

# **Federal options and other means of accommodating diversity**

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### TABLE OF CONTENTS

<b>1) Introduction .....</b>	<b>1</b>
<b>2) Ethnocultural and religious diversity .....</b>	<b>3</b>
<b>3) Variety of means .....</b>	<b>4</b>
3.1) Minority language and cultural rights .....	4
3.2) Consociational power-sharing .....	4
3.3) Assimilation, exclusion, integration .....	5
3.4) Devolution .....	6
3.5) Federalism .....	6
<b>4) Federalism in detail .....</b>	<b>9</b>
4.1) Federal constitutions.....	9
4.2) Basic features and division of roles and responsibilities.....	9
4.3) Orders of government working cooperatively.....	10
4.4) Representation at the centre.....	11
4.5) Guarantee of rights .....	12
4.6) Asymmetry .....	12
4.7) Non- territorial federalism .....	13
4.8) Secessionism.....	14
4.9) No unilateral changes and a “ referee” .....	15
4.10) Taxation and public spending.....	15
<b>5) Conclusion, with a few pertinent questions.....</b>	<b>17</b>
Suggested Readings .....	19



## 1) Introduction

This paper is aimed at people involved in what have come to be called “nation building” activities around the world, most particularly in post conflict situations. Its purpose is to provide some practical, clearly explained examples of ways and means of recognizing and accommodating two or more national groups living within a single country.

No blueprint applies to all cases. In this paper, we make an effort to describe some basic characteristics of governance models, in particular federal models. Federalism isn’t the only possible response to diversity, and even where it is used, is often accompanied by other measures such as human rights legislation. There are many ways to accommodate and recognize diversity, in addition to federal constitutional arrangements. In this paper, we briefly discuss some of them.

Having a federal constitution does not in any way assure that minority rights will be respected. The historic situation of indigenous peoples in many federal democracies attests eloquently to that. At the end of this paper, readers will notice that there is a list of questions peoples might ask themselves if they are considering federalism in a situation where there has been a history of conflict and distrust between and among groups. Among these questions are:

- *What provisions will be included for minorities, both at regional and national levels?*
- *How will the Chapter on Fundamental Rights/Bill of Rights be designed? What mechanisms will be used to enforce/protect rights?*
- *How would language rights be defined and protected? What language provisions would apply to the police, armed forces and public service at national and regional level? How would language rights be reflected in educational institutions, courts, etc.?*
- *Would a new constitution contain provisions for constitutionally established institutions to provide services to particular ethnic, linguistic or religious communities?*

We include these questions to indicate that the skeletal structure of a federal system only provides one possible framework within which one can provide for diverse ethnic and linguistic communities occupying a shared political space. Federal models can be very helpful to those seeking political solutions to group discord and tension. But federalism is not an unavoidable necessity; nor is it sufficient unto itself. In addition, to accomplish the goal of accommodating diverse groups federalism must be accompanied by other strategies and measures.

The word federalism itself is often controversial. In part, this is because it is misunderstood. In many places, “federalism” is seen as a first step to secession, and it is true that there have been, and continue to be, secessionist movements in a number of federal countries, including Canada.

When minority nationalities in countries that have lived through conflict propose a federal structure as a political solution, members of the majority sometimes suggest federalism would merely pave the way to splitting up the country. The actual experience of federalism proves that fear to be unfounded.

The federal solution does not so much encourage the secessionist impulse; it contains it. To put it in the starker terms – a system of constitutional rules and democratic practices allows those who seek to advocate secession to do it in a peaceful, non-violent fashion, rather than resorting to armed resistance. The experience of federal countries to date – especially those that have a strong tradition of democracy – is that, despite referenda and other forms of secessionist public advocacy, secession has seldom occurred. Democratic federalism has usually proven resilient and flexible enough to deal with the challenge of secession.

Among the ways other than federalism of dealing with the fact of diversity that we discuss in this paper are:

- policies designed to assimilate heterogeneous elements to the majority culture,
- human and cultural rights provisions, and
- formal and informal arrangements to guarantee various groups a place at the national decision-making table.

This use of a combination of means and strategies underscores the need to be creative in devising arrangements that fit particular situations.

In the real world, people involved in actual nation building efforts are not going to find any pre-packaged solutions. They are going to have to consider their options broadly, and examine a wide variety of techniques, systems and practices in order to create the structures suitable to any specific situation.

In what follows we will attempt as much as possible to cite concrete examples. Those concrete examples are important. They give tangible shape to the structural models. Our aim here is to provide useful and easily assimilated information.

We have included a bibliography for further reading. We do not pretend that what we have described here is in any way exhaustive. We envisage that this paper will be used in conjunction with other resources.

## 2) Ethnocultural and religious diversity

A great many countries are home to diverse ethnocultural or “national” groups. In some cases these groups are concentrated in separate geographic regions. This is the case in Spain or Belgium or Malaysia.

In other cases the groups are not geographically concentrated. The Muslim people of Sri Lanka, for instance, live scattered throughout the country. Although many among them consider one region to be a historic homeland, they are not a majority in that region and most Muslims live in other parts of the country. The Swedish minority in Finland, the Hungarian minority in Slovakia, the Slovak minority in Hungary and Romany populations throughout Europe are not territorially concentrated. Similarly, some indigenous peoples in the Americas and Australia have what is often called a “land base,” while many others do not, and live interspersed with the general population.

There is also great variety in the population balance, although it is rare that the various groups are exactly equal in population. In Canada there are about three times as many English speakers as French speakers. In Belgium the Flemish are about twice the population of the Belgian Francophones. In such and other similar cases, there is a certain degree of balance between the main groups that compose the society, and that tends to lead to political institutions that reflect that balance. In other cases, there is a single majority population and much smaller national or ethnic minorities. At times in such circumstances, the smaller peoples have had difficulty asserting their language, cultural and political rights. This was the case until not too long ago for indigenous peoples such as the Sami of Scandinavia and the aboriginal peoples of Canada.

India presents a complex picture of diversity, with a number of very large language and ethnic groups (Hindi speakers, Bengali, Tamil, etc.) and many smaller groups, sometimes referred to as “tribals”. China is also home to many language and ethnic minorities. Both giant countries provide some measure of accommodation for these diverse elements, but in very different ways.

There are also differences in the ways in which peoples define themselves as an “ethnic” or “national” group. In some cases, the essential element of group identity is religion, in others it is language, in yet others it is shared history and cultural traditions. A sense of distinct group identity is a clear fact all over the world. Sometimes it is based on language; sometimes, religion; sometimes, shared cultural tradition; often, a combination of those and other factors. Many countries are home to a multiplicity of these identities – all demanding recognition. Political and civil society leaders and those who advise them have to deal with that ineluctable fact. Without entering into a long definitional discussion, we hope this paper can provide some helpful information for those who have that task.

### 3) Variety of means

Countries that are home to diverse populations deal with that diversity in a number of ways.

#### 3.1) Minority language and cultural rights

Many countries provide publicly funded schools and some access to government services in minority languages. Some also provide broadcasting facilities, and support cultural and community institutions for minority cultural groups.

The Chinese authorities, for instance, provide for primary and middle school education in minority languages for the Uigur and Zhuang people, for Koreans in certain areas and for Mongolians.

In Peru Quecha is recognized as an official language of the republic and Peruvian law provides that it be taught, together with Spanish, in all schools. There are similar provisions for the teaching of indigenous languages in other Latin American countries such as Brazil and Paraguay. In Finland, there are provisions for Swedish language education for the Swedish minority, in Poland for the Lithuanian minority and in Hungary for Slovaks, Czechs, Poles, Croats, Slovenians, Germans, Romanians and a number of other groups.

Minority rights could include education in whole, or in part, in the minority language; access to some government forms in the minority languages (such as tax or census forms;) the right to interpretation in court proceedings, and, in some cases, some territorial recognition of the minority language in local areas where it is widely used. Finland, for instance, defines some municipalities as being either officially bilingual or officially Swedish.

In many countries that provide for minority rights, these rights are legally and/or constitutionally guaranteed. For instance, in 1993 Hungary passed a detailed law guaranteeing minority language rights for a number of groups and stating the conditions for their use and legal redress available to members of minority groups.

In some cases, minority rights guarantees are reinforced by treaties between countries that provide for equal treatment of each others' peoples.

#### 3.2) Consociational power-sharing

This is a term some social scientists use to describe arrangements in which the political structure makes provisions to include members of various ethnic or national groups in the central government, political party system, civil service, etc. Experts often use the term “elite accommodation” to characterize these sorts of measures. This means that the leaders of the groups negotiate arrangements to guarantee all a share of power, jobs, educational opportunities and the like. These are often informal. For instance, in some countries that experts describe as consociational, positions in the central government executive are, by custom, guaranteed to various national or ethnic communities. In other cases, the arrangements are legal or constitutional. In New Zealand there are legally guaranteed seats in Parliament for members of Maori group.

### 3.3) Assimilation, exclusion, integration

Some countries have endeavored to deal with the presence of minority populations by encouraging or coercing them to adopt the language and culture of the majority. In the Americas, this was an approach frequently taken, in the past, with indigenous populations. It wasn't until relatively recent times that Americans and Canadians accepted that the aboriginal peoples in their countries had cultural, traditional, community and language rights. The extent of these rights is still very much a matter of dispute.

To assimilate means losing a significant part of one's original group identity, especially in its public manifestation. Those who favour assimilation sometimes claim benevolent motives. They argue that it is necessary for all members of society to share a common language and culture in order for all to fully participate in the economic, social and political life. In this way, assimilation is quite different from policies of exclusion and discrimination of which the South African Apartheid system was a classic example.

Ironically, aboriginal peoples in North America have long *demanded* education and other services in culturally specific form that takes account of their languages and traditions. On the face of it, what to one group was a policy designed to limit opportunities was to another necessary to its cultural survival. That is deceptive. North American indigenous peoples have not demanded *inferior* services that would consign them to second-class status in society. Some argue that the situation of indigenous peoples calls for "citizens plus" policy. That would entail all the rights of citizenship in the general society, as well as additional measures to encourage indigenous languages, cultures and traditions.

Both assimilation and, especially, deliberate exclusion are largely discredited policies, associated with the racialist ideologies of an earlier age. We mention them here because they are an important part of the history of policies that respond to diversity. Assimilation, in particular, is still widely practiced with respect to immigrant populations. The usual assumption is that those groups that are among the original inhabitants of a territory have a greater claim to recognition than those who arrived more recently.

*Integration* of heterogeneous groups could also look deceptively like assimilation, but it is different. The purpose of integration is to assure all groups can participate in social, economic and political life without sacrificing their distinct identities. Sometimes this is achieved by consociational arrangements that guarantee members of specific groups participation in the national institutions.

Another means of achieving integration, without assimilation, is through, affirmative action. This is a policy of "reverse discrimination" in employment, access to education, etc. in favour of historically disadvantaged groups. The argument for affirmative action is that those who have suffered systemic discrimination in the past need more than a level playing field and lack of negative discrimination. They need some positive measure, in the form of quotas, so-called "ethnic set-asides" and similar measure, to counteract the long history of exclusion. This is a controversial policy. In North America, for instance, it runs counter to a strong current of liberal individualism, which favours equality of access but no special measures to redress the ills of the past.

### **3.4) Devolution**

Some countries have chosen to allow a great measure of self-government to territorial entities that are the historic homelands of distinct peoples. The British government did this in the 1990s for Scotland and Wales. Westminster “devolved” a great number of powers to Welsh and Scottish assemblies, giving Wales and Scotland status that resembles that of “constituent units” in federal countries.

A policy of devolution differs from federalism in that the devolved entities derive their autonomy from central government legislation, which the central government can choose, unilaterally, to reverse. As we shall see, in a federal country, the constituent units are normally guaranteed by a constitution, and their status cannot be altered by the central government. This distinction is important, especially for those examining governance options in countries where there has been some history of conflict and mistrust between and among ethnic communities. All groups might seek the assurance that only constitutional arrangements, upheld and adjudicated by a disinterested judiciary, can provide. In devolution arrangements, such assurances are lacking.

### **3.5) Federalism**

In a federal country, power and authority are divided between or among two or more orders of government. In almost all cases, these orders of government are defined territorially. As a rule, a federal country is divided into territorial constituent units that have defined responsibilities and powers. In many federal countries these constituent units are often called “states”, other times they are provinces, territories, länder, cantons, autonomous communities and republics.

In the majority of federal countries, there are two orders of government: 1) the constituent unit (state, province, etc.) order and 2) the federal (national, central) order. They each have constitutionally defined and guaranteed roles and powers. In a few federal countries, municipalities are also constituted as constitutional orders of government, with defined roles and powers. In India, this extends to the village-level, “panchayat” order of government.

There are about 25 federal countries in the world today and they account for more than 40% of the world’s population. We say “about” 25 because there are a number of borderline cases. Experts classify South Africa and Spain as federal, but those countries do not choose to describe themselves that way. On the other hand, the United Arab Emirates and Pakistan do describe themselves as being federal, while experts would dispute that. Among the more important federal countries are the United States of America, Germany, India, Nigeria, Brazil and Canada.

Experts often sum up federalism as combining self-rule with shared rule. This implies that a federal country is more than an alliance of independent entities. There is normally a federal government with sufficiently great authority to act in the interest of the entire country. At the same time, the constituent units do not derive their legitimacy from the central government, but from the people. In the vast majority of cases, all orders of governments are elected.

Experts sometimes argue as to whether federalism must be accompanied by some form of representative democracy. There are differing views on this subject. For the purposes of this paper, we assume that those who are interested in federalism are also pursuing democratic solutions.

Experts do generally agree that one of the basic features of federalism is that all orders of government have direct contact with the people. Elections and the democratic processes associated with them provide the best means of assuring that direct contact.

There have been a number of non-democratic regimes that called themselves federal. The Soviet Union was one of these. Superficially, it did have the appearance of a federal country, with multiple constituent units. However, the one-party apparatus trumped the federal structure. The constituent units did not have any real measure of autonomy, and did not derive their legitimacy from the willing consent of the governed. When the control of the single party was lifted, the “federation” fell apart. Today, many researchers describe cases such as the Soviet Union as “pseudo-federations.”

Some federal countries, such as the USA, were formed by the coming together of previous separate entities. Others, such as Belgium, were formed by creating constituent units out of what was once a single national unit. In yet other cases, such as Canada or India, there was a combination of both a coming together and the creation of new units.

Federalism is a response to a variety of conditions, of which ethnocultural or national diversity is only one. Two of the prime motives for federalism are to bring government closer to the people and prevent any single government from acquiring excessive power over the citizenry. Those were specific goals of post World War II German federalism and are often cited as aims of Indian and United States federalism.

Some federal countries are quite ethnically and linguistically homogeneous. Others that may be home to a variety of ethnic groups (such as the United States and Brazil) are not structured in such a way as to give autonomy and power to distinct peoples or national groups. Such countries may choose to use other instruments, such as those described above, to deal with the challenge of diversity; their federal systems were not designed for that purpose.

A number of federal countries are designed to reflect and give political expressions to their diverse population groups. Among these are: India, Spain, Ethiopia, South Africa, Belgium, Nigeria, Malaysia, Canada, and Switzerland. The combined experiences of those countries could be of interest to people wrestling with the challenge of constructing governance arrangements in situations of significant diversity. No single model is without significant flaws. That is one reason why it is helpful to examine a variety of models. As well, it is extremely unlikely that federalism as practiced in given country will provide a perfect fit for any other country.

Federalism is always designed with specific, local conditions in mind. No two federal countries are exactly identical, though there are a number of general principles and practices that apply to most. As well, even where government is structured on the federal principle (of shared and self-rule, and divided authority) that is not the only way a country is likely to assure that the rights of all groups are respected.

What some call “ethno”- federalism is very often accompanied by other measures, including language rights and consociational arrangements. The Nigerian federal system allows for each of

the states to assume a particular cultural character. At the same time, at the level of the federal cabinet there is an effort to assure that all groups are represented ( a consociational arrangement).

In what follows we will examine the federal model in greater detail, looking at it in terms of broad general categories, including economy and finances, distribution of powers among orders (sometimes called “levels”) of government and the role of courts. This is a short, general introduction to the way federal countries work, based on actual cases. Readers who have an interest in the subject will want to refer to more detailed texts, a few of which we recommend in the bibliography.

## 4) Federalism in detail

### 4.1) Federal constitutions

The federal principle is realized through a constitution, which defines functions and powers of the federal and constituent unit governments. Some constitutions, such as that of Nigeria, list the areas of jurisdiction that pertain to each order of government. Other constitutions, such as that of the United States of America, only enumerate the areas of jurisdiction that pertain to the federal government and leave all residual areas to the constituent units.

Most modern federations have similar lists of powers and place constitutional limits on governments. In the Indian and Malaysian constitutions, for example, government functions and powers are contained in a provision consisting of the federal list (functions and powers of the federal government) state list (functions and powers of state government) and the concurrent list (functions and powers of both federal / state Governments).

Citizens of federal countries are at once citizens of the entire country and of their home state, province, whatever. Each of the latter can have its own political personality -- normally, of course, within the framework of the constitution. That means not only that citizens of some states, provinces, etc. might pay different taxes than the others; it means that they might enjoy different language regimes than those of other states (provinces, etc.). That is the case in a number of federations that are designed to recognize and make place for diversity, including Canada, Switzerland, Spain and India.

### 4.2) Basic features and division of roles and responsibilities

Most experts agree that there are five features that capture the essence of the federal model as it is practiced in virtually all cases. These are:

1. At least *two orders of government*, each acting directly on their citizens; a formal distribution of legislative and executive authority and allocation of resources between the orders of government, including some areas of autonomy for each order;
2. Provision for the *representation and respect of regional and group views* within the federal (central) policy making institutions;
3. A written supreme *constitution not unilaterally amendable* and requiring the consent of all or a majority of the constituent units;
4. A *referee* to rule on disputes between the various orders of governments;
5. Mechanisms and processes to facilitate *intergovernmental relations* for those areas where responsibilities are shared or overlap.

In most existing federations, there are two constitutionally recognized orders of government – usually the central or federal government and the state/regional/provincial governments. (There exists a clear-cut division of powers and responsibilities between the orders of government. As a

general rule federal governments tend to retain exclusive powers and functions over the following areas:

- National security
- Foreign relations
- Currency/Monetary system
- External trade/commerce
- Citizenship
- Immigration, emigration, extradition
- Protection of intellectual property; property rights, and copyrights

Similarly, constituent unit governments usually have jurisdiction over the following areas:

- Public Utilities
- Administration and enforcement of state laws and programs
- Grants-in-Aid to local governments
- Police, public safety; law and order
- State and local infrastructure
- Health
- Education

The above list is by no means complete. Indeed, several federal constitutions do not provide an exhaustive list of specific responsibilities for the various orders of government. As mentioned earlier, the U.S. constitution only lists the powers of the federal government. The federal legislature (Congress) may legislate within its enumerated areas of jurisdiction as well as within any other area that it might choose to enter. The states, on the other hand, have the ability to legislate in areas that have not yet been occupied by Congress and they therefore hold the residual authority.

In Canada, by contrast, there is a clear allocation of power between the orders of government. All powers that have not yet been allocated by the constitution belong, by default, to the federal order of government. Thus, in Canada, it is the federal government that becomes the repository of residual powers. This ensures that no areas of jurisdiction are left outside the competence of both orders of government.

Still other federal constitutions mention concurrent lists of responsibilities. In India, for example, education is in the concurrent list. This means that both the centre and states are competent to legislate on issues related to education. Hence, there co-exist in India, both central and state boards of education, along with centrally and state funded post-secondary institutions, each functioning to a mandate laid down by the respective order of government.

#### **4.3) Orders of government working cooperatively**

In federal systems, central and constituent units are linked in a mutually interdependent political relationship. Consequently, it is in the mutual interest of all stakeholders that orders of government find ways of resolving their differences in less confrontational ways.

Governments usually find that their collective interests are best served when they seek cooperative solutions through intergovernmental channels. The nature and scope of intergovernmental cooperation in federations depends on a variety of factors. For example, in Germany, each party has the legal obligation of being pro-federal; each party has the legal obligation to cooperate in the interests of the federation. Countries with deep linguistic and ethnic cleavages coinciding with jurisdictional boundaries sometimes experience greater difficulty in securing harmonious intergovernmental relationships than countries whose social cleavages do not coincide with jurisdictional boundaries.

Intergovernmental relations can be managed using both formal and informal institutional arrangements. The authority of executives at both orders of government in Canada allows them to often strike agreements through informal and personal contact between their respective senior officials. In other cases there are formal contexts for agreement, such as conferences that include both levels of governments.

Intergovernmental relations can be conflictual and tense at times. However, it is generally easier to reach agreements when all parties subscribe to the rule of law and are genuinely committed towards accommodating diversity.

The way in which power is allocated to branches of government *within* each order also plays a significant role in shaping the character of intergovernmental relations.

In *parliamentary* systems such as that of Australia and India, the executives of the federal order and of the constituent units are usually able to bind their respective legislatures to agreements struck at the executive level.

Alternatively, in *presidential* systems such as that of the United States, the separation of authority between the executive and the legislative branches of government in both the federal and the state orders can make it difficult for executives to obtain the consent of their respective legislatures when the latter is controlled by a different party. This could frustrate attempts to achieve good governance through consensus.

#### **4.4) Representation at the centre**

Constituent units in a federal system are usually territorially based, although Belgium is an exception. To this end, constituent units must have representation at the centre. This representation could take the form of provinces/regions/states electing a certain number of members to some sort “House of the Regions” of the national legislature. Examples of these include the Senate in the United States or Bundesrat in Germany.

When the provinces/regions have a voice and a stake in the centre they tend to ensure that regional views are taken into account in the process of national decision making. In addition it helps keep in check a the tendency to reclaim power back to the centre. Such a chamber helps to prevent unreasonable encroachment by the centre on regional powers and is usually mandated by a written Constitution.

#### 4.5) Guarantee of rights

Some federations are established on the principle of ensuring the rights of all national minorities. This becomes especially delicate when it is impossible to draw interior borders between constituent units such a way that they capture the various ethnic groups. It is very frequently the case that a group that is a majority in one region is a minority in another. While territorial divisions can provide a certain measure of autonomy for diverse groups, the fact of de facto minorities throughout the country means that other mechanisms are necessary to assure that the rights of all are protected throughout the country.

For example, in Bosnia-Herzegovina, although there are Serb, Bosniak and Croat territories, none of them is *ethnically pure*. The federal government has been given the responsibility of creating an Office of the Ombudsperson that is answerable to the federal parliament to ensure that the rights of the national minorities are respected. This office works closely with the Human Rights Chamber.

Another approach is to enshrine in the constitution a corpus of fundamental civil rights enforceable by the courts. Such was the case when Canada introduced a Charter of Rights and Freedoms during in 1982. Since the 1970s, the Belgians have moved step-by step from a francophone dominated unitary structure to a bilingual federal arrangement.

The recognition among policymakers that there are few ethnically homogenous countries means that there is greater emphasis on providing communities with the requisite linguistic, religious or cultural protection. There is also a realization that politically accommodating diversity may actually enhance political stability by reducing polarization.

#### 4.6) Asymmetry

In a large number of federal systems, constituent units are considered to be equal and have the same legislative powers. However, the constitutions of certain federations provide for an asymmetric division of powers in order to reflect the differences among their constituent units. These differences may be territorial, demographic, linguistic, cultural or religious.

There are two main forms of asymmetric federalism. The first approach consists of increasing the federal government's authority in regions where the constituent unit's capacity to exercise legislative authority is less advanced or is temporarily undermined. In such cases, the federal government may take over until the constituent unit is in a position to exercise its own authority. Such was the case in India where, for the first six years of the Union, the federal government assisted certain less developed states until they were able to exercise their own legislative power.

The second, and more common approach to asymmetric federalism involves affording one or several constituent units more autonomy than the others. The Malaysian and Spanish systems are two of the best illustrations of this approach.

Although it is a centralized federal system, Malaysia has given the states of Sabah and Sarawak powers that normally fall under federal jurisdiction. Both states are ethnically distinct when compared to the rest of the country. These Bornean states have considerably more autonomy than the 11 other states in areas such as taxation (in particular customs and excise), immigration and

citizenship, trade, transportation and communication, fisheries and several social affairs sectors. Indeed people from mainland Malaysia are expected to present their passports while entering the Bornean states, much as they would if visiting another country. The aim of this approach is to protect the distinctive characteristics of the two states and their interests by regulating the flow of non-indigenous people.

In Spain, the Catalan and Basque Autonomous Communities have greater powers than the other constituent units of what is effectively, though not officially, the Spanish federation. When modern democracy was founded in Spain (in 1978, following the end of the Franco government) the “historic” minority nationalities were granted greater powers than the rest of the newly created regions of Spain. In fact, at first most regions did not have constituent unit administrations and only developed those, over time, through a process (defined in the Constitution) of negotiation with the central government.

The Catalan and Basque communities have had, from the outset, control over such matters as culture, education and, in the Basque case, all taxation. They are now seeking greater powers and this is a matter of vigorous and sometimes acrimonious debate in Spain – but a debate that is conducted according to peaceful, democratic rules. (Most of Spain’s other constituent units have negotiated lesser measures of autonomy than the Basque and Catalan communities.)

Spain is an interesting example of how a country can emerge from a regime where minorities suffered repression and denial of basic cultural rights, often accompanied by violence, to one where their rights are guaranteed and fostered by special institutional arrangements. Despite this, there is still a small extremist element in the Basque country that engages in violent attacks on the Spanish state structure. Some experts explain that these extremists are, in a way, still reacting to the conditions of the Franco period. The influence of this extremist element is quite limited.

#### **4.7) Non- territorial federalism**

Belgium has pioneered an ingenious form of non-territorial federalism. The small European country is divided into three main regions: Flanders in the north, Wallonia in the south and, as an enclave in Flanders, the Brussels-Capital Region. Each region has its own government, and there is a federal government for the entire country. The Flemish region is unilingual Flemish; the Walloon region, French. Brussels is bilingual. In order to provide services such as education to the populations of both regions and Brussels, the Belgians invented a “community” order of government.

There are, thus, a Francophone community government and a Flemish community government, and they are responsible for what the Belgians define as matters that pertain to the “person”, such as education, social services, culture, and health. The Regional governments are responsible for matters that relate to territory, such as transport and economic development. There is also a small German speaking population in eastern Wallonia. It also has a Community government, dealing with German speakers who live in that area. For territorial purposes, the German Community area is part of the Walloon region.

The Belgian model is a complex mixture of territorial and non-territorial (community) elements. If Belgium were to apply the linguistic community principle in a consistent way members of the

Francophone minority in Flanders and the Flemish minority in Wallonia would be considered part of their respective linguistic communities. But that is not the case. The Francophone community government has responsibility for French speakers in Brussels and in Wallonia. French speakers in Flanders are not included; and the same applies to the Flemish population. There are complex, local political reasons for these limitations on the “reach” of the linguistic community governments. The Belgium concept of “community” government is nonetheless a useful model for those seeking ways to accommodate cultural groups that are not geographically concentrated.

Other countries use such measures as constitutionally defined language rights, in combination with territory-based federalism, to guarantee rights to members of cultural groups who may be part of the majority in one region, but are minorities elsewhere.

#### **4.8) Secessionism**

Several observers point out that federal structures have not entirely succeeded in eliminating separatist impulses.

Canada has lived through two secession referenda in the French speaking province of Quebec (second largest Canadian province, home to 25% of the population). Federalism may have provided the framework for Quebec to hold these votes. But the democratic, constitutional system also made it possible for the debate over a proposed secession to take place peacefully and in a legal way.

A federal system does not guarantee that all members of “national” groups will always be perfectly content and satisfied. It does create the conditions for differences to be argued, and resolved, without recourse to violence or threat of violence. When the Ethiopians created their modern, multi-national federation following a long period of one party dictatorship and a series of civil wars, they made a point of including provisions for the legal right of secession in the new constitution. The federation, they argued, is a partnership based on a voluntary pact – not a prison.

Power-sharing or increased territorial autonomy gives distinct groups more confidence in their ability to preserve their distinctiveness. It does not mean that those groups will not seek full sovereign national status. Whether in a federal or unitary structure it is not unusual that political forces within certain groups should campaign for nothing less than national independence. Often this nationalist position if based on long histories of discrimination and oppression.

The least that federalism has been able to provide is a democratic, non-violent, rules based way of dealing with this secessionist impulse. Federalism won’t guarantee that national minorities will not seek greater autonomy or outright political independence. But federalism does not create that desire for independence. It exists in a variety of political contexts. If any claim can be made for federalism, it is that ethnic nationalist movements can often accept the large measure of “internal self-determination” that a federal structure can offer, as opposed to full national sovereignty. And, as we stated above, in the actual experience of democratic federations secession has been extremely rare.

#### **4.9) No unilateral changes and a “referee”**

A federal constitution is deemed to be a compact or covenant between the centre and the regions/provinces, and therefore, amendments require the consent of both the centre and a specific number of provinces/regions. Federal forms of government require power sharing that cannot be amended or withdrawn unilaterally.

In any country where there are state or provincial governments as well as a central government, there are bound to be occasions where conflicting or contradictory laws are passed by different orders of government. Each federation must find a way to resolve these contradictory enactments. The referee in such situations is usually the judiciary. In Switzerland, however, the electorate plays the role of referee through the process of referendums.

When the highest court of appeal of a federal country finds that a statute violates the constitutional division of powers, that statute is definitively struck down – or declared *invalid* – on federalism grounds. Given that virtually every federal constitution enumerates areas of jurisdiction without defining the specific activities that pertain to each area, there is usually some degree of uncertainty and disagreement with respect to the validity of statutes enacted by different orders of government.

The courts have to play an additional referee role in federations that have fields of concurrent jurisdiction. In such countries, cases are regularly brought before the courts that expose a clear contradiction between two valid laws, each of which has been enacted by a separate order of government. Constitutions that establish concurrent jurisdiction must therefore provide a rule for the courts to use for resolving such disputes. In Canada, for example, that rule is the principle of *federal paramountcy*. Under this principle, when federal and provincial laws cover similar subjects and are in conflict, the central law is operative and the provincial law (to the extent of the conflict) is rendered inoperative and the provincial law cannot operate so long as the central or federal law exists.

#### **4.10) Taxation and public spending**

Constituent units can only exercise political autonomy when they are fiscally autonomous. Indeed, it is fiscal autonomy that allows states and provinces to implement their distinct programs in their own fields of responsibility, even when they deviate from policies of the federal government. In federations, the division of powers goes hand in hand with the ability for each order of government to raise its own resources. These instruments of fiscal autonomy include the ability to raise personal and corporate income taxes, property taxes and revenues from the public ownership of resources.

Some constitutions also permit constituent units to raise funds via national and international capital markets. Fiscal autonomy is generally enshrined in a constitution and cannot be revoked unilaterally by the federal government.

There are significant issues in each federation about fiscal issues, how money is raised, how it is shared, how it is spent. In Canada resources are provincially owned and the windfall from that flows to different provincial governments. In Nigeria, the central government claims all oil

revenue and then divides it up according to a formula. In recent times, constituent units in many parts of the world have had to take on additional responsibilities in rapidly growing areas such as health and education. Given the inadequacy of existing fiscal arrangements to address the financial needs of constituent units there has been much debate over how these imbalances may be rectified.

There are two ways in which fiscal imbalances can be addressed. These include:

- **Vertical balance**

Vertical imbalances occur when there is a disparity between the constitutionally assigned expenditure responsibilities of federal and constituent governments and their ability to raise adequate revenue. Such imbalances may occur either because of unforeseen changes in taxation or expenditure regimes, or because the cost of responsibilities assigned to one order of government – such as the cost of education or social services, historically assigned to constituent governments – may have risen disproportionately over time.

Adjustments for such balances are made through tax-share arrangements between the various orders of governments or grants (both block grants and specific purpose grants). In the absence of clear guidelines governing the disbursement of grants in many countries, it is the subject of political debate. Usually individual provinces prepare their budgets separately and then attempt to reach agreements on allocations at regular meetings of treasury officials or ministers.

- **Horizontal balance**

Horizontal imbalances occur when revenue capacities vary across constituent units such that there is disparity in the level of services they provide to their citizens. To rectify this in Canada, the federal government makes unconditional transfer payments to provinces based on a formula (adjusted from time to time) aimed at equalizing their revenue capacities. This is in contrast with Australia, which goes to great lengths to equalize both revenue and expenditure aspects. Whereas the United States despite large inter-state disparities has no formal equalization system.

The issue of conditional or specific purpose transfer payments is controversial. Federal governments will sometimes make transfer payments to fund part of specific provincial programs to redress a shortfall in provincial funds. Such cost sharing transfers come with conditions, which makes them less popular since they erode provincial autonomy and constitute a *federal intrusion* into their fields of competency. While such programs ultimately help provinces meet their expenditure commitments, or increase equity among regions and social groups, the sustainability of such programs is dependent upon reaching consensus on the nature of the funding between the orders of government. The federal division of power typically requires collaboration between different orders of government with respect to areas of jurisdiction, which, though lying within the legislative competence of only one order, encompass pressing social needs requiring comprehensive, nationwide solutions.

## 5) Conclusion, with a few pertinent questions

Federalism can provide a fair and effective means for countries such as the Philippines, Indonesia, Burma, the Democratic Republic of Congo, Iraq, Cyprus, the Sudan and Sri Lanka to accommodate the unique needs of their diverse communities. Distinct groups in other countries have come to believe that federalism offers them the flexibility they believe they need in order to develop and implement their own policies in such fields as education, culture, social services, economic development and other matters.

Often, the boundaries of constituent units are drawn in such a way that a minority group on the national level represents a majority of the population of one or more of the constituent units. In Spain, for example, the autonomous community of Catalonia is the home of that country's Catalan minority. Similarly, although French-Canadians are an ethnic and linguistic minority in Canada as a whole, they form the substantial majority of the population of the Province of Québec.

As previously discussed, many federations have to deal with the issue of intra-unit minorities. In India for example, the state of Assam, where Assamese is the official language, the Ahom community only forms 28% of the total population, other large linguistic groups in the state include Bengalis and Bodos, who speak their own distinct languages.

Post-conflict institution building in multiethnic societies often entails both democratization of the state and bringing about reconciliation between ethnic groups with a recent history of mutual antagonisms. This would require the protection of minority rights on both territorial and non-territorial basis. The federal system is flexible enough to allow for this.

Federalism is only one option that countries may seek to exercise in managing ethnic diversity. However, regardless of what structure might evolve policy makers need to consider a host of issues with regard to its form. In general, they need to clarify the relationship among constituent units (or peoples) on the one hand, and the relationship between the national government and constituent units, on the other. While the questions that follow are by no means exhaustive, they nevertheless cover many of the basic matters that need to be resolved when crafting institutions to accommodate ethnic diversity:

- ❖ What or who will the constituent units/people be? How many should there be and on what basis will their borders be demarcated? For instance: how would the state demarcate what constitutes an ethnic group or indeed would a federal structure have eighteen, five, three or two units?
- ❖ What distribution of powers and responsibilities is envisaged for the units and the centre? Will there be two lists distributing powers or three, including a concurrent list?
- ❖ What powers will be exclusive? Which shared? Where would the residual power reside; and in areas of shared jurisdiction which order of government will have primacy?
- ❖ Will there be provisions for constituent units to assume less or more power, according to their desires and needs; will there be provision for asymmetrical arrangements (i.e. will one

constituent unit have greater powers than the others – such as Catalonia in Spain, or Scotland compared to Wales in the UK)

- ❖ How would the federal principle or power sharing be reflected in the central political institutions so as to make them truly national as opposed to central (e.g.: the electoral system, representation in institutions such as the courts, the public service, the armed forces and police)?
- ❖ What are the mechanisms to provide for regional representation at the centre? Will there be an upper house? How will it be constituted and what powers and responsibilities will it have?
- ❖ Should there be constitutional recognition of a third tier of government? Could there be institutional arrangements to serve the needs of communities on a non-territorial basis?
- ❖ What provisions will be included for minorities, both at regional and national levels?
- ❖ How will the Chapter on Fundamental Rights/Bill of Rights be designed? What mechanisms will be used to enforce/protect rights?
- ❖ How would language rights be defined and protected? What language provisions would apply to the police, armed forces and public service at national and regional level? How would language rights be reflected in educational institutions, courts, etc.?
- ❖ Would a new constitution contain provisions for constitutionally established institutions to provide services to particular ethnic, linguistic or religious communities?
- ❖ What kind of Constitutional Court will be established? How will it be selected (in such a way to guarantee that all regions and groups are represented and protected)? How would references to the court work? Would the court have final jurisdiction with respect to citizens' fundamental and language rights as well?
- ❖ What sort of fiscal arrangements will there be? For instance, would all taxes be collected by the centre and redistributed according to a set formula? Or would all orders of government collect taxes? Would there be differential access to different kinds of taxes? What kind of equalization provisions would there be?
- ❖ Would there be a basic statement of "Federal Comity" embedded in the constitution- some kind of agreed-to "Principle of Co-operative Government"?
- ❖ How would the amending procedure be defined so as to assure a decisive role for both the centre and the constituent units?
- ❖ How would a new federal structure be ratified? What kind of consultation and citizen participation would there be in the process of approving a new constitution?

- ❖ How will the parties ensure that there is support among the members of the public for the evolving negotiated agreements? What is the anticipated place and role of political parties and citizens in the process of negotiations?

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