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[Editor's Note: This is Part 2 of a four-part series of articles excerpted from "Position Paper on the National Convention's Principles for a Constitution for the Union of Burma" prepared by David C. Williams, Director, Center for Constitutional Democracy in Plural Societies. With the permission of the author, specific recommendations made by the Ethnic Nationalities Council have been omitted.]

II. Decentralization

Power-sharing in the union government will go some distance toward giving the minorities a stake in the system, but it is not enough: the constitution must also decentralize power to Burma's states. If the ethnic minorities as a group have power in the capital, then they will be able to participate in national level decisions, but those decisions will still be made by the nation as a whole for local communities that each has its own range of cultures, traditions, styles of government, languages, and religions. When the constitution decentralizes power to the states, then each state may make decisions for itself over those things that matter most to it. When States have influence only by working through the Union government, then they have power only when they can persuade the rest of the Union government to go along with them. If they cannot do so, then they will feel oppressed when national policy trammels on their particular values and life-ways. In other words, power-sharing at the center is not an adequate substitute for local self-determination.

Decentralization of power can promote good government in a variety of ways. If local people control some of their own affairs, they may become more involved in government, so that democratic participation increases. Frequently, local people understand their own local problems better than the center, so decentralization allows them to make more informed decisions. Similarly, because they are close to the problem, local people can often respond to local problems with greater speed and efficiency than the center could. Finally, when local cultures are different from those surrounding them or from the larger state, decentralization can allow local people to govern themselves in their own way, so they can achieve real self-determination. And again, the benefits of decentralization are directly relevant to Burma's particular history and applicable to Burma's particular situation: Burma has been governed so much from the center that local people have rarely been allowed to contribute their energy and



expertise or to express their local values. Decentralization can occur only if local people have some real control over their own affairs, rather than always being subject to the authority of the union government.

Again, the National Convention's Principles appear to recognize the importance of local self-determination, because they would create state governments, complete with legislatures, executives, and judges, as well as self-administered zones for smaller groups within the various states: "[T]he three branches of State power, so separated, are distributed among Pyidaungsu (Union), regions, states, and self-administered areas." Principle I/5(b). But again, this gesture toward decentralization is largely a token one for several reasons: the Principles dictates the form of each state's government, but each state is different, so each state should determine its own form of government through its own constitutional process; although the state legislature would be elected under the Principles, the state executive and judges would be under the control of the Union President; the local governments other than states (self-administered areas and union territories) will be clearly subordinate to the national President; and the powers of the state legislatures will be extremely limited. Under these Principles, the sub-national governments would merely be servants of the central administration.

a. Under the NC Principles, States will not be allowed to write their own constitutions.

As the SPDC often points out, each polity has its own particular needs, challenges, traditions, values, and hopes, so each polity needs its own constitution, tailored specifically to it. A constitution that might be right for the United States or China might be very wrong for Burma. There is no one-size-fits-all constitution. And yet the NC's Principles would take exactly that approach with respect to the form of state governments: each state would receive exactly the same form of government, taken off the shelf rather than crafted by the people of the particular state. What the National Conventions demands for itself, it has denied to the people of the states.

State constitutions are important for two reasons. First, because Burma's states are very different, each will need a different form of government. But the NC Principles would create exactly the same legislature for each: a unicameral body with two representatives from each township, see Principle IV/23 (a), one representative chosen by each "national race" larger than 0.1 percent of the population "other than those who have already got the respective State or a self-administered area in that state," Principle IV/23(c); and twenty-five percent of the total representatives chosen by the head of the Tatmadaw.



This provision would create a peculiar kind of legislature: some chosen by the military, some chosen to represent “races,” and some chosen to represent localities. Of the last group, each township regardless of size will send two representatives, so the smaller townships will be over-represented relative to population. And there will be no representation based on population at all. It is not clear that such a legislature would be wise for anyplace: it will likely be highly divisive and fissiparous as each group pulls in very different directions. In addition, to give a representative to each “national race” builds racial definitions into the constitution, and such arrangements almost always lead to profound conflict, even war. Minority “races” will feel that they have too little power, and majority “races” will feel that the minorities have too much power. (To be sure, Burma’s various ethnic groups need some measure of self-determination, but it would be better to do it simply by geographically decentralizing power, not through rigid racial lines). Finally, the smaller townships are over-represented and there is no representation based on population. As a result, urban townships will likely be dissatisfied and may feel little stake in the system. In short, it is unlikely that this style of legislature could lead to stable government for anyone.

But even if it might work for some, it surely will not work for all of Burma’s states, because they are too different. Shan State is quite large, ethnically diverse, and commercially active, with long international boundaries; Karenni State is quite small, much more homogeneous, rural, and without any international boundaries. Shan State’s problems will probably resemble those faced by Burma as a whole, so it might need a similar form of government, especially a bicameral legislature—yet the NC Principles would give it something very different. Karenni State, on the other hand, is quite different from both Shan State and Burma as a whole, yet the NC Principles would give it a government exactly the same as Shan State’s.

The second reason that state constitutions are important is that by writing the constitution together, the people of the state acquire a stake in the system and work out their differences. If the citizens of a state have worked together to create a shared form of government, then they might stick with it even when times are bad. If by contrast they feel that someone else has imposed a one-size-fits-all constitution on them, then they will hold it in scant regard and abandon it as soon as soon as misfortune hoves into view. And by developing a stake in their state constitutional regime, the citizens of the state will likewise acquire a stake in the national constitutional regime as well, because the one is part of the other.

The genius of true decentralization is that it allows each state to govern itself in its own way while simultaneously knitting together into an overarching national frame. But the Principles do not focus on the particular problems of



particular states because they do not conceive the states as political communities; instead, they imagine that the states are administrative subdivisions of the national government, with the same structure, in the way that regiments are subdivisions of armies. Thus, the Principles describe decentralization as a process of distributing State (meaning national) power across different jurisdictional levels—so that all power is really the power of the national government. But the power of states is not a gift from the central government; it is a gift from its own citizens who, by writing their own constitution, can address their own particular problems and acquire a stake in the system.

At present, the Ethnic Nationalities Council is sponsoring a state constitution-drafting process. Each state has its own constitution drafting committee, and each committee has produced at least one draft. The drafts are based on deep reflection about the circumstances of the individual states and on consultation with the people of the states. Each draft constitution is different because each state is different. Only through writing their own separate constitutions can the people of Burma ultimately come to think of themselves as a single country, joined by mutual commitment in all their differences, rather than yoked together into a single team of oxen.

b. Under the NC Principles, members of the State Executive and Judicial Departments will be responsible to the union President, not to the citizens of the state.

The NC Principles would dictate the form of each state legislature, rather than leaving that decision to the people of the states, but at least the members of the legislature (except the Tatmadaw representatives) would be answerable to the people of the state. By contrast, under the NC Principles, the State executive and judiciary would merely be underlings of the national President. They would not be selected by or answerable to the citizens of the state. They would not in fact be part of a state government at all. Instead, they would be national officers, prefects sent out to govern the local population, captains deployed by the generals to command the local troops.

Under the principles, the President appoints and controls the State and Regional executive department. The President selects a person from the State or Regional Hluttaw to become Chief Minister of the Region or State. See Principle V/21(e). The State or Regional Hluttaw has no power to reject the person so named unless that person fails to satisfy the constitutional qualifications for the position such as age and residency. See Principle V/21(g). The State or Region Chief Minister then appoints the other State or Region ministers, and again the local legislature has no right to refuse. See Principle IV/22(a) and (c). Because the President controls the Chief Minister, he of course



controls the choice of ministers made by the Chief Minister. The President also has the power to allocate ministries among the list of persons so chosen. See Principle IV/24(f). Finally, the Principles overtly stipulate that all the ministers shall be subordinate to the President: “The Region or State Chief Minister shall be responsible to the President of the State,” Principle IV/22(l)(1); “The Region or State Ministers shall be responsible to the Region or State Chief Minister concerned, and through the Chief Minister, to the President of the State,” Principle IV/22(l)(2). In short, the President chooses the ministers, can terminate the ministers, and can control the actions of the ministers in office. They are merely the local agents of the central government.

Some ministries are chosen by someone other than the President, but ultimately all are responsible to the President:

The Tatmadaw chooses the ministers for security and border affairs, see Principle IV/22(a)(2), but of course, this selection method does not allow the citizens of the state to govern themselves. It would appear that the Tatmadaw ministers are responsible to the President the same as every other state minister, though if the President dismisses one, the Tatmadaw still control the selection of the next.

In self-administered areas, the Okkahta will be chosen by a complicated committee (explained below), rather than by the President, see Principle IV/34(e), and the Okkahta then also becomes a member of the executive department of the state in which his self-administered area is located, see Principle IV/22(e). But though not chosen by the President, the Okkahtas are still responsible to the President and so serve only at his pleasure, see Principle 34(k)(2), and the President assigns duties to the Okkahtas “to undertake the affairs of respective self-administered division or self-administered zone,” Principle 22(g)(1).

Similarly, as we have seen, in each state, the “national races” who are more than 0.1% of the population “other than those who have already got the respective State or a self-administered area in that state,” Principle IV/23(c), are entitled to send one representative to the State or Regional Hluttaw, and those representatives then become members of the executive department as well, see Principle IV/22(a)(4). Again, these ministers are not chosen by the President and are “elected to undertake the affairs of national races in the respective region or state”—so at first glance, they would appear to be accountable to their constituents. But in fact, like all the other ministers of the state, they are responsible to the President and so must follow his dictates, see Principle IV/22(l)(2), and he assigns them their duties “to undertake the affairs of the national races concerned,” Principle IV/



22(g)(2). In other words, the national races administrators are not representatives of the national races in the state government; instead, they are ministers of the President to carry out his policy with respect to those national races.

The State or Regional Hluttaw apparently has power to reject the Chief Minister's nominees for State Advocate-General, see Principle IV/28(a), and State Auditor-General, see Principle IV/31(a), and the President has no right to reject the person approved by the State or Regional Hluttaw for either of those posts, see Principle IV/28(c) and 31(c). But of course the President chooses the Chief Minister, who nominates people for these posts, so the President really controls their selection in the first place. In addition, both the Auditor-General and the Advocate-General—like everyone else exercising executive power of any sort under these principles—will be responsible to the President. See Principles IV/28(f)(i) and 31(e)(i).

Finally, The President appoints the justices of the High Courts of the states and regions, see Principle VI/10(c)(1), and again the state legislature cannot reject his nominees except on the grounds that they do not meet the formal qualifications laid down by the constitution itself, such as age, citizenship, and experience, see Principle VI/10(c)(2). In other words, the legislature cannot reject a nominee on the grounds that he is incompetent, corrupt, a crony of the President, or likely to act in unfair ways. In short, the President can stack the courts with his political allies, and no-one can do anything about it. Because the lower courts are subordinate to these high courts, the President can control them as well through his appointees to the high courts. See Principle VI/18. Formally, unlike the members of the state executive departments, these judges are not responsible to the President, but as we will see when discussing national judges, the President has very broad powers to impeach judges if they displease him. See Principles VI/12 and 13.

c. Under the NC Principles, sub-national government other than the states will also be responsible to the union President, rather than to the citizens of those sub-national governments.

Aside from states, the NC Principles ostensibly provide for three other forms of sub-national government: the national races administrators, the self-administered zones, and the union territories. Once more, however, these provisions only give lip service to decentralization because they are all under the control of the President.

As we have seen, national races are entitled to send one representative to their state or regional Hluttaw, and those representatives will also become the



national races administrators in the state or regional executive department. But as we have also seen, those representatives are actually just a part of the state government, not a separate unit, and they are ultimately subordinate to the President.

Similarly, the President has ultimate control over the self-administered zones and division. The principles call for self-administered zones and divisions “to be prescribed for national races who reside together in communities on the same common stretches of land in appropriate sizes of population, other than national races who have already got Regions or States.” Principle I/4. Because these areas are described as self-administered, it might seem that the point in these areas is the decentralization of power. But again, that appearance is misleading.

These areas are to be governed by a “leading body,” which has “legislative power vested in them under the Constitution,” Principles IV/34(b)—a short list of powers contained in Principle on Sharing of Legislative Power 12. The makeup of the leading body is complicated:

- First, the representatives to the State or Regional Hluttaw from the townships in the self-administered areas become members, Principle IV/34(d)(1);
- Then the Tatmadaw appoints members to handle security and border affairs, Principle IV/34(d)(2);
- Then the Hluttaw and Tatmadaw members choose one representative for each national race (with more than 10,000 population and without “regions or states of their own”), Principle IV/34(h)(1);
- Then the Hluttaw and Tatmadaw members choose other people, as necessary, to bring the number up to ten, see Principle IV/34(h)(2);
- Then the Commander-in-Chief of the Tatmadaw assigns some more people, if necessary, to ensure that the Tatmadaw members constitute twenty-five percent of the leading body. See Principle IV/34(i).

In short, the leading body will be composed of Hluttaw members, Tatmadaw members, and some other people chosen by the Hluttaw and Tatmadaw members. Thus, at least some of the members of the leading body—the Hluttaw members—will be elected by the people. The Hluttaw and Tatmadaw members (but not, apparently, the others) of the leading body choose their own Okkahta, who will become a minister in the surrounding state or region. See Principle IV/34e).



Because the people choose the Hluttaw members, it might appear that the principles allow them some decentralized self-government. But in fact, it is not so: after all these provisions for choosing the members of the leading body, the principles then provide that the members will all be subject to the will of the President: the members of the leading body will be responsible to the Okkahta, who will be responsible to the Chief Minister of the State or Region, who will in turn be responsible to the President. See Principle IV/34(k). It turns out that the leading bodies are really just subdivisions of the state executive department, which in turn is really just a subdivision of the national executive department. The Principles allow no decentralization of power to these areas.

The President's dominance over the capital and other Union territories is even greater. The Principles provide that the capital Nay Pyi Taw shall be a union territory, and that the national government may create other union territories as the need arises. See Principle II/7. The Principles contain provisions for the form of government for Nay Pyi Taw, see Principles V/35-38. They contain no provisions for the form of government of other union territories, but presumably the other territories would be governed in the same way as Nay Pyi Taw. The Principles also say very little about what powers these territory governments would possess. Principle IV/14 stipulates that the national legislature "shall enact the required laws if the need arises to do so for the Union territories in connection with matters for which legislative powers are delegated to the Region or State Hluttaws or the self-administered division or zone leading bodies." That language suggests that the legislature may but need not delegate the same powers to the territorial governments as possessed by the state and regional legislatures and the leading bodies of the self-administered areas. It is not clear whether Nay Pyi Taw automatically receives these powers or must await enabling legislation; Principle 35(k) suggests that the latter might be the case: "Formation of Nay Pyi Taw Council, duties, rights and privileges of the chairman and members of the Nay Tyi Paw Council shall be prescribed by law." Presumably, in areas not delegated to the territorial government, the national government would directly govern the territory.

What is clear is that however broad the territorial powers might be, they will be exercised in subordination to the President. The President constitutes the Nay Pyi Taw City Council, see Principle V/35(c)(1), appoints its members without any legislative participation, see Principle V/35(c)(2), prescribes the number of members, see Principle V/35(c)(4), prescribes qualifications for the members of the council, see Principle V/35(d)(3), and "effect[s] changes in demarcation of districts and townships in Nay Pyi Taw," Principle V/35(b). All of the members of the council are responsible to the President, see Principle V/35(c), and the President may order their resignation, see Principle V/35(f)(3)(aa). The only exception is that the Tatmadaw may appoint some number to the coun-



cil, see Principles V/35(c)(3), and the President may terminate those members only “in coordination with the Commander-in-Chief” of the Tatmadaw, see Principle 35(f)(3)(bb). In other words, in practice, the President will make many of the rules for the district in which the whole government sits. As a result, he can directly threaten and control the rest of the government in their day-to-day lives. Legislators might fear for their safety and liberty if they act in ways contrary to the President’s desires.

In short, then, the President will control all the important government actors outside of the central government, with the exception of the State and Regional legislatures. For all intents and purposes, outside the central government, the President is the state. The State and Regional legislatures alone possess some separate power, but as we will show in the next section, that power is extremely limited.

d. Under the NC Principles, the legislative powers of the states will be excessively limited.

The NC Principles contain two lists of legislative powers, one for the union and one for the states and regions, organized under subject headings such as “defense and security of the union” and “agriculture and livestock breeding.” Again, the Principles appear therefore to gesture toward decentralization by giving the states some powers. But on closer examination, those powers turn out to be not much more than trivial. They certainly do not adequately address the desire of Burma’s ethnic minorities for some meaningful degree of self-determination.

The division of power between the union and the states should be the result of genuine, open negotiations between the various stakeholders in Burma, and this position paper cannot adequately forecast the outcome of such talks. Nevertheless, the ENC feels that the Principles are not acceptable for four reasons: all powers not listed are reserved to the union government; when state and union powers overlap (as they often will), union power always prevails over contrary state edicts; the total amount of power given to the states is too limited; the Principles omit certain state powers that Burma’s ethnic minorities feel are extremely important to them.

First, the residuary clause: the Principles provide that all powers not specifically listed belong to the national legislature: “Legislative power is vested in the Pyidaungsu Hluttaw in connection with other matters not stated in the legislative list of the Union, Region or State, and self-administered division or zone leading bodies.” Principle on the Sharing of Legislative Power 13. The union, in other words, receives all residual power beyond the listed power. In



practice, it is difficult to know how broad the listed powers will turn out to be, because that question will be a matter of interpreting the listed powers. As a result, it is difficult to know how large the residuary powers will be. But however broad or narrow, they should be given to the states, not the union. The union government is the result of a compact between Burma's peoples to live under a single national government. They created that government for certain specific reasons such as foreign affairs, commercial interchange, and collective defense. Those powers should be given to the union government in a specific list. But all other powers—those not listed—should be reserved to the states, which Burma's peoples recognize as their organic governments.

Second, federal supremacy: under the Principles, the powers given to the union and the powers given to the states will frequently overlap. When they do, the union and the states may adopt contrary policies. For example, the union is given power over “land management” Principle on the Sharing of Legislative Power 5(A)(1), and over “forest,” Principle on the Sharing of Legislative Power 6(A)(6). The state, on the other hand, is given power over “agriculture,” Principle on the Sharing of Legislative Power 5(B)(1)—ostensibly one of the state's broadest powers. But agricultural laws will almost always raise issues of land management, and they often will raise issues of forestry as well—yet both those powers are given to the union. When those powers overlap, conflict might result. The state might wish to protect the traditional agricultural practices of its people in the forest, and the union might instead wish to clear the forest.

When such a conflict occurs, the Principles provide that the union government will always win: “If anyone [sic] of the provisions stipulated in a law enacted by a region Hluttaw or a state Hluttaw is in contrast with anyone [sic] of the stipulations contained in a law enacted by the Pyidaungsu Hluttaw, observance of the law must be in accord with the stipulations contained in the law enacted by the Pyidaungsu Hluttaw.” Principle on the Sharing of Legislative Power 15(3). As a result, the state's listed powers will be next to meaningless. The union's powers are so extensive—covering huge areas of every listed subject matter, plus the residuum—that they will almost always be relevant, and when they are relevant, they prevail over contrary state policy. The listed state powers, limited on their face, will prove to be utterly trivial in practice. Really, the states are allowed to exercise their powers only on federal sufferance.

Third, limited state powers: the state powers, taken in toto, are quite limited. It is not possible in this position paper exhaustively to show just how limited they are, but a few themes emerge. First, many of the powers are obviously miniscule in comparison to union power. In the “social sector” list, after giving the union power over such broad subject as education and health (a list with 21 subjects), see Principles on the Sharing of Legislative Power 9(A),



the Principles give the states power over things like “Freight handling,” id. at B(4) and “Photo, painting and sculpture exhibitions,” id. at B(7). Second, very many of the state powers allow the states to regulate only in accord with a union law, so that the states may not actually set their own policy. For example, in the very important “economic sector” list, the states are allowed to regulate economic, trade, and cooperative activities—but only in “accord with the law enacted by the Pyidaungsu.” See Principles on the Sharing of Legislative Power 4(B). And that is the sum extent of the states’ power over the economic sector.

Fourth, specific omissions: Burma’s ethnic minorities have been discussing the division of powers for some time, and certain common themes have emerged. The minorities are specially concerned that the states should have extensive powers over certain subjects, but the NC Principles would give the states no or only very limited power in those areas. The subjects include education, language, culture, natural resources, environmental protection, traditional land use, transportation, etc.

In short, the NC Principles give the states very limited powers and no or limited powers over those areas that are of particular concern to the states. The Fundamental Principles require the union government to help the “national races” in a number of ways—to “develop language, literature, fine arts and culture of the national races”; to “promote solidarity, mutual amity, and respect and mutual help among the national races” and to “promote socio-economic development including education, health, economy, transport and communications of less developed national races,” Principle I/11—but nowhere do the principles recognize that the states have a right to measured self-determination. In other words, the union must help the national races, but at the end of the day the union decides what is good for them. The power remains in the capital.

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