



Part C : Special Features

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A Legal Analysis on the Plight of Ethnic Nationalities in Burma

By Aung Htoo¹

I. Introduction

Burma is composed of various ethnic nationalities, including the majority Burman people. The situation of the non-Burman ethnic nationalities has been an underlying political and legal question in Burma for hundreds of years. The successive ruling military juntas in Burma manipulated this issue to prolong their rule for almost five decades.

Since Burma's independence in 1947, the ethnic nationalities of Burma have struggled for their right to self-determination. Due to the inability to divide power fairly among all peoples of Burma, several ethnic groups resisted the centralized government. As a consequence, in 1960 the military seized control by force. Ethnic armed struggles continue even today as a result of the military regime's refusal to recognize the rights to self-determination of ethnic nationalities. The current situation has not improved and, many would argue, has even worsened. The Union Constitution recently approved by the military regime in May 2008 attempts to legalize this inequality and unfair treatment. Dangerously, the new Constitution, much worse than the previous ones, creates the most rigid centralization, to be assumed by the military elite over the Burman majority and non-Burman ethnic minorities alike. This paper attempts to explore the plight of ethnic nationalities in Burma from legal and human rights perspectives.

II. A Brief Background of Ethnic Nationalities in Burma

(A) Pre-independence Era

Before the 18th century, ethnic peoples were mainly self-governed in various forms. Some were independent kingdoms while others were still principalities. During the 18th century, the Burman feudal kings became stronger than the rest and assumed governance of the Mon and the Arakan kingdoms together with the Shan principalities. The British defeated the Burman King in 1885. Britain administered most of the country directly but left governance



local in Karenni and Shan areas. However, all ethnic regions, together with the majority Burman area, were formed into a single country called Burma. Burma became part of the British empire and was made a province of India.

In January 1947, representatives from Burma led by General Aung San went to Britain and asked for Burma's independence, including (mainland) Burma proper and the Frontier Areas. The British intended to grant independence for Burma proper but not for the Frontier Areas. The British expressed their intention that "independence be extended to the Frontier Areas once the people living in the Frontier Areas agreed to join Burma proper; however, let these people decide the question of unification themselves". General Aung San met with Shan, Kachin and Chin leaders at Panglong on 12 February 1947 and signed an agreement with them guaranteeing the federal structure of the future Union of Burma. This became known as the Panglong Agreement. The essential parts of the agreement provided:

- * frontier peoples would have the right to exercise autonomy in their respective areas;
- * frontier peoples would enjoy fundamental democratic rights just as in other democratic countries; and
- * states would be entitled to financial allocation from the national revenue.

(B) The 1947 Constitution and its Consequences

The 1947 Constitution was drafted in the pre-independence era. This was also a period of much hard work to gain independence and sovereignty from the British. The Constitution was drafted in a very short period by a 111-member constitution drafting committee, composed of leaders from AFPFL, members of the Cabinet, representatives of ethnic peoples and intellectuals. It was based on initial trust and understanding among the ethnic groups, and for practical purposes it was intended to flesh out the details later. However, the proposed equal rights for the ethnic people were not realised because of a lack of infrastructure and insufficient attention from the then country's leaders. When it became apparent that ethnic people did not, and would not in the foreseeable future, enjoy political and economic equality with the Burman majority, civil war broke out. A number of ethnic armed groups were founded during the ensuing more than 50 years of civil war in Burma.

The democratic governments formed under the 1947 Constitution, which ruled the country from 1948 to 1962, fostered economic development for the country.² However, development throughout the country was uneven. Progress generally occurred in the low land where the majority of Burman people resided whilst very little change happened in areas where other ethnic nationalities were found.³ The movement of the ethnic leaders for constitutional reform, based on



federalism, emerged in this context. However, the military, led by General Ne Win, manipulated the situation and staged a coup in 1962 under the pretext of protecting the union from disintegration.⁴ The next four decades of military rule in Burma only exacerbated the ethnic divide in Burma as it consistently waged a propaganda that federalism would lead to secession and disintegration of the union.⁵

(B) The 1974 Constitution and Ethnic Rights

Following the coup in 1962, Burma's economy started to deteriorate. To overcome the glaring problem of legitimacy, the regime drafted a Constitution for the formation of a one-party state, which fully guaranteed the perpetuation of the military dictatorship. A referendum was held on the draft constitution in 1973 and the people were forced to support it. What followed were a general election and the installation of so-called civilian government dominated by military and ex-military officers.

The 1947 Constitution established a semi-federalist state under which the rights of the ethnic people were to some extent protected by the bi-cameral system through which legislative power can be checked and balanced. However, the 1974 Constitution abolished the Chamber of Nationalities, which had comprised representatives from the ethnic states. State power was exercised only by the People's Assembly, with its great majority of Burman representatives who were mostly army and ex-army personnel.

After dissolving the previous Union, composed of five ethnic states and Burma proper, as provided for in the 1947 Constitution, the constituent units in the 1974 Constitution were transformed into seven ethnic states, largely inhabited by non-Burman people, and seven geographical divisions, largely inhabited by the majority Burman people. As a result, an ethnic state had status equal to one division, in which only one seventh of the Burman people lived. Under the new 1974 Constitution the multi-party democratic system⁶ and free-market economy was abolished.⁷

The 1974 Constitution deprived individuals as well as collective groups of the freedom of association and political participation. The dissatisfaction of the ethnic people greatly increased following this further dilution of their rights and political influence. The armed struggle of the ethnic organisations consequently gained momentum between 1974 and 1988. The mountainous areas of Burma became largely controlled by armies formed by the ethnic people.⁸ As developments progressed, the ten ethnic armed organizations formed a political alliance entitled National Democratic Front (NDF).

The economic and socio-political situation of the country deteriorated



dreadfully. This set the scene for the popular democratic uprising in 1988. Then in September 1988 the military again staged a coup, abolished the 1974 constitution, and established a military administration. As a negative impact of civil war, the ethnic peoples are a disproportionate target for human rights abuses and heinous crimes. Ethnic regions are regularly exploited for their natural resources, leaving behind environmental disasters, drug problems and human rights violations as of now.

III. Suffering from the Commission of Heinous Crimes

(A) Crimes against humanity in Eastern Burma

In June 2008, Amnesty International issued its important report on crimes against humanity in Eastern Burma.⁹ The report makes the case, in convincing fashion with specific cases and data, that heinous crimes such as rape, forced labor, torture and murder have been committed by the military regime in a systematic and widespread manner. The report notes that for 2½ years a human rights emergency has been occurring in the form of a military offensive by the Burmese army (*tatmadaw*) waged against ethnic Karen civilians in Kayin (Karen) State and Bago (Pagu) Division. This offensive has involved the widespread and systematic violation of international human rights and humanitarian law that constitute crimes against humanity.



The current counter-insurgency campaign has civilians as primary targets and is unprecedented in its length. An estimated 147,800 people have been and remain internally displaced in Kayin State and Bago Division. Many of these people have been subject to widespread and systematic human rights violations including unlawful killings, torture, enforced disappearances, arbitrary arrests, forced labor, the destruction of homes and villages, and the destruction or confiscation of crops and food stocks. Amnesty International adds that the continued impunity of these bodies contributes to the country's human rights crisis.



(B) Imprisonment and other severe deprivation of physical liberty in violation of fundamental rules of international law

It is a crime against humanity to imprison someone in violation of fundamental rules of international law when it is part of a widespread or systematic attack against civilians. The SPDC regularly, as part of government policy, arrests and imprisons political opponents, including leaders of ethnic groups. On 9 February 2005, nine Shan national leaders including U Khun Htun Oo, Chairman of the Shan National League for Democracy, were arrested by the Burmese military regime for attempting to form a committee called the "Shan State Academics Consultative Council".

The Shan leaders were quickly convicted of serious crimes and punished with long-term imprisonment of up to 106 years. From the evidence, however, it is apparent that they were simply attempting to implement their political aspirations by exercising their fundamental human rights and freedoms, including freedom of expression, freedom of peaceful assembly and freedom of association. The regime was concerned that such attempts might spread to other provinces or states within which various ethnic nationalities reside and a number of ethnic armed cease-fire organizations are based, resulting in a threat to their power. As a result, such peaceful attempt was criminalized, exaggerated, and combined with other fabricated offenses; subsequently, for one major action, outrageous penalties were rendered several times under numerous separate charges, contrary to the effective national laws in Burma.



The fate of U Khun Htun Oo and his colleagues was already decided once they were arrested. The judge in each case merely acted as a rubber stamp to the regime's wishes. The admittance of hearsay, the failure to correctly apply the law, the use of evidence that had no relation whatsoever to the alleged crime, were all symptoms of a judiciary that is completely controlled by the regime. Moreover, generally, justice requires that sentences be proportionate to



the nature of the crimes. Here, the use of maximum sentences in all cases, regardless of the complete lack of evidence, was another indication that the courts were being manipulated by the regime and were unable to decide the cases independently.

IV. Exploitation of Natural Resources in Ethnic Areas

One of the ways in which the military regime oppresses ethnic nationalities is through exploitation of natural resources. Environmental damage, human rights violations and economic dependency are all byproducts of the SPDC's exploitation of timber, precious stones, natural gas and other resources that should benefit and belong to the ethnic nationalities.

(A) Impact of logging and mining

After the Burmese government reached a ceasefire agreement with an ethnic Kachin armed group in 1994, the military regime signed a contract with China to cut down timber and hardwood in Kachin forests. Due to deforestation, there was a historic flood in Kachin state in 2004, climate change and an increase in temperature¹⁰. Forests in Karen, Karenni and Mon states have also been targeted by the regime's economic machine.

Exploitation of precious stones and metals has led to a negative environmental impact. Chinese companies were allowed to extract gold along Burma's longest river, the Irrawaddy. They amalgamated large amounts of



Logging activities: Passage road Mon State, WBRC.

mercury with the gold and dumped it into the river. Now, the Irrawaddy has been polluted with mercury that threatens the health of the people¹¹. Burma is one of the world's top-producers of high-quality rubies and is the top jade producer¹². However, Burma's gem mines, which are ruled by military authorities and mining companies, experience unsafe working conditions and flagrant human rights violations, including widespread land confiscation, extortion, forced labor and child

labor¹³. Careless use of machines and oil has caused environmental pollution. Infectious diseases such as HIV/AIDS, malaria and tuberculosis are increasing in mining areas and, because of readily available drugs, more and more people have become drug users and addicts¹⁴. Recently, on 30 September 2008, a news article was released on the jade trade in Hpakant, Kachin State. Noting



the regime's control over the gem industry, the article highlighted that "Myanmar's mining industry is built on suffering. Forced and child labor, land confiscation, drug abuse, sexual exploitation and environmental damage have scarred the mining trade, according to human rights groups."¹⁵

(B) Impact of dam and hydropower projects

Around 2005, the Burmese military regime signed a memorandum of understanding with Thailand and China to construct a series of hydropower dams along Salween River. Salween Watch reported that human rights violations, including forced relocations, rape, forced labor, illegal confiscation of property and murder, are common in these areas. At the Tasang site in Shan state, 300,000 people have been forcibly relocated since the dam studies began¹⁶. Electricity exploitation is also rampant in Karenni State.

(C) Impact of gas pipeline project

Another example of a trade agreement that has brought human rights abuses is the construction of a pipeline to export natural gas. In the 1990's, the 260



kilometer-long *Yadana* natural gas pipeline was constructed from the Andaman Sea, across Burma, to Thailand. Forced labor was used for project infrastructure and villagers were made to carry arms and supplies for soldiers patrolling the pipeline route. Local people were subjected to abuses such as extrajudicial killings, torture, rape and extortion by pipeline security forces.

Villages were relocated to clear the way for the pipeline and villagers' lands along the pipeline route were confiscated¹⁷. Similarly in Arakan state of western Burma, since 2000, Korean international company Daewoo has been exploring underwater gas in the Bay of Bengal off the Arakan coast. Military presence was increased in the area to secure the gas pipeline. Along with the increase in troop deployments came a corresponding increase in human rights abuses such as extortion, violence, forced labor and land confiscation to make way for barracks, outposts and other military infrastructures¹⁸. Other natural gas exploitation takes place in Karen and Mon states.

(D) Impact of contract farming

In December 2005, Burma signed a contract farming agreement with Thailand, in which Burma agreed to reserve 17.5 million acres for Thailand to plant crops such as sugarcane, palm oil, maize, cassava and rubber to be



supplied to factories in Thailand¹⁹. This contract farming agreement increased land confiscation in Shan state and Kachin state²⁰. For instance, with the help of the military regime, the pro-junta Yuzana Company seized over 200,000 acres of land in Hukawng Valley to cultivate crops for Thailand²¹. Similar land confiscation is taking place throughout the country for many other purposes. In Burma, land is the primary source of livelihood for more than half of the population. The government confiscation deprives hundreds of thousands of people of their livelihood.

(E) Land Confiscation

Land confiscation is common throughout Burma, including in ethnic areas.



For instance, in Kachin State, from 2001 to 2006, the military increased its presence from ten battalions to fifty battalions. To meet this expansion, the military confiscated people's farm land without giving notice or paying compensation. In Karen State, the military confiscated land for Army Plantations-- in April 2000, in Kyar-Ein-Seik-Kyi Township, over 80 acres were confiscated by IB 283, 284, and 32 for an army plantation. Similar

incidents have been documented in Karenni State, Mon State and Shan State. Uprooting people from the agricultural lands their families have used for generations leads to massive displacement, creating internally displaced people and driving people to foreign countries to seek migrant work or refugee status.

V. Lack of Constitutional Guarantees of Ethnic Rights

In his "Position Paper on the National Convention's Principles for a Constitution for the Union of Burma", Professor David C. Williams of the University of Indiana School of Law analyzes to a large extent how the SPDC's constitutional principles formulated in its National Convention undermine ethnic rights.²² The central thesis of his paper is that, like previous Burma constitutions, the National Convention's Draft Principles continue to over-concentrate power in the Burman majority, a select group of men that dominate the executive, legislative and judicial branches, and in the army.

According to Professor Williams, the National Convention Principles (and consequently the SPDC Constitution) over-concentrates power in the Burman majority. If maintained, this disregard for the legitimate desire of ethnic nationalities for "measured self-determination" will lead to continued conflict



with the Burman majority. Professor Williams posits that it is very unlikely that ethnic minorities will control the upper house of parliament because the army has the right to choose at least twenty-five percent of the members of the upper house. Furthermore, some of those representatives will likely come from specially designated territories and self-administered areas within the ethnic states and regions which may not fully represent ethnic interests. Professor Williams adds that even the power that the ethnic nationalities have in the upper house means little because it is the weakest part of the government. In reality, the presidency is where the power will lie and, in addition, the Burman majority will control the lower house of parliament.

Importantly, the differences among Burma's states require a different form of government for each state. But the NC Principles create the same legislature for each, without respecting these different needs. Furthermore, under the NC Principles, the president appoints and controls the state and regional executive department. Thus, the executives of each state are merely subordinates of the national president, thus effectively diminishing ethnic power. Moreover, the state or regional parliament has no power to reject the president's choice unless that person fails to satisfy the constitutional qualifications such as age and residency. The president's control over the Chief Minister means he also controls the Chief Minister's choice of ministers. In fact, the NC Principles state outright that all the ministers are subordinate to the president.

Similarly, the national president will control the judiciary in ethnic areas. The president appoints the justices of the High Courts of the states and regions. The state legislature cannot reject the president's choices except on the grounds that they do not meet the formal constitutional qualifications. Thus, for instance, the legislature cannot reject a nominee on the grounds that he is incompetent, corrupt, or a lackey of the president. The president will be able to control lower courts through his control of the High Courts.

The division of powers between the national government and the state and regional governments also reflects over-concentration at the national level. The powers given in the NC Principles to local government are insignificant and do not address the need of ethnic nationalities for self-determination.

VI. Conclusion and Recommendations

In spite of the fact that the ethnic issues need to be addressed properly and with special emphasis, this does not mean that the issues are too complicated to resolve. It is also unreasonable to say, as the military junta usually mentions and ASEAN has unofficially adopted, that without strong centralization by military prowess in order to establish stability, Burma would collapse. If Burman and non-Burman ethnic nationalities reach a common understanding on how to



construct a political union within the framework of a federal union and its constitution, where the minority groups feel they belong and which they are proud to be a part of, "trust" would be established and Burma will never fall apart. To this end, the international legal communities may take notice of and support the following recommendations:

- 1) To conduct a legal campaign, that challenges the SPDC Constitution and legitimacy of the forthcoming 2010 election process; and to provide recommendations for a democratic transition of Burma from the legal perspective;
- 2) To put pressure on the UN Security Council to refer the situation of Burma to the International Criminal Court in order that SPDC officials be held responsible for crimes against humanity and war crimes, justice for victims be sought, and the rule of law, which is a pivotal foundation for a genuine national reconciliation, be effectively promoted;
- 3) To critically evaluate and publicize the current condition of the judiciary in Burma and bar council, focusing on the relationship between judicial independence and the rule of law, holding accountable the members of the judiciary who legitimize the military regime's oppression.

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(Endnotes)

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² The Information reported in the Mirror and the New Light of Myanmar, the newspapers published in 1961-62.

³ U Tun Myint, Secession Issue of Shan State [23 January 1957], pp. 17-18.

⁴ The Statement of the Revolutionary Council in March 1962.

⁵ Analysis of SLORC's National Convention, Constitutional Seminar Record, published by the Burma Lawyers' Council, 1995, p. 47.

⁶ Article 11 of the Constitution of the Socialist Republic of the Union of Burma (1974).

⁷ Article 6 of the Constitution of the Socialist Republic of the Union of Burma (1974).

⁸ Martin Smith's interview with Brang Seng, "Burma, Insurgency and the Politics of Ethnicity" by Martin Smith, p. 443.

⁹ "Crimes Against Humanity in Eastern Myanmar", Amnesty International, 5 June 2008.

¹⁰ A Choice for China, Global Witness Report 2005.

¹¹ Ecological Crisis: A Kachin Experience, by Ningrang Tu Nan, Kachinnet.

¹² Human Rights Watch in News, Burma Gem Trade and Human Rights Abuses, January 11 2008.

¹³ Id.

¹⁴ Id.

¹⁵ The National (UAE): Jade trade in Myanmar thrives on exploitation, rights abuses – Rajeshree Sisodia, <http://www.burmanet.org/news/2008/09/30/the-national-uae-jade-trade-in-myanmar-thrives-on-exploitation-rights-abuses-%e2%80%93-rajeshree-sisodia/>

¹⁶ Salween Watch 2007, Volume 1, pages 1, 3.

¹⁷ http://www.earthrights.org/site_blurbs/yadana_natural_gas_pipeline_project.html.

¹⁸ Shwe Gas Report, July 2006, page 22, by All Arakan Students and Youth Congress.

¹⁹ <http://ethnicvoices.civiblog.org/blog/Thailand>.

²⁰ Shan Herald Agency for News, 25 January 2006.

²¹ Kachin News Group, 17 Aug. 2007.

²² "Position Paper on the National Convention's Principles for a Constitution for the Union of Burma", Prepared on behalf of The Ethnic Nationalities Council by David C. Williams, Director, Center for Constitutional Democracy in Plural Societies, January 15, 2008.

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[Editor's Note: This paper will be published as a four-part series of articles in the LAWKA PALA journal. This edition contains the Executive Summary and Part I. With the permission of the author, specific recommendations made by the Ethnic Nationalities Council have been omitted.]

Position Paper on the National Convention's Principles for a Constitution for the Union of Burma

Prepared on behalf of The Ethnic Nationalities Council by
David C. Williams
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January 15, 2008

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Executive Summary

In working toward a better constitutional future for Burma, all should pay attention to the objective conditions inside Burma. Every country needs its own constitution, designed to suit it; there is no one size fits all constitution. Burma's future constitution should therefore respond to Burma's particular needs and problems, so Burma should have its own unique constitution, different from others. The central objective fact is this: since independence, Burma's constitutions have over-concentrated power, and this over-concentration has been one of the primary causes of the country's profound problems. Although an improvement on the current regime, the National Convention's Draft Principles continue this pattern.

The constitutions have over-concentrated power, and the NC Principles would over-concentrate power, in at least three ways. Burma's history shows that Burma's governments are especially prone to these three types of over-concentration. These three are therefore the most relevant objective conditions, specific and particular to Burma itself. Any constitution tailored to Burma must therefore deal with these risks:

1. Since 1947, Burmese constitutions have over-concentrated power in the Burman majority, ignoring the legitimate desire of ethnic minorities for measured self-determination. As a result, a number of ethnic groups went into



resistance, and in response, the military seized control in 1960. The ensuing conflict is the longest ongoing civil war in the world today. If this over-concentration is not remedied, Burma's problems will only continue. There are two ways to de-concentrate this power: **power-sharing** at the center, so that the minorities have sufficient power to balance the majority; and **decentralization**, so that Burma's diverse cultures can rule themselves within an over-arching national framework. The National Convention's Principles pay lip service to these doctrines, but in reality they merely make token gestures.

2. Since 1960, Burmese constitutions have de facto over-concentrated power in a small group of men wielding executive, legislative, and judicial power. Usually, one particular general has dominated this group, leading to an almost monarchical style of government. As a result, the country has groaned under arbitrary government without checks and balances. The constitutional remedy is the **separation of powers**, with a particular focus on limiting the power of the president, because the executive is the most likely branch to dominate the others. Again, the National Convention's Principles pay lip service to this doctrine, but in reality they would create a president of almost kingly power.

3. Also since 1960, Burmese constitutions have de facto over-concentrated power in the army, the Tatmadaw. The military is an important institution, but it is not democratic. To give it substantial power in government is therefore to make Burma un-democratic. Burma has not known truly civilian government for almost fifty years, as one military junta after another has held absolute sway. In central Burma, the military has largely suppressed political activity except for a brief period shortly after 1988. In many ethnic areas, the Tatmadaw has been waging war on minority resistance groups, so that the military commander's will is the only law. This pattern is so deeply entrenched that it will take strong constitutional measures to change it and to keep Burma from reverting to it. The constitutional remedy for this over-concentration is the **subordination of the military to civilian government**. The National Convention's Principles do not even pay lip service to this doctrine, as it overtly mandates that the Tatmadaw should have a "national political leadership role," run itself without civilian involvement, and be the body "primarily responsible for safeguarding the State Constitution"

This position paper will analyze the NC's Principles with respect to these four doctrines: power sharing, decentralization, separation of powers, and subordination of the military to civilian government. It will explain why the Principles do not sufficiently embody these doctrines, and accordingly how the Principles need to be amended.

[...]



Full Analysis

I. Power-Sharing

Because Burma is a diverse and plural country, it is vital that all major groups feel that they have a stake in the constitutional regime in general and in the national government in particular. In the past, Burma's ethnic minorities have felt excluded from the politics of the center. Any workable constitution must offer them a realistic opportunity to balance the power of the majority, so that they will not be simply over-whelmed and side-lined. In a simple majoritarian democracy, in which the majority always rules in proportion to its numbers, then the minorities will have little stake.

The NC's Principles seem to recognize this concern because they do not create a simple majoritarian democracy. Instead, they would create a bicameral legislature: in the lower house, representation would be based on population so that the majority will rule; but in the upper house, each State and Region will have the same number of representatives regardless of its population. See Principle IV/2. If one State has one million people and a different State has ten million people, each will still have the same number of representatives. The effect of this arrangement would ostensibly be to give disproportionate power to smaller (in population) states and regions, where Burma's ethnic minorities are concentrated. This arrangement is characteristic of many of the proposed constitutions for Burma, and the goal is always to empower Burma's ethnic minorities some disproportionate power. In the union government, the upper house would be their particular champion, their reason for giving loyalty to the regime. [...]

But in fact, under the NC's Principles, the upper house will not actually serve to protect the ethnic minorities, for two reasons: first, it is unlikely that the ethnic minorities actually will control the upper house; and second, even if they did, it is unlikely that the upper house will actually have any real power, as compared to the lower house and the President.

a. Under the NC Principles, Ethnic minorities will not control the upper house.

It is very unlikely that ethnic minorities will actually have controlling influence within that house. The SPDC would give equal representation to each of the seven States and seven Regions (currently the seven divisions, see Principle I/4(b)); each will send twelve members to the upper house. Commonly, Burmese people anticipate that ethnic minorities will dominate the seven states, and ethnic Burmans will dominate the seven regions. Of course, some ethnic minorities might be elected from the seven regions, but then some



Burman people might be elected from the seven states, probably in equal numbers. So, at first glance, it would appear that the upper house would exactly balance power between the majority and minorities. But once more, appearances are deceptive, because in the end, the Burman majority will actually control the upper house for several reasons:

First, the Tatmadaw will have the right to choose at least twenty-five percent of the members of the upper house (and it may be more, as explained in the next section) "at the rate of four representatives from each region or state inclusive of Union territories." Principle IV/ 13(b). In other words, one-quarter of the representatives from the ethnic states will actually be chosen by the Tatmadaw. In all likelihood, these representatives will not be sympathetic to the concerns of ethnic peoples. The real balance of power in the upper house will therefore be that the minorities control only three-eighths (because they control 75% of the representatives from the ethnic states, which are one-half of the upper house), and the majority will control five-eighths (because they control all the representatives from the regions and 25% of the representatives from the ethnic states).

Second, although the upper house will be composed of equal numbers of representatives from each state or region, it appears that some of those representatives will come from specially designated territories and self-administered areas within the states and regions. The language is not clear, but it is important: "equal numbers from each region or state inclusive of Union territories and including one representative from each self-administered division or self-administered zone." Principle IV/13(a). In other words, each state is allocated twelve representatives, but from that number must come representatives from these special areas. The Principles are not explicit about how these representatives will be chosen, but they might shift the ethnic balance of the upper house still further.

The provision seems to contemplate different arrangements for representatives from territories and representatives from the self-administered areas, so it is important to separate the two. With respect to the self-administered areas: each will send one representative to the upper house, so that the number of representatives chosen by the other people of the state will go down. If a state has four self-administered areas, the voters in the rest of the state will command only eight representatives. Because it is likely that the self-administered areas will be concentrated in ethnic minority states, this provision is likely to reduce their power still further. Of course, representatives from these areas may be sympathetic to minority concerns, but they may not be, because the Principles do not specify how the representatives from those areas will be chosen and whether they will be truly independent. As we will see, the President will largely control the "leading bodies" of those areas: they are regarded as administrative



units of the executive branch, even though the voters choose some members of the leading bodies. It seems likely therefore that the President will also dominate the representatives from these areas to the upper house of the union legislature.

In addition, the union territories will be sending representatives to the upper house, but it is entirely unclear how this process will work. The provision may mean only that voters in the territories participate in the elections to the upper house in the same way as all the other citizens of the state. If that is the meaning, then the provision may not change the ethnic balance of the upper house very much.

But the language might mean that the union territories will each receive some number of their own representatives to the upper house, to be drawn from the number allocated to the surrounding state. If the territories are heavily Burman, then the provision would shift the balance in the upper house still further away from the minorities. And there is reason to believe that the territories might well be heavily Burman because of the way that they will be formed. The Principles stipulate that the Capital of the Union Nay Pyi Taw shall form a union territory, see Principle II/5(a), and majority Burmans will probably control the representatives from that territory. The Principles provide that further territories could be created: "if the need arises to designate areas that have special situation in connection with national defence, security, administration, and economy etc. as Union territories they may also be designated as Union territories after enacting laws." Principle II/5(b). The Principles are not very clear about the process for creating new territories; it would appear that the legislature would have at least some role in "enacting laws." But as we will see, the lower house will really control the legislature, so that the majority Burmans will be deciding how many new territories are needed and where they should be. In addition, the Principles specifically provide that new territories may be created for reasons of "national defence" and "security"—areas in which the Principles give the Tatmadaw almost carte blanche as we will see. The Tatmadaw and the lower house could use this power to create new territories, dominated by the majority, that would take representatives away from the minority populations of the state.

In short, then the minorities will not control the upper house when the constitution is enacted, and as time goes on, their share of power will likely decrease if new Union territories are created with their own representatives to the upper house.

[...]



b. Under the NC Principles, the Upper House will be powerless.

In short, then, the ethnic minorities will not control the upper house under the NC's principles. But even if they do, it will make little difference because the upper house is by far the weakest element of the union government. As we will see, the Burman majority will control the president, who will have enormous power, so much so that the legislature will probably function mostly as an advisory body. In addition, the majority will control the lower house, and under the principles, whenever the upper house and lower house disagree, the lower house will win.

In some bicameral systems, both houses must consent before a bill can become law: the upper house cannot act without the lower, and the lower cannot act without the other. Such a system would ideally balance power in the government, so that majority and minorities must learn to seek each other's support and understanding.

But that is not how the legislature will work under the NC Principles. If the upper house and the lower house cannot agree, then the question shall be decided by the two houses sitting together as a joint body: "If there arises disagreement between the Pyithu Hluttaw [the lower house] and the Amyotha Hluttaw [the upper house] concerning a bill, the bill shall be discussed and approved in the Pyidaungsu Hluttaw [both houses sitting together]." Principles on Legislature of Hluttaws 19. In addition, the Principles provide that certain matters "shall be initiated exclusively in the Pyidaungsu Hluttaw," Principles on Pyithu Hluttaw and Amyotha Hluttaw 11(a) and (b), so that the upper house will not even be able to meet separately to consider the issue and hold its own—overrideable—vote. It is not entirely clear from the Principles which issues belong exclusively to the Pyidaungsu Hluttaw, but apparently they include such important matters as over-riding presidential vetoes, see Principles on Legislature of Hluttaws 21(a) the ratification of treaties, see Principles on Legislature of Hluttaws 14, and crucially, ratifying executive orders that have the force of law, see Principles on Legislature of Hluttaws 15(b).

In short, then, under the NC's Principles, Burma will not have a truly bicameral legislature. Instead, it will have a unicameral legislature—the Pyidaungsu Hluttaw, consisting of the two houses sitting together—where some questions must initiate and where all questions end up in the case of disagreement between the two houses. In that unicameral legislature, the members of the lower house will dominate simply because there will be more of them than members of the upper house. Under the Principles, the lower house will have 440 members, see Principle IV/4, and the upper house will have only



224 members, see Principle IV/13. To be sure, some of the members of the lower house may be ethnic minorities, but because representation in the lower house will be based on population, the ethnic minorities will have no more than a proportional share—perhaps 35%. And in fact, they will likely have many fewer than that, as many electoral systems disfavor the minority—as exemplified by the results of the 1990 election in Burma.

In short, then, as we have seen, ethnic minorities will control no more than 3/8 of the upper house (eighty-four members) and no more than 35% of the lower house (154 members), for a total of 238 members in the Pyidaungsu Hluttaw, which is 35% of the total with both houses sitting together—and likely they will have substantially less than that. The majority will control the other 426 members. In the absolute best case scenario, then, the minorities will hold 35% of the power in a unicameral majoritarian legislature. The whole point in bicameralism was to give the minorities a disproportionate share of power so that they would not be over-whelmed by majority rule and have a stake in the system. On their face, the NC's Principles appear to acknowledge the importance of that goal, but when all is said and done, they would return the country to a pure majoritarian system.

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