religious intolerance and persecution continues to be extremely common in many places in the world and often leads to more general human rights abuses, such as torture, and to violent, armed conflict.

Let me offer a framework for analyzing religious rights adapted from the work of Prof. W. Cole Durham.<sup>1</sup> Prof. Durham suggests that there are certain threshold conditions that are necessary to make religious freedom possible. First, the society must be religiously diverse: if everyone were the same then there would be no need for religious liberty guarantees. For better or worse, this condition seems to be met almost everywhere. Even societies where all members share a particular religious tradition usually include disagreement about the meaning and application of that tradition. Second, the society must have a minimal level of

economic stability. This is not a very high standard, but economic instability can make religious liberty harder to maintain. Under conditions of economic hardship, governments tend to focus their attention and resources on economic development without paying too much attention to the impact on fundamental rights, including religious liberty. Third, the government of the society must have a minimal degree of political legitimacy. Governments that are perceived as illegitimate will generally lack both the desire and the ability to promote religious liberty. They will lack the desire because they will be more concerned about repressing challenges to their power. And they will lack the ability because any efforts they make to promote religious liberty will be seen with suspicion and distrust by the population. The final threshold requirement for religious liberty is that there must be a basic commitment to religious tolerance in the society. People may disagree about religious matters, but they must be willing to live together and respect each other's right to disagree. This attitude is less a matter of law and more a matter of culture. Luckily, most major religious traditions – including Christianity, Islam, and Buddhism – have some resources for encouraging tolerance. Thus, protection of religious freedom through law depends, in part, upon building and maintaining a culture of tolerance outside of the law as well.

There are two parts to religious freedom and it is useful to distinguish them and to clarify the relationship between them. The first part is the right of individuals or groups to freedom from government interference with their religious beliefs and practices – let's call this part freedom from interference. Sometimes the government interferes by flatly prohibiting a belief or practice and sometimes it interferes by discriminating against people of a certain religion in employment, education, or other government benefits. For example, some nations require that people holding government office must belong to a particular religion. In order to assure this first aspect of religious liberty – the freedom from

interference – it is not sufficient to prevent direct interference. Discrimination on the basis of religion must also be banned.

The second aspect of religious freedom is the relationship between religion and the government – let's call this religion/state relations. This part is concerned about government actions that bring religious beliefs or practices into state activities – such as prayer or religious education in public schools. Religion/state relations is about government actions that intrude into religious institutions, such as government oversight of church-run schools or hospitals. In these situations, the government may not be interfering with any particular person's religious beliefs or practices, but it is joining religion to government in ways that may be harmful to religious liberty. So, we have two aspects of religious liberty: first, the freedom from interference for groups and individuals and, second, the relationship between religion and the state.

In the U.S. Constitution, these two aspects of religious liberty are represented by two different clauses: the free exercise clause and the establishment clause. The free exercise clause addresses the freedom from government interference. The establishment clause addresses the relationship between religion and the state. There is sometimes tension between these two clauses: if the government tries to help people to practice their religion, it may end up establishing religion (usually the religion of the majority). For example, if a public school sets aside time during school for voluntary prayer by students, that might be seen as facilitating the religious practice of those students and thereby increasing religious liberty. On the other hand, prayer in the public schools also looks like an endorsement by government of religion in general, and perhaps of the practices of certain religious groups in particular, and might therefore violate the establishment clause.

With respect to each of these two parts – freedom from interference and religion/state relations – there is a broad range of issues that might be considered by constitutional drafters. For example, a basic question regarding freedom from

interference with religious liberty is which beliefs count as religious. International law has generally recognized that beliefs such as agnosticism and atheism should receive the same protection as conventionally religious beliefs. But what about political ideologies like communism or philosophies like existentialism? Is religious liberty simply an extension of freedom of thought generally, in which case political, sociological, and philosophical beliefs might get the same protection as religious beliefs? Or is there something special about religion that justifies protecting religious belief and practices to a greater degree than political or philosophical ones, and, if so, what is it that distinguishes religious beliefs? One answer sometimes offered by predominantly Christian societies is that religion is about a belief in a Supreme Being, but many courts have recognized that this is an unsatisfactory answer in light of the major world religions, including Buddhism, that are not best understood in terms of such a belief. Courts in many countries have struggled with the definition of religion in cases involving the Church of Scientology and other newer sects, particularly ones with a powerful commercial aspect. It is very difficult to design an adequate definition of religion in terms of the substance of the beliefs. As a result, the U.S. Supreme Court has adopted a functional definition. The Court asks whether the belief system plays the same role in the life of the believer as conventionally religious beliefs do. Any constitutional system that gives special protection to religion that is not enjoyed by other sorts of beliefs and practices must consider the question of the definition of religion.

With respect to freedom from interference, constitutional drafters might consider how much protection they wish to extend to religious belief and practice. Prof. Durham describes a continuum of protection. At one end, the constitution might offer only the minimal protection for purely internal religious beliefs. Such minimal protection would allow citizens to believe what they want, but only as long as they keep their thoughts

to themselves. One aspect of this minimal freedom would be the right to change one's religious beliefs. There are some countries, such as the Sudan, in which apostasy is punishable as a crime and in which even this minimal level of protection is not met.

The next step along the continuum might protect religious belief and practice in strictly private settings, such as within the home and in private meetings only. In some nations, disfavored religions have been prohibited from constructing places of public worship: churches, mosques, temples and so on. In these nations, only private worship is permitted to those religions.

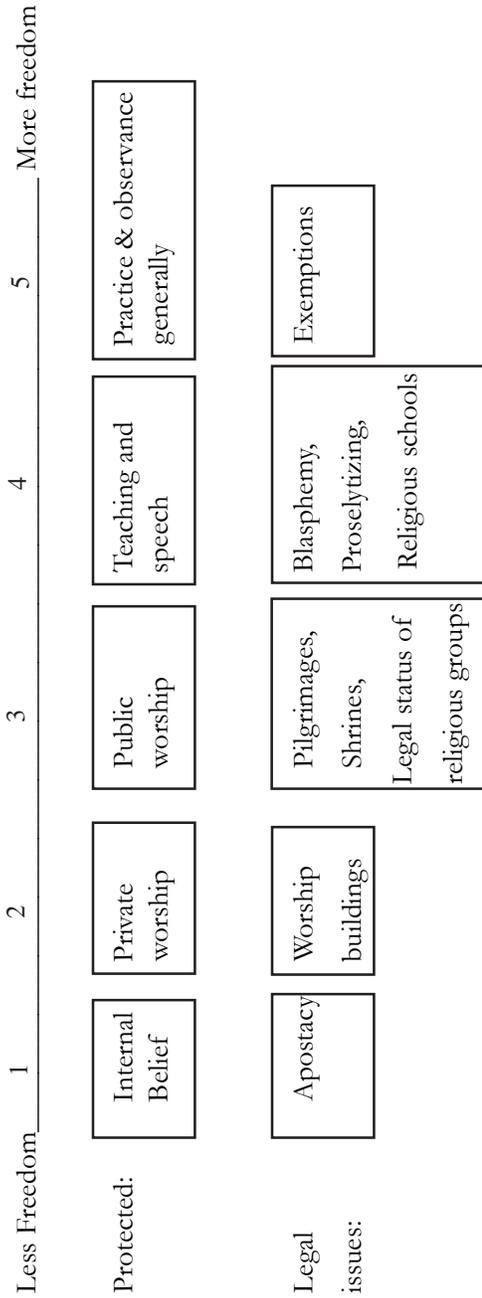
If a Constitution extends protection to worship in public as well as private settings, then many new legal issues arise, including the regulation of religious processions and pilgrimages, the protection of religious sites, and the ability of religious organizations and institutions to receive legal recognition (as corporations or associations) that would allow them to control property, make contracts, and so on. For many people, religion is a communal as well as an individual activity. Constitutional protection for religious liberty must, therefore, address the rights and powers of religious groups and institutions as well as of individuals.

The next stage would extend protection to other religious activities beyond worship, such as teaching and various forms of religious speech. Several countries, including Great Britain, have laws prohibiting blasphemy (generally they apply only to blasphemy against the majority religion). Such laws interfere with this stage of the continuum. Similarly, a number of countries restrict proselytizing – religious speech aimed at converting people. Greece, for example, restricts proselytizing in its constitution and the European Court of Human Rights has said that some restrictions on proselytizing are consistent with the protection of religious liberty in the European Convention for the Protection of Human Rights and Fundamental Freedoms. Russia and certain African nations

have argued that societies that are struggling to overcome a history of colonialism or internal religious oppression need protection against proselytizing. They argue that their traditional religious cultures are weak because of this history and must be insulated against attempts by outside groups to convert their members. Since the proselytizers have both free speech and freedom of religion claims at stake, this is a difficult and controversial issue.

The final stage of the continuum would include protection for religious practices and observances generally, including many activities beyond the particular practices mentioned in the previous stages. Many issues arise in such constitutional systems concerning the practices of religious minorities that violate the general rules of the society. The question in such cases is whether people with religious objections to the general laws ought to be entitled to exemptions from those laws. For example, where a society conscripts soldiers for its army, should it make an exception for conscientious objectors (people religiously committed to pacifism)? Or where a society prohibits polygamy should it make an exception for those who engage in this practice as a matter of religious observance? In the U.S., some religious exemptions were available for many years but the Supreme Court has recently changed its approach and denied religiously based exemptions in most cases.

Thus, the continuum of positions on freedom from interference looks like this:



At every point along this continuum of protection, another issue arises: when, if ever, might the government be justified in restricting religious liberty? Assuming that the constitution protects a particular belief or practice, is it possible for the government to justify restricting it nonetheless? For example, if a religious practice threatens the public health, could the state prohibit it? Some constitutions, like Canada's, specify a standard to be used to determine when the government may override fundamental freedoms protected by the Constitution. Canada's standard allows rights to be overridden where the limits are reasonable and are demonstrably justified in a free and democratic society. The Supreme Court of Canada has held that this provision requires that the restriction serve a very important government goal and that the impact on the right be proportional to the goal of the restriction.

The European Court of Human Rights also uses a similar proportionality principle in analyzing restrictions on rights under European Community law. In the U.S., where the Constitution is silent on this subject, the Supreme Court has designed a standard of review which is considerably more stringent than those in Canada and Europe. The result is that the U.S. has a more absolutist vision of individual rights and the government is less able to restrict rights in the service of other social goals. So, for example, the U.S. Supreme Court has struck down laws prohibiting speech that encourages hatred on racial or religious grounds. The Court believes that these "hate speech" laws intrude on the fundamental right to freedom of speech and cannot meet the very high level of justification required to override such rights. Courts in Canada and Europe, on the other hand, have upheld "hate speech" laws. They find that the government interest in preventing hatred along racial and religious lines is extremely important and that these laws restrict freedom of speech no more than necessary to serve that interest. These different results arise from different understandings of when the government is justified in overriding fundamental rights.

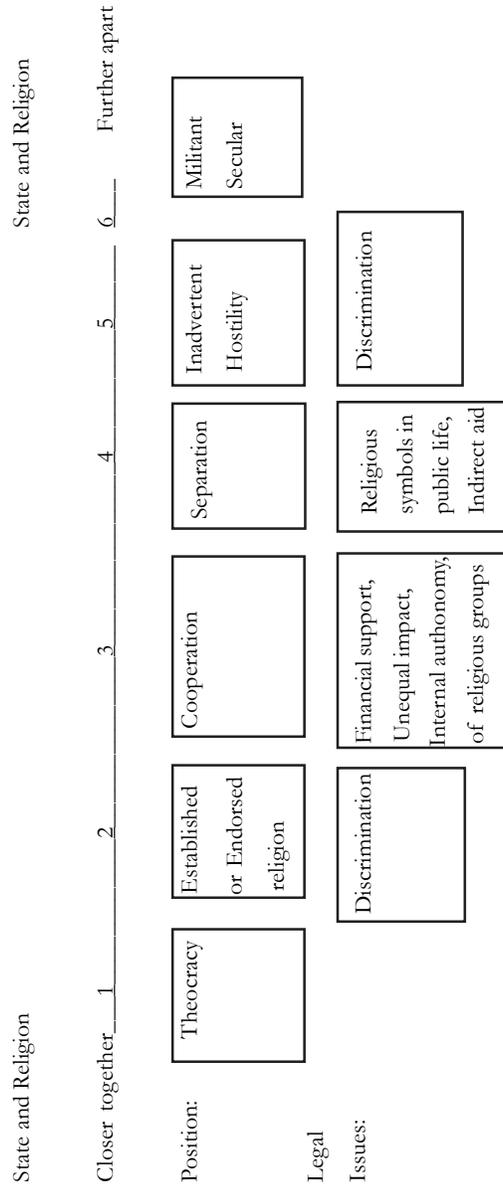
Moving to the second aspect of the problem – the relationship between religion and state – we find a similar continuum. At one end of this range, is theocracy: a complete identification of religion and government. Some current Islamic states qualify as theocracies. Moving a little from this end of the continuum, we find states with an endorsed or established religion but with more separation between that religion and the workings of the state. England would fall into this category, as would most of the Scandinavian countries. Often, such countries have a constitutional commitment not to discriminate against people who are members of religions other than the established or endorsed religion. The major issue in such countries is how to avoid such discrimination in a system that inherently favors a particular religion.

Moving further along, we find governments that are neutral as between different religions – they have no favored or endorsed religion – but they are not neutral as between religion and non-religion. They see their role as cooperating with religion and facilitating it. Germany and India would both be examples of this category. One of the major issues for such states is whether or not to provide direct financial support for religious institutions. Another concern is that the government's support may have different, and unequal, impact on different religions.

The next stage on the continuum is separation: the famous “wall” between religion and the state. The U.S. is the originator of this approach. Issues in separationist states concern religious symbols and practices in public life (such as prayers and references to God in public ceremonies) and indirect aid to religious institutions. The next stage on the continuum contains states that say that they are neutral and separate from religion, but that actually show some hostility to religious concerns, particularly the concerns of religious minorities. France may be an example of this point on the continuum. Finally, at the opposite end of the range from theocracy is militant secularism and official hostility of government to

religion, such as in the Soviet Union and Albania.

Thus, the second continuum looks like this:



The Constitution doesn't need to resolve all of the legal issues associated with particular points on both of these continua, of course. In fact, most of these issues will need to be left to the legislatures and courts that will interpret the constitutional provisions in particular circumstances. But constitutional drafters should be aware of which collection of questions they are creating for their courts and legislatures by choosing each position on the continuum.

Countries typically signal their commitment to one or another of these models of church/state relations with their constitutional language. Some countries specify the theocratic basis of their government in their constitutions, such as Pakistan, Iran, and Saudi Arabia. Some, such as India, France, Japan, Russia, and Kazakhstan, describe themselves as secular states. While these different nations mean very different things by "secular," it does signal their distance from the theocratic pole. Many nations have a principle of non-discrimination on the basis of religion in their constitutions. Some, such as Brazil, Cuba, Hungary, South Korea, the Philippines, and Poland, specify the separation of church and state.

Professor Durham makes an interesting observation about the relationship between these two continua (freedom from interference and religion/state relations). It might seem that as you move away from the theocratic end of the religion/state continuum and toward the secular end you should also move toward greater freedom from interference in religious liberty. But this is not true. In fact, both ends of the religion/state continuum – theocracy and militant secularism – lead to less freedom from interference by the state in religious belief and practice. The greatest liberty on the first continuum seems to be achieved in the countries that adopt one of the models in the middle of the second continuum: cooperation or separation. Thus, one reason to favor the models of cooperation or separation over the other possibilities is that they appear to lead to the greatest freedom from interference.

How else might one choose a position along the religion/state continuum? Is there any reason to care about the nature of religion/state relations aside from the impact on freedom from interference with religious liberty? There are, indeed, other reasons to care about religion/state relations and the most important one is that the choice of a position on this continuum is closely tied to different visions of the nature and foundation of the state. A theocratic model is based on the idea that political legitimacy is always dependent upon religion. A state that wishes to assert an independent basis for the legitimacy of its political system – such as the consent of the people – will not adopt theocracy. At the other extreme, militant and hostile secularism is based on the idea that politics can control all aspects of life, including those traditionally understood as religious. This view leaves no room for a private sphere that is legitimate independent of government. The range of positions in the middle of the continuum, however, see both government and religion as independently legitimate, not dependent on each other but also not overwhelming each other. These models seek to balance and blend the two spheres of government and religion. And they must achieve that balance and blending within the conditions of life of a particular nation.

This observation brings me to my final point. This framework for analysis is useful for outlining the range of issues that constitutional drafters might consider and the range of positions available to respond to those issues. But which position a constitution adopts on any of these issues is not simply, or even primarily, a question of legal theory. It is, instead, a pragmatic judgment that must be made in the light of the history and present circumstances of the nation. The same position – for example, allowing religious education in public schools – will have dramatically different meanings and consequences in countries with different histories and different religious cultures. In Germany, for example, this practice is seen in light of a history in which the Nazis and other fascist

regimes tried to make the schools entirely secular. In that context, religious education in the public schools has the meaning of maintaining a public sphere hospitable to religion. In the U.S., on the other hand, religious instruction in the public schools must be seen in light of a long tradition of separation of church and state and the current efforts by Christian fundamentalists to reintroduce religion into many aspects of public life and politics. In that context, religious education in public schools would represent a significant retreat from state neutrality on religion and a victory for a particular religious view. Thus, in thinking about such choices, constitutional drafters (and, later, constitutional interpreters such as courts and legislators) will need to struggle with how best to realize the ideals of religious liberty within the life of their own particular nation.

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**CONSTITUTIONAL DRAFTING AND  
FUNDAMENTAL RIGHTS:**

**The Example of Gender Equality**

**Constitutional Drafting and Fundamental Rights:  
The Example of Gender Equality**

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Gender Equality as a Fundamental Right

- I. Two parts of Gender Equality
  - A. Government commitment to equality
  - B. Guarantee of non-discrimination
- II. International Law
  - A. Declarations and Conventions
  - B. Customary International Law
  - C. Variation across nations
- III. Constitutional Mechanisms for achieving gender equality
- IV. When may government override the right?
- V. Conflict between gender equality and customary or religious practices

In this second session, we will continue to look at the ways in which constitutions protect fundamental rights by using the example of gender equality. Before we begin, however, I would like to take a minute to say something about the meaning of the word “gender.” Obviously, there are physical, biological differences between men and women. But gender differences go far beyond biology. In most times and places in human history, men and women have lived very different lives. They

have spent the hours of their days engaged in different tasks; they have fulfilled different roles in their families and communities; and they have had different ideals and ambitions. These differences are not required by the biological difference between men and women. They are largely a result of culture rather than biology. The word “gender” points to the fact that the differences are constructed by culture rather than required by nature.

Moreover, the genders are not just different, they are also unequal. In most times and places, the roles, tasks, and virtues assigned to women have had a lower social status than the roles, tasks, and virtues assigned to men. The word “gender” reminds us that differences between men and women are generated by a system, a system composed of thought and institutions and social norms, a system which creates this great inequality. So, to adopt gender equality as an ideal is to commit ourselves to recognizing and eliminating this cultural system that makes women subordinate to men.

Unlike religious freedom, which has a long history of recognition as a fundamental right, gender equality is a relatively new right. In recent decades, it has, however, been codified by a number of international instruments and has become a well-recognized obligation of states in the international community. When drafting a constitution, you may want to bring your constitutional protection for gender equality in line with international standards, so I will briefly describe to you the status of this right under international law.

The principle of gender equality is generally understood to have two parts. First, the government must be committed to the ideal of the equality of all people regardless of their sex or gender. Second, the government must not discriminate on the basis of gender in the provision of employment, education, health care, and other goods and services. This two part principle of gender equality appears in the United Nations Charter itself. The prohibition of discrimination is repeated in the Universal Declaration of Human Rights, one of the

earliest statements by the United Nations on this topic (1948). The two major covenants concerning human rights, which a very large number of nations have signed, are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights (1966). The second of these covenants again prohibits all signatory states from discriminating on the basis of sex or gender. Also, many of the regional conventions on human rights that are offered for signature by countries within particular areas of the world prohibit gender discrimination with respect to those rights and freedoms that they protect. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights all include commitments to gender equality.

Finally, the most recent and most specific international agreement on the subject is the Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention 1979). Over 100 countries have signed this Convention. The Convention bars discrimination on the basis of gender in specific areas of life, including political participation, employment, health care, education, legal capacity, and family life. The Convention also calls upon signatory states to do more than just eliminate discriminatory laws. States are to promote the full development and enhancement of women and eliminate discriminatory barriers to that enhancement in social and cultural life, not just in law. As Donna Sullivan, one commentator on international law has observed, the goal of the Women's Convention is not to guarantee that women and men are treated exactly the same way. Instead, the goal is to ensure that gender discrimination does not interfere with women's ability to exercise their rights and to "dismantle the political, economic, and social structures that perpetuate their subordination."<sup>2</sup> So, a state should ask: Do women wield equal political power in our society? Do they control land and businesses equally? Are they leaders in

the community equally? Do they do all of the housework and childcare or is this work shared? The issue is not whether the law treats men and women exactly the same, but whether it helps women to improve their status or not.

While conventions such as these are binding only on the countries that choose to sign them, there are two reasons why they might be relevant to people engaged in constitutional drafting. First, a new government may wish to sign such conventions, either as a way of joining regional organizations or as a way of seeking recognition from other nations. It would, then, want its constitution to be consistent with such commitments. Second, the proliferation of gender equality rights in international instruments indicates that gender equality may be attaining the status of customary international law. While specific conventions are binding only on the nations that sign them, customary international law is binding on all nations. Customary international law includes only those norms that are very widely accepted and understood to be fundamental. Certain aspects of gender equality – such as the prohibition on laws that explicitly discriminate on the basis of gender with respect to fundamental rights – may already be customary international law, and other aspects of gender equality may attain this status in the relatively near future.

Now, to say that gender equality is a universal norm of customary international law is not to say that it means exactly the same thing everywhere. States have some flexibility in how they choose to recognize these universal rights and in the precise form that they take. So, for example, a variety of rules regarding the inheritance of property might be consistent with a gender equality norm: no one particular system is required. But there are two limits here. First, even with respect to areas where less important rights are at stake, the flexibility is not endless. Many systems of inheritance rules might be consistent with a commitment to gender equality, but a system that leaves women with no meaningful support upon the death of their husbands and makes them economically dependent upon either

his family or their own would not be acceptable. The question in all such cases is not whether the treatment of men and women is exactly the same, but whether the treatment of women maintains their lower status.

Second, some rights are so important that there will be relatively little flexibility for nations in how they choose to protect or recognize them. For example, the right to be free from violence – a part of the fundamental dignity of the individual person – is so basic and important that a state will need to protect it carefully and thoroughly. A government, like the current government of Burma, that refuses to protect its citizens from violence in general, violates the human rights of all of its citizens. A government that systematically refuses to protect its women citizens from violence, violates their human rights. Effective laws against rape and against violence within the family, such as wife beating, are required or else the government will violate the international law commitment to gender equality.

Last year, I described to you several of the ways in which the norm of gender equality might be incorporated into a constitution. These include: (1) a constitutional provision specifically guaranteeing gender equality and prohibiting discrimination on the basis of sex or gender; (2) specific government agencies designed to consider the effects of government actions and policies on women and to protect and promote their welfare, such as a Bureau of Women's Affairs; and (3) constitutional requirements that a certain percentage of government officeholders and elected officials be women.

The first of these mechanisms – a constitutional guarantee of gender equality and non-discrimination – is probably the minimum constitutional protection that a state committed to gender equality would include and such a provision is common to many modern constitutions. This is an important statement of the nation's commitment and provides a basis for women to challenge discriminatory practices in the courts. The women

can argue that such discriminatory practices violate this provision of the Constitution. The second mechanism – a Bureau of Women’s Affairs as part of the executive and/or legislative branch of government – is an excellent way to ensure that women’s interests and concerns are generally considered when laws and policies are made. A great deal of gender discrimination is unintentional: people are simply acting on the basis of stereotypes or they are unaware of the different impact of a policy on men and women. This government agency could bring such concerns to the attention of law and policy makers and help reduce much of this unintentional discrimination.

Finally, the third mechanism – a requirement that a certain percentage of government officeholders be women – is a way to directly attack the differences in power between men and women. It gives women the influence over law and policy that would allow them to make sure that their viewpoints and concerns are heard and considered. It also contributes to the dismantling of gender hierarchy elsewhere in society, by providing examples of women with power that could be emulated by people in business and other arenas. There are several ways in which such a requirement could be implemented. One possibility is that for each seat in the parliament or legislature, if a woman has not been elected in the past two election cycles, then only women may run for that seat in the next election. This guarantees that at least one-third of the legislature will be women, and that every local constituency will have a woman representative at least one-third of the time. Such strategies for assuring that women hold a certain percentage of the offices of power are the newest and least common form of constitutional response to gender equality. Perhaps a democratic Burma could lead the way on this innovative new approach to gender equality.

As with religious freedom, one issue constitutional drafters should consider is under what circumstances, if any, the right to gender equality can be overridden by the government.

International tribunals have adopted a standard for gender similar to the one they use for assessing government intrusions on religious rights. The European Court of Human Rights, for example, has said that a nation's reasons for overriding gender equality would need to be "very weighty" and consistent with the principles which normally prevail in democratic societies. Moreover, the means chosen must fit the asserted goal: this is a version of the proportionality review I discussed with respect to religious freedom.<sup>3</sup>

There is an argument that the standard used in equality claims should be even stricter than the one used to assess government actions that override other fundamental rights. Where a government restricts rights in general – for example, the free speech rights of everyone — the democratic process will generally ensure that the goals of the restriction are important and that the restriction is proportional to those goals. The majority will allow restrictions on its rights only where those restrictions are likely to be justified. But where rights are restricted only for a particular portion of the population, identified by gender for example (particularly where that portion of the population enjoys less political power than its numbers would suggest), the democratic process will not work as an effective check on government abuse. The powerful majority will not necessarily care about protecting the rights of a less powerful group and may allow intrusions on their rights that it would not tolerate for itself.<sup>4</sup> Thus, if a constitution includes a standard for assessing government claims to override fundamental rights, it might specify a somewhat stricter version of the standard for claims in which the rights affected belong to a less powerful and historically disadvantaged group.

One of the most difficult problems concerning gender equality arises from the conflict between a commitment to this equality and the protection of cultural practices that discriminate on the basis of gender. Many traditional communities have rules and customs, both religious and

culturally based, that treat men and women differently. For example, under Jewish religious law, which is enforced in Israel, only a man may seek a divorce; the woman is not allowed to do so. Or, under Shari'a or Moslem law, which has been codified in a number of countries, including Egypt and Morocco, female heirs, including wives, inherit a smaller proportion of the property of their dead husbands or fathers; a larger share goes to male relatives of the dead man. Or, to take an extreme example, India has struggled to eliminate the Hindu custom of sati, in which a widow is burned to death on her husband's funeral pyre.

Sometimes these rules and customs are recognized and enforced by the nation as customary or religious law. In such cases, there is a serious conflict between the nation's commitment to gender equality and its commitment to maintain the religious and cultural rights of the communities wishing to enforce customary law. Even where the nation has no courts or police to enforce customary law, and where the religious or cultural community must impose its rules through its own private systems, the conflict may arise. Imagine a case where parents seek to impose a religious custom on their daughter, perhaps involving physical mutilation, like foot binding, or perhaps involving removing her from school before the age at which the state normally allows. Under other circumstances, such physical mutilation or denial of education would be illegal. But if the state seeks to enforce such laws, the parents will raise a religious freedom claim, arguing that they are entitled to an exemption from the general laws in order to practice their religion. If the Constitution protects both religious liberty and gender equality, then a court will need to weigh their religious freedom claim against the government's interest in promoting gender equality.

There is no simple formula for resolving such conflicts. Moreover, it is likely that the resolution is best left to the courts or administrative agencies to struggle with in particular cases, rather than addressed in the constitution in general. But

constitutional drafters who include both strong religious and cultural rights and strong gender equality rights have not committed their countries to an impossible dilemma: there are some general principles to guide decision makers in resolving such conflicts. There are three basic considerations: first, how important is the denial of gender equality involved; second, how important is the religious or cultural practice involved; and third, what is the role of the government in enforcing the practice.

First, not all denials of equality are equally important. There is a fairly widely recognized hierarchy of rights, and denials of gender equality that affect the more fundamental rights should be regarded as more significant than those that affect less important rights. Cultural practices that lead to death or serious physical harm for women or girls must be regarded as extremely serious violations of equality. Examples of such practices include sati, genital mutilation, foot binding, and refusal of medical treatment. Cultural practices that seriously restrict important civil, political, social and economic rights are the next category. This would include denying women the right to education, speech, political participation, basic economic security, and so on. And cultural practices that affect only relatively minor rights – such as covering certain parts of the body in public or performing certain ritual acts like bathing – would be a less important category of inequalities. Even with respect to important rights, such as bodily integrity, there are more major and more minor intrusions on such rights. A religious practice that leads to death or serious injury is very different from one that leads only to minor or temporary pain, such as the piercing of ears or nose. So, both the importance of the rights at issue and the degree of intrusion on those rights is relevant.

The same assessment must be made for the religious freedom claims. Is the practice at issue one that is centrally important to the religious or cultural group? On this question, secular authorities like courts will generally have to accept the

claim of the members of the religion, but there will often be authorities within that religion to whom they can turn for such information. A practice that is allowed but not required, like polygamy in many cultures, might be seen as less important than one that is mandatory, such as the ban on abortion in Catholicism. Practices that are closely associated with religious worship, such as the ban on women priests in certain religions, might be seen as more central than ones that are more practical guidelines for life, such as the food preparation requirements of kashrut in Judaism. And the degree of impact on the religious or cultural practice is also relevant. Even a mandatory, important practice may be restricted by a law that simply makes it a little more burdensome rather than completely prohibiting it. For example, imagine a religion that prohibits boys and girls from being educated together. If all public schools are coeducational, then the religious group might have to fund religious schools itself in order to educate their boys and girls separately. The law requiring public schools to educate both boys and girls would not, for that reason, be an interference with their religious freedom even though it makes it more expensive for the religious group to practice its beliefs. A religious or cultural practice could justify a denial of gender equality only if it were both an important practice and it would otherwise be restricted in a substantial way.

Finally, in assessing such conflicts, the role of the state in enforcing either the religious rules or gender equality is significant. In the education example above, for instance, the state is free to promote gender equality in its own schools, but it would be much more problematic if it sought either to enforce the religious rule in the public schools or to enforce the gender equality norm in the religious schools. To force all children to attend single sex schools in the service of a particular religious view would probably violate both gender equality norms and the religious freedom of people of other faiths. On the other hand, to refuse to allow religious schools to operate as single sex schools would probably be an intrusion

on religious rights that is arguably unjustified by the promotion of gender equality. If the state is merely allowing private persons to run their own institutions in gender unequal ways, like a single-sex religious school, that is very different from running state institutions in that fashion. There are many instances in which religious freedom rights would justify a rule allowing private parties to discriminate based on gender but would not justify a rule allowing the state to do so. And, conversely, gender equality might often justify the state in refusing to support a religious practice even if it would not justify the state in completely prohibiting that practice.

As the potential conflict between religious or cultural rights and gender equality rights indicates, constitutional drafters must consider not only the boundaries of each individual right but also the interaction between rights. Conflicts between rights pose difficult challenges, but they are not impossible to resolve. They require attention to the specific situation and a careful balancing of the concerns on both sides. But such potential conflicts do not justify ignoring the claims of either of the rights involved.

As both religious freedom and gender equality rights demonstrate, fundamental rights issues can be very complex with no clear right answers. This can be frustrating both for the drafters of constitutions and for those, like the courts and legislatures, that interpret constitutions. But one of the most important tasks of a constitution is to provide for fundamental rights. Even if you have a perfect balance of power between state and federal governments; even if you have an accurate and delicate voting rights system, you cannot have a just society without protection for individual and group rights. Because democracy is not enough to generate freedom and justice: even democratic societies can violate the rights of their citizens.

But how can a constitution, a piece of paper, prevent this? Imagine a country where the government not only controls military and economic power, but also enjoys great legitimacy because it is a real democracy, representing the will of the

majority of its people. If that government decides to violate some fundamental right, how can the Constitution stop it?

The first answer is that constitutions do not always succeed in stopping such violations. Particularly in times of national crisis, such as wars, courts and legislatures may ignore the rights guaranteed by the Constitution. But the amazing thing is not that constitutions sometimes fail, but rather that they sometimes succeed. Sometimes, this flimsy piece of paper stands between the might of the state and a vulnerable individual and it protects that person.

How is that possible? It is possible because, and only if, the Constitution captures the deepest hopes of a nation for freedom and justice. Then, when the people look at their Constitution, they will see not only the practical minimum necessary for them to live together in peace, but also the ideals toward which they strive. If they see their Constitution this way, as a statement of their ideals, then it may be able to restrain them when the passions of the moment would lead them to violate fundamental rights.

So, constitutional drafters have a large and difficult task. In drafting provisions to protect fundamental rights, they must try to find the words that will touch the hearts of their people. They must speak for the ideals that those people care about deeply enough to stop them on those occasions when they really want to ignore their ideals. The Constitution draws on existing commitment to those ideals, but the Constitution itself also contributes to the creation of that commitment. Writing your ideals into a Constitution, builds those ideals into a shield that can stand against the desires of the people, even a majority of the people. The process of drafting itself, the conversation about your ideals, can help to strengthen them and make them effective in a crisis. Thank you for inviting me to be a part of this conversation.

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**Notes:**

- <sup>1</sup> See W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework* 1 in *Religious Human Rights in Global Perspective: Legal Perspectives* (Johan D. van der Vyver & John Witte, Jr. eds.) (1996).
- <sup>2</sup> See Donna J. Sullivan, Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution, 24 *J.Int'l Law & Pol.* 795, 800 (1992).
- <sup>3</sup> See *Belgian Linguistics Case*, 6 *Eur. Ct. H.R. (Ser.A)* at 34 (1968).
- <sup>4</sup> The most famous version of this argument was offered by John Hart Ely in his book, *Democracy and Distrust* (1980).

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