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Federalism, the subnational constitutional framework and local government: Accommodating minorities within minorities

by

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Abstract

Not a single federation has been successful in demarcating the territorial matrix of the federation into ethnically pure subnational units. This includes federations that are primarily designed to accommodate ethnic diversity. There are usually ethnic minorities scattered in the midst of subnational majorities. The focus of this contribution is on how the institutional design of states can be used to respond to the challenges of minorities within minorities. This article proposes the adoption of constitutional principles that would guide ethnically plural subnational units in their dealing with internal minorities. A subnational constitutional framework that is based on the constitutional principles of self-rule (and possibly shared rule), this article argues, represents the best hope in addressing the majority-minority tension that characterizes subnational units in multinational federations

Key-words

Minorities, federalism, subnational constitution, local government

1. Introduction

The translation of the self rule and shared rule elements of federalism into tangible institutional arrangements goes a long way in terms of accommodating ethnic diversity within the context of geographically concentrated ethnic groups. This is particularly true in multi-national federations where some or all of the subnational units are roughly congruent with ethnic boundaries, thereby, enabling ethnic communities to manage their own affairs.[I] It is, however, widely accepted that it is impossible to create an ethnically homogenous subnational unit. Not a single multi-national federation has been successful in demarcating the territorial matrix of the federation into separate ethnically defined territorial units. In cases where territorial autonomy within federalism is possible for concentrated ethnic groups, there have usually been ethnic minorities scattered in the midst of regional majorities. In the case of India, for example, the federation "has done a lot in containing ethno-linguistic diversity tension by reorganizing the states to reflect language diversity, yet such reorganization has still left minorities within the state boundaries at the mercy of the states".[II] Both assimilation and the extreme measure of ethnic cleansing have also not been able to leave us with ethnic groups that neatly and precisely fall into separate geographical units. The extensive movement of citizens across internal borders also contributes to the rarity of an ethnically pure political unit. Intra-substate minorities are therefore present in most, if not all, federated units. As Cairns remarks, the vision of a federal system with coinciding ethnic and subnational boundaries is "chimerical".[III]

The impractical reality of creating an ethnically pure subnational unit brings to the fore issues about the majority-minority tension at the level of the constituent units. It invokes the problem of minorities within minorities as there is often a fear that minorities face stronger discrimination from regional authorities than they usually encounter from central government. As Choudhry points out

> "*One of the arguments frequently advanced against the accommodation of minorities nationalism through federalism is that it may lead to the creation of local tyrannies. Ethnocultural minorities who constitute a local majority might view the subunit as belonging to them rather than to each one of the subunit's residents. A possible result might be a "sons of the soil" politics encouraging and, perhaps,*

legitimizing discrimination against internal minorities in the framing of public policy, the delivery of public services, contracting, and public employment."[IV]

The focus of this contribution is on how the institutional design of states can be used to respond to the challenges of minorities within minorities.[V] It, in particular, examines the relevance of local government in responding to the multi-ethnic challenge. It examines the relevance of local government as institutional solution to the tension that exists between regionally empowered groups and their internal minorities. Based on similar institutional principles that federalism specifically makes available for the purpose of accommodating ethnic diversity, this article proposes the adoption of constitutional principles that would guide multi-ethnic subnational units in their dealing with internal minorities. A subnational constitutional framework that organizes local government based on the same constitutional principles of self-rule (and possibly shared rule), this article argues, represents the best hope in addressing the majority-minority tension that often characterises subnational units in multi-national federations.

A few caveats are in order. First, the adoption and implementation of the constitutional principles does not necessarily represent a panacea to the majority-minority tension that characterizes subnational units in multinational federations. Rather, the framework, by providing additional means to channel and regulate ethnic claims, serves to mitigate the harms that flow from ignoring the status and treatment of those who do not belong to the empowered regional majority. Second, it is well established that the success of a political system in responding to the challenges of ethnic diversity depends on the interplay of a host of factors, including the rule of law, democracy and the culture of human rights. This contribution does not focus on these processes and structures. The focus is on constitutional/institutional design and how it can be used to address the plight of internal minorities.

This article proceeds in four stages. First, it discusses the limitation of the bill of rights approach in addressing the plights of internal minorities. The article proceeds to discuss the option of territorial solution, with special focus on local government. This is first discussed by outlining the status of local government in multi-national federations. The article then discusses the inclusion of counter-majoritarian elements, including the local government solution, in a federal constitution in a form of constitutional principles that

specifically guide subnational units in their relation with internal minorities. Finally, the article briefly discusses the 'collateral' dangers of localizing ethnicity in the effort to address the plight of internal minorities and provides few general remarks.

2. Bill of Rights as a device to protect internal minorities

Judicially enforceable bills of rights are often regarded as instrumental in protecting internal minorities. A number of rights are relevant, directly or indirectly, to accommodate the needs of persons belonging to minorities. With respect to rights related to ethnic relationships, the bill of rights guarantees the rights of the individual to use his language or exercise his culture alone or in any form of association with others. The non-discrimination clause is also often invoked to protect minorities. Discrimination against anyone based on language, religion or the way of life that is followed as a result of his or her association with a certain ethnic or national group is often prohibited. The bill of rights imposes on the state the duty to respect, among other things, these and other related rights.

The judiciary plays an important role in ensuring that the government fulfills the duty to respect and protect the rights of the individual. Canada, for example, relies on the constitutionally entrenched bill of rights in order to protect regional minorities. An array of both individual and groups rights are included in the 1982 Charter of Rights and Freedoms. Among the included groups rights are rights of minority language and educational rights, which are judicially enforceable. As Choudhry notes, "[t]hrough its provisions for equality rights and interprovincial mobility rights, the Charter of Rights and Freedoms rules out policies that openly discriminate on the basis of ethnic identity or against recent migrants from other provinces".[VI] The application of these protective measures was discussed in a case that involved the decision of the Quebec government to adopt a law that attempted to elevate the regional language, French, to a majority status.

In 1977 the Parti Quebecois government adopted the Charter of the French Language, famously known as Bill 101. The Charter sought to promote the use of French and at the same time restrict the use of English. It obliged both immigrants and Canadians moving to Quebec to send their children to a French school and mandated the display of commercial signs in French only. Some of these restrictions were challenged before the Supreme Court

of Canada. The rights included in the Charter of Rights and Freedoms were instrumental in successfully challenging these restrictions. Based on aspects of the bill of rights included in the Charter, court decision abrogated part of the legislation. The Supreme Court, in 1979, decided that provisions making French the only official language of legislation and justice violate section 133 of the British North America Act, 1867, which guarantees legislative and judicial bilingualism in Quebec. Part of the law that restricted the rights to education in English was struck down entitling not only people who had been educated or whose parents had been educated in English in Quebec but also those who had been educated English elsewhere in Canada to have their children receive education in that language. The Court in 1998 also struck down the rule that imposes French as the only language to be used on commercial signs on the ground that it represents unjustifiable limitation of freedom of expression (See Swinton 1995).[VII] This particular experience of Canada suggests that a bill of rights, enforced with a strong and independent judiciary, can provide some level of protection to internal minorities.

The problem with the bill of rights approach is that it only provides for negative rights, which protect individuals against discrimination and majoritarian abuse.[VIII] As noted by Pildes,

> "*[j]udicial review operates at best as an ex post check or negative veto on the exercise of political power. It can afford, perhaps, a defensive shield. But judicial review rarely is capable of ensuring a fair distributional allocation of goods or of providing affirmative benefits to minority groups. It also does not respond fully to the expressive demands for recognition that are so often central to ethnic minorities and to the legitimacy and stability of democratic institutions across ethnic groups*".[IX]

The bill of rights approach becomes especially insufficient when there is an important minority that may not be satisfied with negative rights, even more so when that minority is generally territorially concentrated and have deep historical roots in the subnational unit in which they are living. Such minority groups do not want to be treated as guests whose rights must be respected. Often, they demand powers that allow them to participate in the management of the constituent units. They demand the provision of mechanisms for political participation and representation. They, as a result, often emphasize the deficiency of the individually oriented bill of rights in protecting regional minorities. In this respect,

the bill of rights and the judiciary are regarded as relatively insufficient institutional responses that cannot adequately address the concerns of internal minorities. Effective protection of minorities requires the judicially enforceable bill of rights to be complemented by other protective mechanisms. It requires "credible institutional commitments" that are "built directly into the structures of political governance, within either or both the legislative and executive branches".[X]

The major criticism levelled against the bill of rights approach is, however, that it is an approach that is based on the assumption that the state can be neutral on ethnic and cultural matters. That cultural matter can be left to the private sphere, with the state neither promoting nor inhibiting a particular group. It is now, however, well established that the state cannot remain neutral with regard to ethnic relationships.[XI] There is no way that the state can avoid recognizing and promoting the identity of a particular ethnic group. A state that claims to follow a policy of neutrality often ends up identifying itself with a particular ethnic group. This is particularly the case with ascriptive identity like, for example, language. A government has to adopt the language of government business. When a government opts to use a certain language as the official language, "it is providing what is possibly the most important form of support needed by [a particular language group], since it guarantees the passing on of the language and its associated traditions and conventions to the next generation".[XII] Simply put, a multi-ethnic state cannot remain neutral to ethnicity or in matters where ethnic relationships are concerned.

From the foregoing, it is clear that the bill of rights is not sufficient to deal with the concerns of minorities. To be precise, the bill of rights is relevant in addressing the concerns of minorities within minorities. But it cannot effectively respond to the challenges of such minorities and certainly it cannot be the only institutional solution. It must be complemented by other institutional measures.

3. Territorial solution

The inadequacy of the bill of rights to respond to the multi-ethnic challenge raises the question of whether a territorial solution should be sought to address these challenges. Of course, this option assumes that the minorities within the sub-national state are generally

territorially concentrated. There are two ways that a state can go about implementing a territorial solution to these specific challenges.

The first option is to allow the ethnic group to break away from the sub-national unit and establish a subnational unit where it is in the majority. In other words, it provides for internal secession. Two such examples come to mind. In Switzerland, a new canton, Jura, was established in 1980 out of the Berne Canton in response to demands for greater autonomy.[XIII] Another federation that provides a constitutional framework for internal secession is Ethiopia. Although it has not been put into practice to date, a major guarantee for the protection of internal minorities in Ethiopia comes from the recognition of the Constitution that the configuration of the state has not resulted in separate ethnically pure subnational units. Article 47(2) of the Constitution provides that ethnic groups within the nine subnational units have the right to establish, at any time, their own subnational unit or state, as they are called in Ethiopia. It provides for a procedure according to which an ethnic group can secede and establish its own state.[XIV]

Although the division of subnational units in response to internal demands for self government by internal minorities is one possible option, it cannot be a "constitutional routine"[XV]. Admittedly, this particular solution might not always be available and not even advisable. In line with the old adage that says not every nation can have a state (MacCormick, 1996),[XVI] not every ethnic group, albeit territorially concentrated, can have its own subnational unit. To begin with, this is not practically possible in many multi-ethnic countries that are inhabited by copious ethnic groups. In a country where there are numerous ethnic groups, it is practically impossible to provide each group with a 'homeland' of its own. Even where possible, this option might entail the creation of micro-subnational units that are too small to achieve the status of a self-governing subnational unit.

In addition, the internal secession option incorrectly presumes that providing an autonomous territorial unit for each aggrieved ethnic group is the way forward. Ethnic groups do not necessarily require a subnational unit of their own. They may only be satisfied with the establishment of an inclusive subnational government that provides the different ethnic groups inhabiting the subnational unit a means for political participation and representation. It is only after this and other options are exhausted that one may resort to the internal secession option. Otherwise, the internal-secession-option would represent a

knee-jerk response and a simplistic approach to a very complex question. Furthermore, throwing the status of a subnational unit to each disgruntled ethnic group would simply send the wrong message that each ethnic group is entitled to a 'homeland' of its own. Considering the associated benefits of power, influence and representation, this could open the floodgate for persistent demands for the status of a subnational unit. This is problematic as it can easily play into the hands of ethnic entrepreneurs who would use the demand for territorial autonomy as a mask to advance their political ambitions rather than protect the identity of the community they ostensibly represent.

The limits of the internal secession option direct one to examine the second territorial solution. Unlike the internal secession option, this option does not require the reconfiguration of the subnational boundaries of the state. It is concerned rather with the territorial subdivisions of the subnational units in which disgruntled ethnic minorities reside. In particular, it inquires whether a territorial solution in the form of local government can be used to respond to the challenges that emanate from the intra-subnational diversity of the state.

The literature on federalism and ethnic diversity has rarely touched on the relevance of local government in addressing the multi-ethnic challenge. Of course, the suitability of local government to address these concerns is not straightforward. The issue is complicated by the often jealously guarded autonomy of subnational units in multinational federation and the status of local government in relation to the autonomous subnational units within which they are situated. Thus, determining the relevance of local government in addressing the challenges of ethnic diversity requires going one step back and examining the place of local government in multi-national federations, federations that are designed to address the challenges of ethnic diversity.

The place of local government in multi-national federations

Federations were often viewed and constitutionally organised as a two-tier structure, involving a federal government and subnational units. In this classical view of federalism, the discussion of autonomy was confined to the territorial, legislative and sometimes, financial authority of subnational units. The concept of autonomous local government enjoying powers that directly emanate from the Constitution was unknown to many

federations.[XVII] In fact, local government was regarded as a stepchild of national and subnational governments.

Recent developments in the world of federations suggest an increasing role and autonomy for local government. Some have even moved towards making local government a full member of the federal partnership. The leading country on this front, South Africa, adopted a three-tiered government, with its constitution providing a considerable degree of legislative and financial autonomy to local government.[XVIII] Nevertheless, the enhanced status and role of local government has been and remains deeply contested. It is far from being a universal and widely accepted notion of organising a multi-level government. Yet, all the available evidence strongly indicates that the trend that suggests an ever-increasing place for local government is here to stay.[XIX] Notwithstanding these developments, the role and place of local government in addressing the challenges of accommodating ethnic diversity has received scant attention. Local government is often viewed as the means to bring government closer to the public and as an engine for economic growth and development. Its relevance in addressing the multi-ethnic challenge has not been addressed. The matter is not, of course, simple or straightforward.

The viability of autonomous local government protecting minority interests is complicated, as indicated earlier, by the strongly defended autonomy of subnational units in multinational federations. Thus, the point of entry here is obviously to determine the status of local governments in multi-national federations compared to those in mono-national federations, especially with regard to their relationship with the subnational units within which they are situated. The next step after that is to identify the implications of the relationship between subnational units and local government in multi-national federations for the capacity and relevance of local government to deal with the concerns of internal minorities. Based on the different premises that underlie the two types of federations mentioned above, this article suggests that a local government in multi-national federation should have a status that is distinct from its counterpart in mono-national federations. More specifically, the logic of multi-national federation implies a local government whose measure of self-rule is bounded by the autonomy of subnational units. This casts doubts on the likelihood of multi-national federations joining the bandwagon of federations that are experiencing the emergence of local government as a full member of the federal partnership, alongside the national and subnational government.

The basic distinction between mono-national and multi-national federations lies in how the basic premises of the two federations view the society they seek to regulate.[XX] The mono-national dispensation views the state as a constituting one society or people. This monolithic conception of the state presents the inhabitants as undifferentiated homogenous group, representing a singular national identity. A multi-national federation, by contrast, accepts the existence of more than one *demos* or nation within the state. In the realm of federations, these contrasting views of the state and the society they seeks to regulate often finds expression in the institutional organisation of the state and more specifically in the territorial structure of the federation. In mono-national federations, boundaries are often drawn according to geographical or administrative convenience. Based on its premise that the various communities form a common society, a mono-national federation declines to reflect its ethnic diversity in the territorial division of the state.[XXI] In multi-national federations, on the other hand, the demarcation of territorial boundaries takes communal bonds into account. In this form of territorial division, "ethno–regional communities are considered as most appropriately represented through their spatial compartmentalization (states, cantons, provinces, communes), predicated on the belief that ethno–regional or national communities should receive due territorial recognition".[XXII] The boundaries of the territorial units of a multi-national federation, more or less, coincide with cultural and ethnic boundaries.[XXIII]

In the context of multi-national federations, thus, the autonomy of subnational units represents the territorial and political autonomy of ethnic communities. In other words, the recognition of ethnic communities is expressed in the legislative, financial and political autonomy of the subnational unit in which they are in a majority or that is defined as belonging to them. That makes subnational units in multi-national federations communities and not mere political units or administrative divisions. This is also evident from the manner in which interferences from the national government is often perceived by such subnational units.[XXIV] Centralisation of powers by the Spanish national government would invoke little or lesser anger from the 14 autonomous communities as it would among the other three ethnic-based subnational units (i.e. the Catalonians, the Basque country or Galicia), and, most importantly, not for the same reason. If any of the 14 Spanish communities object to the centralisation policy proposed by the central government, it would most probably be on the grounds of efficiency or democracy. Ethnic-based units

would, however, resist such centralisation policy based on the ground that these policies pose a threat to the very survival of their respective communities.[XXV] In Canada, for example, the financial dominance of the federal government is regarded by the government of Quebec not as a mere interference with the autonomy of the Quebec province but also as an "invasion [that]…poses a threat to the cultural distinctiveness of the Quebec nation".[XXVI] This indicates the way autonomy is understood or perceived by subnational units in multi-national federations is quite different from those in mono-national federations. This, of course, relates back to the fact that subnational units in multi-national federations are regarded not as mere administrative divisions but as an embodiment and recognition of the distinct-society-status that these ethnic communities are said to possess in the body politic.

With respect to the organisation of local government, two important consequences flow from this specific understanding of autonomy in multi-national federations. First, it suggests that a subnational unit in multi-national federations, being a self-governing community, has the sole authority to decide on the organisation of administrative structures within its territory. As a self-governing community, the subnational unit may decide to use its territorial structure to reflect its particular identity. In the case of ethnic community where the practice of traditional authority is widespread, for example, the community may decide to establish local governments that are either based on traditional authority or, at least, accommodate, traditional authority in their governance system. This suggests that the organisation of local government must be a matter left to the subnational units. The subnational government decides on the structure, including type and number, of local governments within its territorial jurisdictions. In short, local government becomes the jurisdiction of subnational governments. This includes the nature and scope of autonomy enjoyed by local governments. This does not mean that local governments in multi-national federations must not be entrusted with some level of autonomy. The point is rather that the logic of multi-national federations suggests that local government exercise their autonomy within the frameworks stipulated by subnational governments.

Secondly, this particular understanding of autonomy implies that the national government should have little or no power to interfere in matters of local government. This prohibits the national government from using local government as a backdoor to interfere with the autonomy of the subnational unit. A constitutional system that allows the

national government to interfere in the power and functions of local government places the former in an ideal position to circumvent the constitutional autonomy of subnational units. Policies that, for example, allow the federal government to directly fund local government would be problematic. Such policies will not only allow local government to "emerge from the shadow of" the subnational units[XXVII] but also allow the federal government to undermine the autonomy of the subnational units. That is why subnational units often "perceive the growth of local autonomy…as a zero-sum game in relation to their own powers since an increase in local powers means a decrease in their own".[XXVIII]

From the foregoing, it is clear that local governments in multi-national federations must be the jurisdictions of subnational units. The organisation of local government must be left to the subnational units. This also applies to subnational units that have territorially concentrated minorities in their midst. This means reliance on the policy and legislative framework of subnational governments regarding the accommodation of their internal minorities. This is not necessarily a bad idea. The subnational unit, in order to accommodate its internal diversity, may put in place constitutional and legislative measures that protect the cultural and political identity of its minorities.

As indicated at the outset, however, the experience in multi-national federations is not encouraging. Regional majorities rarely sympathize with their minorities. They often impose their language and culture on regional minorities. In India, for example, the Constitution declares Hindi and English as the two official languages. At subnational level, however, the decision on the use of language for official purposes is left to each state. Unlike the South African Constitution that, for example, requires each province to at least adopt two of the official languages, the Constitution leaves the matter of language regulation to each state. The Constitution does not, for example, oblige the states to adopt minority languages for official purposes. Bihar and Uttar Pradesh are states with a large number of Muslim residents where the predominant mother tongue is Urdu. Despite this reality, the two states did not initially adopt Urdu as the language of government business, putting pressure on Urdu speakers to assimilate to the language and culture of the majority. As Adeney (2000, 15) notes, "Urdu was only introduced in these states in the 1980s through an ordinance by the central government". Furthermore, subnational majorities often exclude internal minorities from political representation and participation. As Cairns puts it, regionally empowered majorities are prone to see regional minorities in their midst

as practical challenge to their cultural integrity – as the enemy within – and often "hostile to whatever cultural or other difference the minority individual possesses".[XXIX] Ironically, this is even the case with new majorities that, in the recent past, experienced cultural and political domination by national majorities. These new majorities tend to have a short memory. Despite their own first-hand experience of the horrors of cultural and political domination, they subject ethnic minorities to this very treatment as they pursue their agenda of promoting national ideologies and common identity, which are often articulated in the images (i.e. culture, history and language) of the numerically dominant group.[XXX]

To recap, the strong nature of the autonomy of the subnational units in multi-national federations means that the national government cannot have free rein in the affairs of the former in the name of protecting internal minorities. At the same time, the experience of many ethnically plural federations exposes the dangers of leaving the fate of internal minorities in the hands of regionally empowered ethnic groups. Based on these two points, this article argues that a more plausible response to the challenges of accommodating intra-substate minorities can be found in the adoption of a constitutional framework that guarantees some measures of accommodation to internal minorities. More specifically, it proposes the inclusion of counter-majoritarian elements, including the local government solution, in the federal constitution in the form of constitutional principles that specifically guide subnational units in their relation with internal minorities.

4. Constitutional principles for accommodating internal minorities

The idea of constitutional principles to guide the constitutional framework is a concept borrowed from South Africa. In that country, the drafting of the 1996 Constitution or the 'Final Constitution', as it is often referred to in South Africa, had to comply with a set of 34 Constitutional Principles which were agreed upon by the negotiators and which were made part of the Interim Constitution. The Constitutional Principles were adopted as a guarantee for the negotiators that the counter-majoritarian elements of the Interim Constitution would be maintained in the Final Constitution. The Constitutional Principles included, among other things, a guarantee that the final constitution would acknowledge and protect the diversity of languages and cultures including the recognition of provincial constitution and the right to self determination. For the 'Final Constitution' to come into

effect, it was agreed that the Constitutional Court had to certify its conformity with all Constitutional Principles.

Similarly, this article suggests that a federal constitution for a multi-ethnic state can include constitutional principles that would constitute the normative framework for the treatment of internal minorities. The proposed normative framework would stress that ethnically plural subnational states are sharing with the federal state the same challenges of accommodating ethnic diversity but only at a lower level and that they, like the federal government, have to come to terms with their ethnic diversity. This means, among other things, those subnational units must be guided by the same principles that the federal state relied on when responding to the multi-ethnic challenge; principles, which if adopted, would signify a commitment to equal treatment of internal minorities.

One such principle that the federal constitution can require the subnational units to adhere to is the principle of self-rule. This principle requires the subnational unit to provide its internal minorities a full measure of self government. It must allow them to manage their own affairs. Although there are different ways in which to give effect to the principle of self-rule can be given effect to through different ways, it basically requires the subnational unit to provide ethnic minorities that are territorially concentrated some form of territorial autonomy, a delineated part of the subnational unit in which ethnic minorities manage their own affairs.[XXXI] This means the territorial configuration of the subnational unit and especially the organisation of local government has to take ethnicity into account. This would result in a situation where territorially concentrated ethnic minorities have a local government in which they are in a majority. This provides ethnic minorities with the territorial space that is often necessary to promote language and culture. It also provides ethnic groups a means for a political participation and representation.The ethnically diverse subnational units in Switzerland have used their 'ethnically more or less homogenous municipalities' to provide their internal minorities some level of self rule. In the trilingual canton of Grison, for example, one can find "small Romansh-speaking Catholic and Romanish-speaking Protestant municipalities and German-speaking Protestant as well as Catholic municipalities side by side within a small area".[XXXII]

Of course, providing territorial autonomy to internal minorities does not mean that the entire local government territorial matrix must be guided by a demarcation process that takes ethnicity as its main point of departure or sole criterion. In any multi-ethnic state, not

all ethnic communities demand self-government. In most cases, a state would be composed of communities that, due to historical reasons, demand a certain level of autonomy and others that merely regard themselves as part of a single national identity and do not have any aspiration for self-government. Such disparities are available among the communities that inhabit most subnational units and the territorial design cannot ignore but must take these factors into account. In such cases, an asymmetrical arrangement that allows the provision of differentiated treatment to particular ethnic communities can be considered.

In so far as the institutional translation of the principle of self-rule is concerned, the potential relevance of the territorial arrangement in responding to particular ethnic claims and, hence, accommodating ethnic diversity, cannot be solely based on the nature of the territorial configuration of the subnational state but also on the powers and competences that are accorded to these local governments. In most federations, the powers of local governments are limited to the provision of basic social and economic services. The list of functions a typical run of the mill local government performs includes the provision of utilities, such as water, sewerage and electricity, local amenities, abattoirs, refuse removal, sanitation, fire fighting services, social welfare, roads and traffic, health services and the like.[XXXIII] It is very unlikely that a disgruntled ethnic community can be satisfied by a local government that is only responsible for the provision of basic utilities to the neighbourhood. As the experience of multi-national federations suggests, most politically mobilised ethnic groups often demand control over matters that are relevant to them, which are usually identity-related matters. This implies that the principle of self rule that seeks to respond to ethnic claims cannot avoid including a sub-principle that suggests a division of power, which entrusts the relevant local governments with competence on matters that are of particular relevance to their community. Such an entitlement allows each local government and, hence, the community, to preserve and promote its identity as well as freely pursue its own cultural development. In this regard, the experience of multi-national federations suggests that the identity-related competences on which such a local government should exercise control are, broadly speaking, language, culture and education. This usually extends to institutions and structures through which these areas find further practical expressions. This, for example, refers to schools, museums, libraries, theatres, broadcasting agencies and the like.

The question is, however, to what extent the identity-related functions mentioned above can be performed by a local government. This is both about the capacity and suitability of local government to discharge these responsibilities. In as much as the suggestion appears to go too far in empowering local government, there is enough evidence to show that local governments, in many countries do, in fact, perform most of these functions. The local governments in Ethiopia that are specifically designed to address the concerns of minorities have the power over language policy both for the purpose of government business and education at the local level. They are also empowered with the power to promote and preserve the culture of the community on whose behalf they are established. Municipalities in Scotland have public holidays that are distinct from the state-wide public holidays (Keating, 2001, 105). Most local governments exercise control over primary and secondary education; Local governments that exercise control over culture and, by extension, museums and libraries are also not uncommon.[XXXIV]

From the foregoing, it is clear that a local government is a suitable locus of authority to promote language as it can designate the language of government business at the local level. It can also adopt policies that help to promote and preserve the culture of its community. This extends from the simple power of designating particular days as public holidays to controlling libraries and museums which help to preserve the cultural heritages of a community. The local government can also exercise control over education although the extent of this power can be contested. To be precise, local government can exercise control over primary and secondary education, including the medium of instruction. On the other hand, the extent to which local government can either design or influence educational curriculum is debatable. Nevertheless, the point remains that there is little to doubt that local government cannot effectively discharge responsibilities that are related to identity-related matters.[XXXV]

Reality check! Adopting lofty constitutional principles and simply trusting multi-ethnic subnational units to realise the principle of self rule could be a pious wish. The literature on multi-national federations is awash with evidence that amply demonstrate the capriciousness of subnational units to give effect to such types of constitutional stipulation. This calls for an independent and impartial enforcement mechanism that does not solely rely on subnational units. One such option is to give the national government supervisory authority, which may include the power to ensure that subnational units comply with the

self rule and shared rule principles envisaged in the constitutional framework. This may include the power to take any appropriate steps to ensure the fulfilment of constitutional principles and obligations implied thereto. This might range from the rather soft measure of writing notices and directives to the subnational government, outlining the extent of the failure to meet its obligations and stating any steps required to meet its obligations, to the more extreme measure of intervening in the works of the subnational government and taking over the responsibilities of the subnational government with regard to the enforcement of the relevant constitutional principle/s.[XXXVI] This option views the national government as the guardian of minority rights. It would allow the central government to assume a Big Brother role to regulate or supervise the policy and practice of sub-national governments towards minorities. An example in this regard comes from India where the President is "empowered to appoint a special officer for linguistic minorities", thereby, providing "a procedure for minorities to complain to the national government".[XXXVII]

However, one can easily identify few problems with the approach that posits the national government as the guardian of minority rights. First, not only would this supervisory power of the federal government be unacceptable by the regionally empowered group, it would also become a continuous source of tension and conflict between the two tiers of government, creating a perennial stress on the federation.Secondly, there is no guarantee that the federal government may not use and abuse this power to circumvent the constitutional autonomy of subnational units. A good example of partisan abuse of such 'intervention powers' comes from India where Article 356 of the Constitution allows the central government, and particularly the President, to suspend the state government and take over its responsibilities on the ground that 'the state cannot be governed in accordance with the Constitution". Between 1967 and 1987, the central government made use of Article 356 to suspend state government for a staggering 72 times. On more than half of "these occasions", "the power of the central government was invoked by the ruling national party to undermine a state government which was in the hands of a party or coalition that was opposed to the national party"[XXXVIII]

The other alternative is to ensure the enforcement of constitutional principles, including the settlement of disputes that may arise from the implementation thereof, through the establishment of an impartial body. This could take the form of a court or a panel that is composed of individuals who are qualified and well-suited to adjudicate such matters. This,

of course, is now new. An impartial adjudicating body, either in the form of a constitutional court or Supreme Court, is an important feature of many multi-national federations.[XXXIX] As is evident from the experiences of these federations, these adjudicating bodies play an important role in maintaining the balance between unity and diversity. Thus, an independent court (Supreme Court or a constitutional court) or panel seems to be an ideal candidate to ensure the implementation of the constitutional principles. Such a body can be entrusted with the power to decide on issues relating to the right of ethnic communities to exercise self-rule and achieve representation in important subnational decision-making bodies. Members of an ethnic group who claim marginalization and suppression in the hands of subnational majority can present their application to this body. But, most importantly, laws and actions of subnational government affecting the identity of internal minorities can be subject to the process of 'certification', which determines their compliance with the constitutional principles. An interesting example again comes from South Africa. As indicated earlier, the adoption of the Final Constitution was made subject to its compliance with the Constitutional Principles. The duty of deciding whether the final draft complies with the Constitutional Principles was left to the Constitutional Court. A similar power of certifying the laws and actions of the subnational government on matters that affect internal minorities can be given to an impartial body, which, as mentioned earlier, could be a court (a constitutional court or a special court) or a panel.[XL]

5. Conclusion

As indicated at the outset of this article, a geographical configuration of a federal state, including one that heavily relies on ethnicity in the making of subnational units, does not leave us with separate ethnically pure territorial units. Be it indigenous ethnic groups (i.e. indigenous to the area they inhabit) or ethnic migrants, there will always be ethnic minorities that are scattered in the midst of regional majorities. A multinational federation that grants a mother state to a numerically dominant ethnic group within a territorial unit often exposes minority groups to discriminatory policies of the regionally dominant group. Such an arrangement would only move the locus of interethnic conflict and tension from the central government to the level of the constituent units.

It is submitted that addressing the anxieties of regional minorities requires the state to accept that the constituent units share with the larger state the same problem of accommodating ethnic diversities but only at a constituent unit level. The constituent units, recognising their multi-ethnic character, can apply, to the extent possible, processes and institutions of both self rule and shared-rule. This tentative normative framework has one obvious danger. There is often a potential danger in using ethnicity as a basis to organise the subnational state. The use of ethnicity to demarcate internal boundaries has the potential to freeze ethnicity and territorial boundaries, elevating ethnic identity to a primary political identity. In such a system, ethnicity becomes the dominant lexicon of political discourse, creating conducive conditions for ethnic entrepreneurs. The implication is that the normative framework suggested above would only move the locus of ethnic tension from the subnational to the local level. This begs the general question of when and how ethnicity should be used as a basis to organize local government. This is not a question that is unique to the phenomenon of ethnicity-based local government. It pertains to any multi-ethnic state that seeks to address the challenges of ethnic diversity but is perplexed by the dilemma of using ethnicity to respond to those same challenges. A response to this dilemma has obvious implications for any system that seeks to use the territorial matrix of subnational units and hence local government to respond to the demands of internal minorities without merely 'localizing ethnicity'.

As argued elsewhere, in as much as there is a need to recognize ethnic diversity, there is no inherent/compelling reason to use ethnicity as the sole and/or prime means of organising the state.[XLI] The likelihood that ethnic differences will translate into political divide that warrant recognition in the public sphere is dependent on the historical and political circumstances that attend the state formation process. This says ethnic cleavage does not necessarily translate into a political divide, and hence the contingent nature of politicised ethnicity. This suggests that a state, to the extent possible, should attempt to accommodate ethnicity without making the latter an explicit principle of state organisation.

In the realm of local government, the contingent nature of politicised ethnicity would mean that the primary focus should be on creating an inclusive subnational system without elevating ethnicity into a primary means of political organisation. In terms of configuration of local government, the system can provide territorial autonomy to ethnic groups without, however, explicitly defining it as an ethnic local government. This can be done, for

example, by dividing an internal minority into a number of viable homogeneous local governments rather than demarcating the entire members of a particular internal minority into one territorial unit. This can be further facilitated by avoiding nomenclatures and other indicators that posit the local government as an 'ethnic local government' and a language policy that regards the different linguistic groups as equal members of the subnational unit. This provides room for intra-ethnic competition as the territorial configuration of local government avoids the emergence of ethnic identity as a sole means of political mobilization.[XLII] Such innovative mechanisms have the advantage of avoiding the elevation of ethnicity into a primary political identity in the political battles of the subnational unit.

Finally, it must be emphasised once again that the normative framework proposed in this article does not ensure the prevention or eradication ethnic tensions or the creation of disgruntled internal minorities. Rather, the framework serves to mitigate the harms that flow from ignoring the plight of internal minorities.

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I Some refer to such federation as an ethno-federal state. For more, see Hale 2004. Ethnic federalism is another term that is often used to refer these federations (Turton 2006).

II Brass 1991: 26.

III Cairns 1995: 26.

IV Choudhry 2008: 153.

V The terms ethnic minorities, intra-substate minorities, internal minorities and minorities within minorities are used interchangeably to refer to those who do not belong to the regionally empowered group. For the sake of brevity and consistency, we will stick to the term internal minorities.

VI Choudhry 2008: 153.

VII Swinton 1995.

VIII The most common positive right that the bill of rights often provide is a constitutionally guaranteed minority language education right.

IX Pildes 2008: 184.

X Pildes 2008: 185.

XI See Patten 2005. For a discussion on citizenship and identity, see also Kymlicka 1995: 11; Choudhry 2008: 153; Rosenfeld 2010.

XII Kymlicka 1995: 11.

XIII This was done through an amendment of the federal constitution (Linder 2010). See also Smith 1995: 15.
XIV According to the procedure outlined in article 47(3) of the Constitution, the demand for statehood must be approved by a two-thirds majority of the members of the Council of the ethnic group concerned. After receiving a written demand, the state council, from which both ethnic groups want to secede, organises, within a year, a referendum for members of the relevant ethnic group. For an ethnic group to have a state of its own, only a majority of the voters' vote in favor of secession is sufficient. Once this is achieved, the state council will transfer its powers to the ethnic group that made the demand and the new state created by the referendum will automatically become a member of the federation. For more, see A Fiseha Federalism and the accommodation of diversity in Ethiopia (2005).
XV Cairns 1995.
XVI As aptly noted by MacCormick, "[t]he attempt to match up nations with states, and then to accord sovereignty to each state may be the true source of the evils we perceive. [...] There cannot be a perfect match between the nations that exist in the world and any possible set of sovereign states that have absolute authority over exactly demarcated territories. [...] [I]f it is injudicious to increase excessively the number of states, it may in the alternative be possible to diminish their pretensions, and thus to adjust the position between those nationalities who have and those who have not a fully sovereign state of their own. The principle of subsidiarity springs to mind as a useful principle for liberal refection in this context" (MacCormick 1996: 566).
XVII As noted by Steytler, "[t]e Constitution of the United States of 1787 was silent on the matter, as was the Swiss Constitution of 1848. In the Canadian Constitution of 1867, local government was mentioned only as a provincial field of competence. The Australian Federal Constitution of 1901, being silent on the matter, had the same effect – making local government a creature of state power." (Steytler 2005: 1).
XVIII For more on South African local government, see De Visser 2005.
XIX The entrenchment of local autonomy and the increasing transfer of power to local government have received impetus from a chorus of international institutes like the World Bank and the IMF that encourage the devolution of power to local government as a key component of good governance and a sound development policy.
XX Kymlicka 2007. See also Burgess 1991; Resnick 1994.
XXI Kriek 1992.
XXII Smith 1995: 6.
XXIII Smith 1995: 6.
XXIV Kymlicka 2001.
XXV They might, of course, also disapprove of such policies based on the same reason that other non-ethnic based units do. The converse, however, is not usually true.
XXVI Telford 2003.
XXVII Steytler 2009: 433.
XXVIII Steytler 2009: 433. Steytler notes that the long term development of "hourglass" federalism, with strong central and local governments and a declining state government in the middle, is feared and resisted by states". Although this is common to all federations, as indicated earlier, the urge and motivation to resist the empowerment of local government by the federal government and protect the autonomy of subnational units in multi-national federations are stronger. The extent to which ethnic-based subnational units jealously guard their powers in the face of attempts of greater centralisation by federal governments is a major indication of this fact.
XXIX Cairns 1995: 33.
XXX A parallel development can be noted in the case of ethnic groups that have recently achieved their independence and autonomy after decades of political and cultural subordination. In most of the new states that were created following the sudden break-up of the Soviet Union, for example, 'old and new minorities', like the formerly empowered Russian population, are often treated as second-class citizens in many states. For more, see Kymlicka 2002: 16.
XXXI Norman 2006: 101 notes that the question of how to demarcate internal boundaries 'goes to the heart of the federalist 'solution' for minority self-determination'.
XXXII Fleiner and Basta Fleiner 2009: 609.
XXXIII Steytler 2009: 413.
XXXIV Steytler 2009: 413. The critical role of financial autonomy cannot also be ignored. Local governments may have the necessary legislative and administrative powers in order to manage their own

affairs. However, all these powers will be hollow if they are not accompanied with the necessary financial resources. The institutions that they intend to use as a vehicle to preserve and promote their identity will also be of no use if they do not have the constitutional mandate to raise and mobilise revenue. Financial autonomy is thus another critical component of the self rule principle that the proposed normative framework must consider in entrusting ethnic communities with a right to manage their own affairs.

XXXV In as much as it is important to provide minorities some level of self-government, it is also equally important to ensure their participation and representation in the institutions of subnational government. The federal constitution can require the subnational units to be guided by the principle of shared rule in organizing the institutions of subnational government. This requires the subnational government to provide internal minorities with adequate opportunity for political participation and representation at the level of subnational government. The principle of shared rule can be concretised in different institutions of the subnational government including the subnational legislature and executive. The representation of minorities in subnational government does not have to be made based on explicit constitutional criteria. It might suffice if the federal constitution, in general terms, requires the subnational unit to, at least, guarantee, in its constitution, that the subnational government must reflect the diversity of the subnational unit. The requirement must apply both to the legislative and executive branches of the subnational government. The inclusion of internal minorities in subnational government helps them feel that they are not merely 'others' that are simply tolerated by the regional majority group but also equal members of the society that participate in the management of the subnational unit. It also ensures that the system does not simply focus on the autonomy of the different ethnic groups but also ensure that the subnational state belongs to all who live in it. This also ensures that sufficient attention is given both to ethnic diversity and the promotion of social cohesion and that these considerations filters through the federal territorial matrix and shape the governance structure of subnational units as well.

XXXVI Similar measures, albeit in a different circumstances and for different reason, are available for the national government in South Africa, outlined in s 100 of the South African Constitution.

XXXVII Adeney 2000: 15.

XXXVIII Chibber 1995: 74.

XXXIX Tierney 2004.

XL An equally important issue is the representation of the different ethnic groups in such adjudicating body.

XLI Fessha 2010.

XLII In terms of shared rule, it includes a subnational government that reflects the diversity of the different ethnic groups that inhabit the country and thus provides a means for political participation and representation. This does not have to take a strict quota system but an inclusive political practice as the former has the tendency to entrench ethnicity as a primary political divide.

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