

Ethnic Rights and Constitutional Change: The Constitutional Recognition of Ethnic Nationalities in Myanmar/Burma

Melissa Crouch^{1*}

Note: this chapter is an earlier version and will appear as: M Crouch (forthcoming) 'Ethnic Rights and Constitutional Change' in A Harding (ed) *Constitutional Reform and Legal Change in Myanmar*. Hart Publishing. For inquiries please contact Melissa Crouch melissa.crouch@unsw.edu.au

Introduction- Territorial Divisions: The Seven States and Regions - National Race Affairs Representatives - Self-Administered Zones and Divisions - Conclusion

One way in which state policies may accommodate the unique claims of cultural groups is by legally conferring certain recognition or status on such groups through the Constitution. The accommodation of the rights of minorities and managing diversity is often crucial to democratisation and political stability.² The Myanmar³ government recognises that it needs to resolve ethnic conflict and grievances as part of the process of transition to a quasi-civilian democracy under the 2008 Constitution. The political and legal reform process⁴ has renewed

* Lecturer, UNSW Law, Sydney. This chapter is based on field research conducted in Yangon, Shan State, and Naypyidaw, supported by the Centre for Asian Legal Studies, Law Faculty, National University of Singapore. I would like to thank Katherine Southwick for her comments on an earlier version of this chapter. All errors remain my own.

² See generally W Kymlicka and Baogang He, *Multiculturalism in Asia* (Oxford, Oxford University Press, 2005).

³ In this chapter I use Myanmar to refer to the country post-1988, and Burma as it was known from independence in 1947 up until 1988.

⁴ On the development of the legal system generally, see Melissa Crouch, 'The Layers of Legal Development in Myanmar' in Melissa Crouch and Tim Lindsey (eds) *Law, Society and Transition in Myanmar* (Hart Publishing, 2014), pp 33-58.

discussions about the viability of federalism as part of the constitutional amendment process. Yet the 2008 Constitution already contains several provisions that appear to give some form of recognition to certain ethnic nationalities.

In Myanmar, the administration of local areas has undergone, and will no doubt continue to undergo, change as part of the transition to democracy. Under the 2008 Constitution, there are several levels of administration, beginning from the village and village-tract,⁵ to wards, townships (some of which are organised into self-administered zones), districts and finally states or regions. At the national level, representation in the *Pyithu Hluttaw* (People's Assembly, the lower house) is drawn from the townships, while members of the *Amyotha Hluttaw* (Nationalities Assembly, the upper house) represent the states and regions. The ways in which ethnic nationalities are represented at the national level, and the extent to which they have powers of governance at the local level, is based on past constitutional configurations of central-local relations.

In this chapter I explore the constitutional arrangement of central-local relations and its implications for the transitional regime. In Myanmar a key determinant in central-local relations is ethnicity. While a majority of the population are ethnic Burmans, the country is also home to a diverse range of ethnic groups, usually referred to in Myanmar as 'ethnic nationalities'. I therefore focus on how and why the current Constitution recognises the rights of ethnic minorities compared to past constitutions. That is, I am concerned with why a military regime would grant forms of special recognition to ethnic nationalities in a Constitution drafted under its control. This is related to a more recent concern in the literature in terms of the meaning of constitutions in authoritarian regimes.⁶

From one perspective, constitutional recognition of ethnic rights can be understood through the literature on cultural rights and multiculturalism. Kymlicka and Norman define 'minority rights' as 'public policies, legal rights and constitutional provisions sought by... groups for the accommodation of cultural differences'.⁷ In order to clarify the kinds of constitutional rights that ethnic nationalities in Myanmar have been given, I rely on Levy's classification of legal rights sought by minorities. His list includes eight different, though at

⁵ For a preliminary analysis of village governance, see S Kempel (2012) *Village Institutions and Leadership in Myanmar: A View from Below*. Yangon: Myanmar Development Research.

⁶ See for example Tom Ginsburg (ed) *Constitutions in Authoritarian Regimes* (Cambridge, Cambridge University Press, 2014); Tom Ginsburg and Tamir Moustafa (eds) *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge, Cambridge University Press, 2008).

⁷ W Kymlicka and W Norman, *Citizenship in Diverse Societies* (Oxford, Oxford University Press, 2000), 2.

times overlapping, rights, including: support to do things the majority can do; self-government for particular groups; rules that aim to protect a group by imposing restrictions on those outside the group; internal rules of a group; incorporation of a legal code into law, such as customary law; special representation of a group, and symbolic recognition of a group.⁸ Drawing on this classification, the argument in this chapter identifies three aspects of the formal division between the central government and ethnic nationalities under the 2008 Constitution, in order to expose the ways in which cultural rights may be used by authoritarian regimes.⁹

Symbolic Recognition: Territorial Divisions of the Seven States and Regions/Divisions

The form of constitutional recognition that has endured the longest is the designation of seven ethnic-based states, and seven Burman-based regions. I consider how this form of representation emerged from discussions leading up to independence, as well as discussions between the government and ethnic nationalities in the 1950s and 1960s.

Since independence in 1947, Burma has struggled to incorporate ethnic nationalities and this is partly because of the colonial legacy. Burma was annexed to Britain in three stages (from 1825 to 1885), and was organised at two administrative levels: ‘ministerial Burma’ in Burma proper, and the ‘scheduled’ or ‘excluded’ frontier areas.¹⁰ Certain ethnic areas were therefore never under complete colonial control. As part of the political negotiations towards independence from British colonial rule that took place in the late 1940s, numerous discussions were also held with ethnic nationalities. The most historic was the Panglong Agreement, which recognised the need for separate governance arrangements with ethnic nationalities. On 12 February 1947, this was signed by General Aung San and leaders of the Shan, Kachin and Chin ethnic nationalities. Despite the fact that not all major ethnic nationalities were included in this meeting, the Panglong Agreement remains a symbolic political pact between the majority Burmans and the plethora of ethnic nationalities that also call Burma home.

⁸ Levy, *The Multiculturalism of Fear* (Oxford, Oxford University Press, 1997) 25.

⁹ I only focus on special rights. I do not focus on human rights or cultural rights given to all groups under the Constitution.

¹⁰ Michael Charney, *A History of Modern Burma* (Cambridge, Cambridge University Press, 2009); A Smith, ‘Burma/Myanmar: Struggle for Democracy and Ethnic Rights’ in W Kymlicka and Baogang He (eds) *Multiculturalism in Asia* (Oxford, Oxford University Press, 2005), 262-287.

Following this agreement, the drafting of the 1947 Constitution took place, and several features of the Constitution demonstrate an awareness of the need to accommodate certain ethnic nationalities. The 1947 Constitution provided for the creation of special areas for five ethnic groups: the Federated Shan States, Kachin State, Karen State (also known as Kaw-thu-lay), Karenni State and the Special Division of the Chins. Two groups, the Shan and Karenni, could opt to leave the Union after ten years if this was approved by a plebiscite. After 1948, however, armed insurgencies against the government began across the country, including in Karenni State (1948), Karen State (1948), Shan State (1959), and Kachin State (1961).¹¹

Some of the constitutional provisions concerning ethnic nationalities were later abolished through constitutional amendments based on negotiations and deals made with ethnic nationality leaders. The first, which took place in 1951, provided for the governance of Karen State and stated that the right to secession no longer applied.¹² The Second Schedule was also amended to reduce Karen representation in the Chamber of Nationalities from 24 to 16 seats, while Burman seats increased from 53 to 62. Other ethnic nationalities that were not recognised in the Constitution were nevertheless given greater recognition, such as through the appointment of the Mon Affairs Minister and Arakan Affairs Minister in March 1961, which was to be in preparation for the formal establishment of Mon State and Arakan State respectively.¹³

Another step that reduced the special constitutional rights of some ethnic nationalities was the change in the administration of Shan State. After part of Shan State was put under military administration in 1952, negotiations took place between the government and Shan State leaders.¹⁴ Subsequently, the rights of Shan chiefs and their representation in the Chamber of Nationalities were annulled.¹⁵ The 1962 coup led to the complete abolition of the Shan State Council, and the arrest of some of its leaders.

In the 1974 socialist Constitution, the introduction of the seven states and seven divisions was formalised, although it did not make any special provisions for ethnic groups. The ethnic nationalities given some forms of special recognition in the 1947 Constitution were

¹¹ See generally Martin Smith, *Burma: Insurgency and the Politics of Ethnicity* (Bangkok: White Lotus, 1991).

¹² The Constitution Amendment Act 1951, 7 November 1951, replacing art 180 with 181.

¹³ Kyaw Yin, *The Foundations of Public Administration in Burma: A Study in Social and Historical Perspectives* (New York, University Microfilms, 1968), 299. These Ministries were later abolished after General Ne Win's coup in 1962.

¹⁴ Sai Aung Tu, *History of the Shan State: From its Origins to 1962* (Thailand, Silkworm Books, 2009) 317, 338.

¹⁵ The Constitution Amendment Act 1959 (second) repealed s 154(2).

promoted to the status of States (Kayah State, Karen State, Chin State, Kachin State, Shan State), along with the addition of two more: Mon State and Arakan State. These are all based on or at least named after the dominant ethnic group in that area. These seven states were on the same administrative level as the seven divisions, and they covered what British authorities previously termed ‘the excluded areas’.¹⁶ The 1974 Constitution can therefore be seen as solidifying a historical division of administrative power, yet without the original promise of secession, which was present in the 1947 Constitution. The states and divisions also had few substantive powers because, for example, it was the central unicameral parliament that retained all legislative power for the entire country under the socialist regime.

The organisation of seven states and divisions (now known as regions) has been retained in the 2008 Constitution. Since 1993, while Myanmar was still under military rule without a constitution, the military orchestrated a constitution-drafting process that was not complete until 2007. As part of this process, some representatives of ethnic nationalities attended the proceedings. For example in 2004 ethnic nationalities made up more than half of the 1,088 delegates at the National Convention.¹⁷ There were eight types of delegates, which included ‘national races’. The 2008 Constitution retained the distinction between seven divisions that were renamed as ‘regions’, and the seven states, with the addition of the new capital, Naypyidaw, as a union territory. This raises the question of whether and how powers given to the states and regions under the 2008 Constitution have been exercised.

Prior to 2014, the constitutional powers of the states and regions had rarely been exercised and remnants of the administrative structures of the previous regime remained intact.¹⁸ Under the previous military regime there was no state and region governments with the power to pass laws, so the states and region governments must be regarded as new developments. In late 2013 there were indications from the President’s Office that greater expectations would be placed on the states and regions to increase the scope of their involvement in administration and governance at the state and region level. Under the Constitution, the structure of state and region government involves a unicameral Hluttaw with military members, so it is only partially elected. The unicameral state and region Hluttaw

¹⁶ M Callahan, *Political Authority in Burma’s Ethnic Minority States: Devolution, Occupation and Co-existence* (Washington, East-West Center, 2007), 12.

¹⁷ M Smith, ‘Ethnic Participation and National Reconciliation in Myanmar: Challenges in a Transitional Landscape’ in T Wilson (ed) *Myanmar’s Long Road to National Reconciliation* (Singapore, ISEAS, 2006) 38-76.

¹⁸ See generally Nixon et al, *State and Region Governments in Myanmar* (Yangon, The Asian Foundation, MDRI-CESD, 2013).

primarily consist of representatives from townships, with 25 percent of seats still reserved for the military. At the level of administration, up until late 2013, while state and region ministers had been appointed to various ministries, there were essentially no ministries because pre-existing departments of the central military administration had simply been put under the realm of state and region control. Further, the General Administration Department, established by the State Law and Order Restoration Council (SLORC) in 1988 as a bureaucratic means to control village level administration, remains in operation.

Further, Union Government control over state and region leadership appointments is ensured because, according to the Constitution, the Chief Ministers are selected by the President from amongst elected Hluttaw members. Among these, 10 out of the 14 are former military officers, and all are affiliated with the government political party, the Union Solidarity and Development Party (USDP), rather than ethnic-based political parties. Although the Constitution grants the state and region parliaments legislative power over a limited range of areas specified in the Constitution, up until the end of 2013 most state and region parliaments had passed few laws.

Finally, in addition to central control of the parliament and executive, the central government also retains control over the state and region courts. The Chief Justice of the High Court in each state and region is chosen by the Chief Justice of the Union Supreme Court on the advice of the President (the former being chosen by the President). Yet public attitudes toward the courts as a means to resolve disputes remain extremely negative. The symbolic recognition of seven ethnic-based states and seven Burman-majority regions largely endures as a convenient way for the central government to allow a basic form of unicameral government while maintaining its control over the state and region branches of government.

Special Representation: Ministers for National Races Affairs

The second way the 2008 Constitution provides for ethnic nationalities is through the appointment of ‘Ministers of National Races Affairs’,¹⁹ which can be characterised as a form of *special representation*. But why this form of special representation, and special representation for whom? This special representation partly functions to divide state and region Parliaments by ensuring there is some ethnic diversity, but it also allows Burmans to have a

¹⁹ 2008 Constitution, s 15.

representative in areas where ethnic nationalities are a majority. The effect of this is to limit the power of state and region governments.

Levy distinguishes between two main types of special representation in legislatures: representation based on the identity of the voters, and representation that is based on the identity of the members of parliament.²⁰ Under the 1947 Constitution, the latter type of representation was in place, and the Chamber of Nationalities reserved 125 seats on the basis of ethnicity in proportion to the population, which included 25 Shan, 8 Chin, 3 Kayah, 12 Kachin and 15 Karen. The other 62 representatives were Burmans. This design was intended to give a voice and recognition to some ethnic nationalities. This was omitted from the 1974 Constitution, which replaced the bicameral parliament with a unicameral parliament as part of the centralised socialist order.

The 2008 Constitution introduced a new category of Ministers for National Races Affairs, which fits with Levy's form of representation based on the identity of the voters, although one criticism of this approach is how the identity of voters is decided. At the National Convention to draft the new constitution in the 1990s the creation of positions for Ministers for National Races Affairs appeared to be a concession proposed for inclusion in the Constitution for ethnic nationalities that could not satisfy the criteria of a 'Zone' (discussed in the following section).

As a result, the 2008 Constitution provides for a national race to have representation at the State/Region or Zone level, if it has at least 0.1 percent or more of the population in that Region.²¹ Like the States and Regions, the Ministers for National Races Affairs remain under close control of the central government, as their role is determined by the President.²² The Constitution also places several obligations on the Union Government and on national races with respect to national races matters, but here I only concentrate on how this formal designation of a Minister for National Races Affairs has been allocated in practice.²³

For the period 2011-2015, the election of 29 Ministers of National Races Affairs at the state and region level provides an indication of the purpose and distribution of this form of representation. The number of Ministers is one indication of the ethnic diversity within each

²⁰ Levy, *The Multiculturalism of Fear*, 45.

²¹ 2008 Constitution, ss 161(b) and (c). This presumably only applies to the 135 ethnic nationalities recognised by the government.

²² 2008 Constitution, s 262(g).

²³ For example, the Union Government must facilitate the development of local dialects, preservation of culture, and promote socio-economic development of disadvantaged races (s 22, 27).

state and region. Shan State has the most with seven representatives, which is not surprising given that the Shan barely constitute a majority in that area. Kachin State has four Ministers; Karen and Mon State each have three. The Irrawaddy, Rangoon and Saigang Regions have two. Finally there are two States – Arakan and Karenni State – and four Regions – Magwe, Mandalay, Pegu and Tenasserim Region – that have just one representative. Chin State is the only one that does not have any representatives, which is an indication that the population is primarily of Chin ethnicity (or one of the Chin sub-groups recognised by the government).

Of the 29 Ministers for National Race Affairs, two ethnic groups, the Burman and the Karen, each have five Ministers to represent them across the states and regions. The crucial point is that this allows the Burmans to have representation in the parliaments of five out of seven ethnic-based states. The Chin and Shan both have three representatives; the Pa-O, Rakhine and Lisu have two; and then a handful of ethnic nationalities have one representative.²⁴

Finally, the political affiliation of the Ministers for National Races Affairs suggests that most of these Ministers are either closely affiliated with the military, or part of it. Out of 29 Ministers for National Race Affairs, 17 are affiliated as members of the USDP. Another two Ministers are from the National Unity Party, a political party also known to support the military. Of the remaining Ministers, nine are from ethnic-based political parties. This includes two from the Kayin People's Party; two from the Shan Nationals Democratic Party; and one from the All Mon Region Democracy Party; the Chin Progressive Party; the Inn National Development Party; the Kayah National Party; and the Rakhine Nationals Progressive Party. The remaining Minister is independent.

In addition to which ethnic group has been granted representation through these positions, it is also important to consider how these Ministers have been perceived in relation to other members of parliament. There are preliminary indications that in some states and regions, these Ministers were given subordinate portfolios, or were even considered to be in an inferior position to other Ministers.²⁵ This came to national public attention through a case heard by the Constitutional Tribunal regarding the Ministers of National Race Affairs.²⁶ The case concerned the benefits given to Ministers of National Races Affairs in comparison to State and Region Ministers. A group of parliamentarians from the Amyotha Hluttaw (Nationalities Assembly) lodged the case with the Constitutional Tribunal in order to challenge legislation

²⁴ These are the Kayan (Padaung); Kachin; Mon; Rawang; Lahu; Akha; and Inn.

²⁵ Nixon, *State and Region Governments in Myanmar*, 56.

²⁶ Constitutional Tribunal Submission No 2/2011, dated 14 December 2011.

that would have effectively prevented Ministers of National Races Affairs from receiving the same privileges as other state and region ministers. In December 2011, the Constitutional Tribunal agreed that Ministers for National Races Affairs were of the same status as other ministers and struck out the related sections of the law.

There are several criticisms of such forms of special representation more generally, as identified in the literature on cultural rights, which need to be kept in mind if the position of the Minister for National Races Affairs is retained. For example, one concern is that special representation may create a false veneer of unity within an ethnic group, when in reality its members may not share the same political interests. It may be ‘self-fulfilling’, in the sense that it may only further encourage political support to gather along ethnic lines, and therefore undermine attempts or a sense of the need to form multi-ethnic coalitions. In addition, it requires officials to identify voters on the basis of race, and this process could be open to discrimination.²⁷ For example, the future allocation of Ministers for National Races Affairs will be determined based on the 2014 census. But the census has been mired in controversy due, among other matters, to the central government’s insistence on retaining the 135 recognised categories of ethnic nationalities. Many ethnic groups feel that they have not been classified appropriately, while other groups are not recognised on the list.

However, as the Ministers for National Races only operate at the State and Region or Zone level, they clearly remain under the control of the central government at the time of writing. In the future it will be necessary not only to evaluate what ‘responsibilities’ are allocated to these Ministers by the President, but also how these Ministers use their position; that is, whether it is for the benefit of people they represent, or whether factors such as business and land deals remain prominent.²⁸

Limited Self-Governance: Self-Administered Zones and Divisions

The third aspect of constitutional recognition for ethnic nationalities is the designation of Self-Administered Zones and Divisions, a form of *limited self-governance*, which did not feature in the 1947 or 1974 Constitution. As Levy notes, the introduction of forms of self-governance are often in response to the need to address demands for greater local control over land, because

²⁷ Levy, *The Multiculturalism of Fear*, 43.

²⁸ Maung Thawngmung, *Beyond Armed Resistance*, 29.

land rights remains one of the central issues in Myanmar.²⁹ In this section I analyse the selection process for the Zones and the constitutional powers each Zone has, with a particular focus on the history and background of the six areas that were successfully designated as Zones.

i) Selection Process for the Zones

The process of determining which ethnic groups received Zone status was largely mathematical and relied on population data (although this data is generally considered to be unreliable).³⁰ At the National Convention in the 1990s, there were 16 groups that applied for self-administered status. The conditions that a group are required to meet in order to obtain this status are largely numerical. First, an ethnic group must make up the majority of the population in at least two townships, and second, the townships must be located adjacent to each other. If the application included more than two townships, the ethnic group had to be a majority of the population in *all* of these townships. The final two conditions that needed to be satisfied are that the application could only be made by one ethnic group, that is, it could not be a coalition of groups. Ethnic groups that already had a state were not allowed to apply for this status (even if they satisfied the above criteria in areas outside its state).

Of the 15 national races that applied for self-administered status in the 1994 sessions of the National Convention, many of the applications failed. Some were rejected because they only applied for status over one township, instead of two or more, such as Lahu and Inntha in Shan State. Others failed because they proposed two townships in two different states, like the application for Kayah Zone related to townships in Shan and Kayah State. Some failed because they did not meet the criteria of a majority population in two townships, such as the attempt to form a Paletwa Hills Division for the Khumi in Chin State.

Some ethnic nationalities attempted to achieve this status by combining with other ethnic nationalities to meet the requirements. For example, an Akha Zone was rejected because it proposed to group the Akha, Shan and Lwela races together, which were considered by the government to be distinct ethnic groups. Further, groups that already had recognition as a state were effectively ruled out of claiming status recognised in another state. Therefore, the Kachin population in Shan State North Special Region 5 and the Kayin population that lived outside of Kayin state were unsuccessful.

²⁹ Levy, *The Multiculturalism of Fear*, 32-33.

³⁰ This section is drawn from documentation on the National Convention on the Online Burma/Myanmar library.

As a result of this application process, the Self-Administered Zones were announced as early as 1995.³¹ Fifteen years later, on 20 August 2010, the Zones were officially proclaimed.³² Not long after the 2008 Constitution came into force, on 30 March 2011, the President issued a notification to clarify the areas these Zones covered and to announce that they had begun operation.³³ Six Zones were established: the Naga, Kokang, Danu, Palaung, Pa-O, and Wa Zones.³⁴ Each of these Zones includes between two and six townships. The Zones have a legislative, executive and judicial branch,³⁵ in the following section I explore the scope of these powers.

ii) Constitutional Powers of the Zones

The Zones as a form of limited self-governance derive meaning through the powers allocated to them under the Constitution. Legislative and executive power is administered by the Leading Body of the Zone.³⁶ The Leading Body has at least ten members, including military personnel and Ministers for National Races Affairs (discussed in the previous section). These members are elected by a Scrutiny Body established by the State Peace and Development Council (SPDC) for a period of five years. The Leading Body is coordinated by a chairperson who is chosen on the consensus of the Body itself, or by a secret vote if there is a dispute. This is an important position because, for example, he has the power to submit a question to the Constitutional Tribunal, the newly established tribunal that can decide on constitutional law matters, although standing is restricted to a select number of government officials.

The role of the chairperson is to oversee the function and activities of the Leading Body, and the President can also assign responsibilities to the chairperson, in the same way that the President determines the duties of the Ministers for National Races Affairs. The position of the

³¹ The Detailed Basic Principles for Prescribing Self-Administered Divisions or Self-Administered Zones as laid down by the National Convention Plenary Session Held on 7 April 1995.

³² The Union of Myanmar, The State Peace and Development Council Notification No. 33/2010, 20 August 2010, Delineation of Self-Administered Division and Self-Administered Zones and their Seats of Government.

³³ Republic of the Union of Myanmar State Peace and Development Council, Presidential Notification No 7/2011, 30 March 2011.

³⁴ 2008 Constitution, s 56.

³⁵ 2008 Constitution, ss 12, 17, 18.

³⁶ The powers of the Leading Body of the Zone are set out in the Constitution (art 274-283) and mirrored in The Self-Administered Division or Self-Administered Zone Leading Body Law No 17/2010.

chairperson is not secure, as the President has the authority to dismiss the chairperson before the end of their five-year term on ambiguous grounds, such as if they are not carrying out their duties ‘efficiently’.³⁷ This is similar to judges of the Supreme Court and High Courts, who can also be dismissed by the President on such grounds. Within the Leading Body, a smaller unit known as the Executive Committee must be formed and consists of between three and five members. All of the existing Zones have elected three members except for Naga Zone and Pa-O Zone, which have five each. The Executive Committee has responsibility for ‘administrative functions’, oversees the civil service, and is also supposed to be responsible for drafting the annual budget.³⁸

In terms of legislative power, the power to pass laws is granted to the Leading Body of the Zone.³⁹ The Leading Body of the Zones has legislative powers according to Schedule III of the 2008 Constitution, which is a narrow list that includes matters such as electricity, and prevention of fires. The list addresses three types of matters: local development and public services; the environment; and the local economy. Even if a Zone does legislate in these areas - and to date there is no evidence of any such legislation - a Zone law is subordinate to both state and region law as well as union government laws, to the extent there are any inconsistencies.⁴⁰

In terms of the judiciary, the courts are supposed to include a Zone-level court, the District Court (in Wa Division), and the Township Courts.⁴¹ However, none of the Zone-level courts have been established to date. This means that any disputes that arise are resolved through non-state or informal means. Finally, the Constitution is clear that the Zones, like the ethnic-based states, have no right to secede from the Union.⁴²

iii) Concentration of Zones in Shan State

Five of the six Zones are located in present-day Shan State. Shan State is important because it is the largest state in terms of land mass and covers almost a quarter of the area of Myanmar. Most of Shan State is rural, rich in mineral resources and famous for its precious stones, metals

³⁷ 2008 Constitution, s 61(a); Law 17/2010, s 53.

³⁸ Law 17/2010, ss 38, 45, 41.

³⁹ 2008 Constitution, ss 275.

⁴⁰ 2008 Constitution, ss 198(c) and (d).

⁴¹ Union Judiciary Law 20/2010, ss 42(b) and (c).

⁴² 2008 Constitution, s 9.

and horticulture. Yet the land is also a liability, as Shan State produces a large portion of the world's opium and heroin,⁴³ which contributes to Myanmar's position as the second largest opium producing country in the world. Due to the borders it shares with China, Shan State is a key state for strategic, security and economic reasons.

Today, the Shan are the largest minority group in Myanmar, most of whom are Buddhist. Only about half of the population of Shan State are ethnic Shan, while other major ethnic groups that live in Shan State include the Pa-O, Palaung, Kachin, Danu, Lahu, Inthar, Wa, Kokang and Akha.⁴⁴ Yet the differences within the population of Shan State are more geographical than linguistic or religious. As a result of this diversity, Shan State has never been united, but if it was it could rival Burman interests and power. Since independence, the central government has therefore encouraged divisions among ethnic groups in order to hamper any attempts to establish a national movement in Shan State.⁴⁵

The history of the relationship between the Shan and the Burmans is part of the reason that five of the six Zones are located in present-day Shan State. The period from late 1200s until early 1500s is generally acknowledged as a time when the Shan rulers, known as *saopha*, were the dominant power in the area now known as Myanmar.⁴⁶ This came to an end after the reassertion of power by Burman Kings, beginning in 1531 with the Toungoo Dynasty. In 1885, after the last king, Thibaw, was deposed and exiled by British colonial authorities, Upper Burma was annexed as part of British India. The extent of engagement between British authorities and the Shan varied under colonialism,⁴⁷ and from 1922 the Shan were under a federated form of administration. By 1937, when the Government of Burma Act 1935 came into effect to separate the administration of Burma from British India, the Saopha were given special representation in the government.⁴⁸

As part of negotiations for the drafting of the 1947 Constitution, it was clearly recognised that the Shan should be afforded special rights. As a result, the 1947 Constitution provided that the Shan had the right to secession from ten years after independence. But in

⁴³ On the history of Shan state, and the use of drugs and US foreign policy in particular, see Bertil Linter, 'The Shans and the Shan State', 403-45.

⁴⁴ Maung Thawngmung, *Beyond Armed Resistance*, 15.

⁴⁵ Maung Thawngmung, *Beyond Armed Resistance*, 16.

⁴⁶ See for example G E Harvey, *History of Burma: From the Earliest Times to 10 March 1824* (London, Frank Cass & Co Ltd, 1967), 71-126.

⁴⁷ Sai Aung Tun, *History of the Shan State*, 171.

⁴⁸ Sai Aung Tun, *History of the Shan State*, 224.

1952 the government declared a large part of southern Shan State under military administration. This was on the pretext of suppressing Kuomintang forces, but also worked to undermine the power of the Shan leaders, the *saophas*, and a large number of Burmese troops brought into Shan State.⁴⁹ Fighting between the government and various ethnic armed groups in Shan State broke out in the 1960s and continued in the following decades, until some ceasefire agreements in the late 1980s and early 1990s.⁵⁰ I want to suggest that we need to keep the social, economic and political history of Shan State in mind in order to understand how the Zones were created and which areas were given Zone status.

I now turn to examine why each of these Zones was established, emphasising the history of relations between these ethnic nationalities and the central government, particularly since the late 1980s.

iv) Round 1 Ceasefires: Wa Division and Kokang Zone

The Wa and Kokang Zones share a similar history in terms of their relations with the central government and both are located in Shan State. Up until the late 1980s, both were part of the Communist Party of Burma (CPB), but then they brought with the CPB and entered into ceasefire deals with SLORC and received certain concessions in return. I argue that the constitutional status as a Zone was granted to these two groups as part of the broader process of the ceasefire deals with these ethnic armed groups..

From the 1960s until late 1980s, the Wa were one of the biggest forces in the CPB, which posed the most significant military threat to the government of Burma at the time.⁵¹ By January 1968, the CPB also entered the Kokang area. Support for the CPB waned in the late 1980s, however, after the CPB took steps to oppose the drug trade, which many ethnic nationalities relied on as a source of income. In March 1989, the Kokang opposed the leadership of the CPB and broke away from the CPB. In April 1989, Wa troops took the strategic base of Panghsang and drove the CPB leadership across the border into China.

As a result of the break with the CPB, new lines of communication were opened up with the Burmese military junta. In 1989, the Kokang entered into a ceasefire agreement with

⁴⁹ Bertil Linter, 'The Shans and the Shan State' (1984) 5(4) *Contemporary Southeast Asia* 403-450, at 411.

⁵⁰ See generally, Martin Smith, *Burma: Insurgency and the Politics of Ethnicity*.

⁵¹ The most comprehensive account of the CPB in Burma is B Linter, *The Rise and Fall of the Communist Party of Burma* (Southeast Asia Program, Cornell University Press, 1990) 35.

the junta, and their area became known as the Shan State Special Region 1 (North).⁵² The Kokang were allowed to keep their arms and control of all their territory. SLORC also provided their army with money, cars and food, and allowed opium growing.⁵³ In 1989 the Wa also entered into a ceasefire deal with the junta, as represented by General Khin Nyunt with the assistance of Lo Hsing-han, a former drug lord from Shan State. The Wa area became known as Shan State Special Region 2 (North). The UWSA was similarly given food, fuel and funding by SLORC, and was allowed to continue its drugs trade and the extraction of natural resources.⁵⁴ As the Wa were part of the first round of ceasefires, they benefited from higher rewards and lack of restrictions in comparison to later ceasefire deals. In particular, the Wa and Kokang were given the profitable jade mines in Kachin State, because areas like the Wa Hills have no minerals of their own. Aside from these concessions, by the late 1990s, the ceasefire deals also allowed room for international NGOs to establish development projects in these areas.⁵⁵ By the mid-2000s, a new partnership was established known as the Kokang and Wa Initiative, which aimed to help poppy farmers and families meet basic needs without income from opium. Yet from a governance perspective institutions in these regions are minimal. Up until 2007, one development practitioner observed that in the Wa region ‘[t]here was no court structure and no system of appealing decision ... There was and is no legal profession and there never have been any practising Wa lawyers in the Wa Region’.⁵⁶

One characteristic of both the Wa and Kokang political parties and armies, and a reason that the central government needs a strategic alliance, is their strong connections to China.⁵⁷ Some leaders of the Wa and Kokang do not speak Burmese.⁵⁸ There are an estimated 700,000-

⁵² Linter, *The Rise and Fall of the Communist Party of Burma*, 83-85.

⁵³ Zaw Oo and Win Min, *Assessing Burma’s Ceasefire Accords*, 15; Linter, *The Rise and Fall of the Communist Party of Burma*, 53.

⁵⁴ On the Wa and Kokang ceasefire deals see Zaw Oo and Win Min, *Assessing Burma’s Ceasefire Accords* (Policy Studies 39, East West Center, Washington, 2007).

⁵⁵ On the Wa see Kramer, *The United Wa State Party*.

⁵⁶ Ronald D Renard, ‘The Wa Authority and Good Governance 1989-2007’ (2013) 17(1) *Journal of Burma Studies* 141, at 152.

⁵⁷ In a visit to the Hluttaw in February 2014, I observed one Wa member of parliament wearing headphones. When I questioned Hluttaw officials whether this was for the purpose of translation, I was informed that it was because the member of parliament was partly deaf (that is, there was no translation service).

⁵⁸ Linter, *The Rise and Fall of the Communist Party of Burma*, 85.

800,000 Wa living in Myanmar, but another 350,000 in China.⁵⁹ Both the Wa and Kokang maintain close ties with China, including officials and intelligence agents from Yunnan. It is also common knowledge that , some Chinese were granted Wa or Kokang identity cards in order to live in Myanmar (at least during the period of General Khin Nyunt).⁶⁰

The UWSA is estimated to have 30,000 troops, which makes it the largest ethnic force in Myanmar. There continue to be disputes between the central government and the Wa. For example, in 2008, the Wa region was the only part of the country that returned a majority ‘no’ vote in the constitutional referendum, even refusing access to election authorities prior to the poll, resulting in balloting being cancelled in areas not under central government control.⁶¹ In 2010, the UWSA submitted a proposal to the Burmese army for the inclusion of three more townships as part of the Wa Zone on the grounds that in 1948 these regions were marked as inhabited by Wa people.⁶² While a new ceasefire was signed with the government in September 2011,⁶³ there have since been calls for greater independence.⁶⁴ Despite the ceasefire deals and Zone status, there remain ongoing demands for greater recognition.

v) **Round 2 Ceasefires: Pa-O Zone and Palaung Zone**

Similar to the Wa and Kokang, the Pa-O and Palaung also share histories of opposition to the central government that, since the 1990s, has been mediated by a ceasefire, and again resulted in the constitutional recognition of Zone status.

The Pa-O are related ethnically to the Karen; most adhere to Buddhism, and primarily live in southwest Shan State. The Pa-O National Liberation Organisation (PNLO) was formed

⁵⁹ Myo Myo and Soe Than Lynn (2010) ‘Wa party to contest few home seats’ *Myanmar Times*, 21-27 June <http://mmtimes.com/2010/news/528/news001.html>.

⁶⁰ M Callahan, *Political Authority in Burma’s Ethnic Minority States: Devolution, Occupation and Co-existence* (Washington, East-West Center, 2007) 21.

⁶¹ Transnational Institute, ‘A Changing Ethnic Landscape: Analysis of Burma’s 2010 Polls’ (Burma Policy Briefing No 4, 2010) www.tni.org.

⁶² *Mizzima* ‘UWSAs proposal on transformation of itself into Border Guard Force’, 7 January 2010, www.mizzima.com/research/3326-uwsas-proposal-on-transformation-of-itself-into-border-guard-force.html

⁶³ Burma News International, *Deciphering Myanmar’s Peace Process 2013*, 180.

⁶⁴ See for example *The Irrawaddy*, ‘Wa Army Pledges to Continue Push for Independence’ 28 March 2013. <http://www.irrawaddy.org/ethnic/wa-army-pledges-to-continue-push-for-independence.html>

in 1949 and has at times fought against both the Shan and the central government.⁶⁵ In the late 1950s, the PNLO was one of the ethnic armies that took up U Nu's offer of 'arms for democracy' and formed a political party known as the Pa-O National Party (PNO).⁶⁶ But in the mid-1960s, some PNO leaders were arrested after the breakdown of the ceasefires. The CPB formed links with the Pa-O and entered into an understanding that the CPB would supply arms in return for being allowed to operate in the Pa-O area.⁶⁷ Following the retreat of the CPB to China, in February 1991, the PNO subsequently, agreed to a ceasefire with the military government.⁶⁸ As part of the ceasefire deal, the PNO were granted logging permits and concessions in the gem mining industry.⁶⁹ The PNO were also allowed to retain control of what was then known as Shan State Special Region 6 (South).

The Palaung did not form a resistance army immediately after independence as the Pa-O did, but they eventually took up arms against the government after the coup in 1962. The Palaung people are related to the Mon-Khmer, and most identify as Buddhist, with a small percentage of animists and Christians. The population is estimated to be over one million, spread across Shan State with a concentration in the northwest, although there are also Palaung refugees in northern Thailand, and a Palaung population in southwest China. In the late 1980s the Palaung State Liberation Party (PSLP), like many other ethnic armed groups, was affected by the junta's 'four cuts' program, a strategy that aimed to target ethnic armies supplies of food, finances, information and recruits. In 1991, the Palaung State Liberation Army (PSLA) entered into a ceasefire,⁷⁰ and the area they controlled came to be known as Shan State Special Region 7. The agreement allowed the PSLP to maintain the area it already held, and was also based on promises of greater financial and development assistance.

One issue of concern for the central government is the ongoing conflict with the Ta-aung (Palaung) National League Army (TNLA). In 2012 this led to the displacement of over 2,000 people, and fighting continued in 2013.⁷¹ The Palaung has also accused government

⁶⁵ Callahan, *Political Authority in Burma's Ethnic Minority States*, 45.

⁶⁶ Zaw Oo and Win Min, *Assessing Burma's Ceasefire Accords*, 8. Smith claims that the Pa-O were offered a state in return: Smith, *State of Strife*, 168-169.

⁶⁷ Linter, *The Rise and Fall of the Communist Party of Burma*, 29.

⁶⁸ Callahan, *Political Authority in Burma's Ethnic Minority States*, 46.

⁶⁹ Zaw Oo and Win Min, *Assessing Burma's Ceasefire Accords*, 44.

⁷⁰ On the Palaung ceasefire see Zaw Oo and Win Min, *Assessing Burma's Ceasefire Accords*, 12, 18.

⁷¹ Burma News International, *Deciphering Myanmar's Peace Process 2013*, 8; and *Deciphering Myanmar's Peace Process 2014*, 7-10.

forces of crimes against its people, such as the murder three off-duty Palaung soldiers in northern Shan State.⁷² Aside from ongoing conflict, in 2013 the TNLA also called for the expansion of the Palaung Zone from two to 12 townships, and it contested the government's estimate of population figures.⁷³ Similar to the Wa, the Palaung continue to call on the Union Government for greater recognition than has currently been granted, such as by adding more townships as part of existing Zones.

vi) **The Exceptions that Legitimise Representation: Danu Zone and Naga Zone**

The last two Zones are grouped together, as they can be seen as the exceptions that seek to legitimise this form of special representation beyond mere ceasefire agreements. While the Danu Zone is located in Shan State, it is the only ethnic nationality of the six that was not in armed conflict against the government. The Naga Zone is located outside of Shan State, and its status therefore reduces the perception that the creation of the Zones was simply to undermine unity in Shan State.

The Danu Zone appears to be largely the result of the numerical formula for Zone status and the population count in the 1990s. The Danu Self-Administered Zone includes two townships, Pindaya township and Ywangan township. The current Chief Minister of Shan State, Sao Aung Myatt, is Danu,⁷⁴ and one of the members of the executive committee is from the Danu political party. When conducting field research, my informants questioned why Danu was recognised as a Zone. As one Danu informant put it, the Danu had never had an armed group, the Danu can speak Burmese and, in his opinion, they have a good relationship with the government. In my attempts to understand what difference the status as a Zone has made for them, responses I received were largely ambivalent. One informant, however, showed me a book that had been published locally on Danu cultural identity. When I sought to clarify whether he meant that the central government was now funding initiatives to publish materials on cultural affairs and local languages, the response I received was, 'Oh no, it was not funded by the government. The central government simply gave us permission to publish'. This raises doubts about reports in the government-run media that Union Ministers had made donations to

⁷² *Mizzima News*, '3 killed 2 raped by Myanmar army says Palaung group' 3 May 2013, <http://mizzima.com/news/ethnic-issues/9327-3-killed-2-raped-by-myanmar-army-says-palaung-group.html>

⁷³ Nan Tin Htwe (2013) 'No ceasefire but govt and Palaung agree to further talks', 4 August, *The Myanmar Times*

⁷⁴ Maung Thawngmung, *Beyond Armed Resistance*, 34.

a Danu Education Foundation.⁷⁵ While on one level obtaining permission to print material on the culture and tradition of ethnic nationalities is a break from the past, it may be attributed to the general lifting of restrictions on media publications and censorship, rather than the creation of the Danu Zone in particular.

Outside of Shan State, the Naga Self-Administered Zone is located in Sagaing Region and includes three townships with Lahe as the capital. The Naga were one of the ethnic nationalities who served in the war alongside the British.⁷⁶ The area populated by the Naga has had a history of conflict and includes the Naga on both sides of the border with India. While there have been past attempts to unite the Naga across the borders,⁷⁷ in 1988 the Burmese Naga drove the Indian Naga out of their base.⁷⁸ Although the National Socialist Council of Nagaland had entered into conflict with the government, it was never to the same extent as the Wa, Kokang, Pa-O or Palaung. A ceasefire agreement was signed on 9 April 2012, which included an agreement to stop all fighting and provided for further discussions on future steps towards settlement.

The Naga Zone has already received development assistance for education, health and infrastructure projects from the Indian government and Indian based companies. Similarly China's support for the Wa Zones and Kokang Zones is also evident, although it is not proclaimed in terms of development aid. The designation of the Naga Zone has also seen a renewal of overt central government sponsorship of annual ethnic celebrations. For example, on 15 January 2013, as part of the Naga New Year celebration hosted at Lahe Township attended by Zone members,⁷⁹ the Deputy Minister for Border Affairs reportedly gave financial assistance for the development of Naga Zone. But this practice of publicly reported displays of gifts to ethnic nationalities is not new, and from one perspective only fosters a sense of

⁷⁵ *New Light of Myanmar*, 'Union Minister meets members of Danu Self-Administered Zone Leading Body', 22 September 2012, 2.

⁷⁶ Maung Thawngmung, *Beyond Armed Resistance*, 3.

⁷⁷ Burma News International, *Deciphering Myanmar's Peace Process 2013*, 151-152.

⁷⁸ Linter, *The Rise and Fall of the Communist Party of Burma*, 107.

⁷⁹ *Myanmar Update*, 'Naga Self-Administered Zone Organises New Year Celebration on 15 January', 23 January 2013, <http://www.myanmarupdate.com/naga-self-administered-zone-organizes-new-year-celebration-on-15-january/>

dependency on the central Union government and requires the Zone to ensure it maintains its focus on pleasing Naypyidaw.⁸⁰

The main issue of contention between the central government and the Naga concerns the categorisation of the Naga ethnic group. The Naga are currently listed as one of the 53 Chin tribes. In March 2013, a public statement issued by several Naga organisations based in Rangoon called on the government to list the Naga as a separate ethnic tribe on the official government list.⁸¹ The status as a Zone has not necessarily reduced the demands of ethnic nationalities for greater recognition.

Conclusion

The relationship between the national Union Government and ethnic nationalities is of crucial significance, because one of the ongoing challenges for the Myanmar government moving forward is how it deals with the demands of ethnic nationalities. Levy's framework on cultural rights provides a useful lens through which to analyse the way in which central-local relations in Myanmar is determined in part on the basis of ethnicity. The organisation of the states and regions I characterise as a form of *symbolic recognition*, which is a means for the government to maintain a sense of continuity in the recognition provided to certain ethnic nationalities. While the states and regions are likely to remain, this is not to suggest that all ethnic groups are satisfied with this distribution of power. Second, there is a system of *special representation* at the state and region level for Ministers of National Race Affairs to represent other major ethnic groups in the area. This allows both for fragmentation of power between ethnic groups, and for Burman representation in the ethnic-based states, although all such Ministers have their responsibilities controlled by the central government. Given that some ethnic groups have actively sought to be represented at the state and region level through the appointment of a Minister for National Race Affairs, this suggests that it is seen as a valuable form of representation at least by some groups.

Third, certain ethnic nationality areas are now recognised as Self-Administered Zones or Divisions (hereafter 'Zones'), which I identified as a new form of *limited self-governance*.

⁸⁰ *The New Light of Myanmar*, 'Naga Self-Administered Zone sees health care services, development works' 16 January 2014, p 16.

⁸¹ Thawng Zel Thang, 'We are an indigenous people in Burma, Naga', *Chinland Guardian*, 16 March 2013, <http://www.chinlandguardian.com/news-2009/2033-we-are-an-indigenous-people-in-burma-naga.html>.

Overall, these forms of recognition, as set out in the 2008 Constitution, can be understood as a means of ‘constitutional business’, whereby the central government (previously the military junta) conferred certain constitutional privileges or created opportunities for some ethnic nationality leaders as a concession that primarily, though not exclusively, relates to previous ceasefire deals in the late 1980s and early 1990s. The implications for all three forms, however, is that the central Union government retains ultimate control under the terms of the 2008 Constitution. This has led to the emergence of a ‘Look to Naypyidaw’ approach, in which ethnic nationalities remain conscious of the need to appease the central quasi-civilian government while at the same time lobbying Naypyidaw to demand increased forms of recognition.

One indication that these forms of recognition provide for continuity in terms of the way in which the central Union government has sought to subordinate ethnic nationalities is the periodic public gestures of dialogue and donations, as reported in the national English-language newspaper, the *New Light of Myanmar*. This usually takes the form of Union government officials visiting Zone areas, or meeting with leaders of the Zones or ethnic nationalities.⁸² These meetings also serve as a reminder to Zone leaders that they are dependent on the Naypyidaw government for ongoing support, fostering a ‘Look to Naypyidaw’ relationship.

Presuming the Zones are retained through the constitutional amendment process which began in 2013 and remains ongoing, the future then raises several questions. Many of these questions rest on the outcome of the 2014 census, which has yet to be made public. If other ethnic nationalities can fulfil the population requirements as a result of the new census count, then in the future more Zones may be formed. It is also possible that existing Zones may be expanded, if the census shows that adjacent townships also have a majority population of that ethnic group. As the existing Zones were only established in 2011, their activities and role must be monitored over a longer period of time in order to understand what function they fulfil and the power they exercise.

Overall, the case of Myanmar illustrates that authoritarian regimes may include provisions for special recognition of cultural rights for some ethnic groups as a means of facilitating negotiations and peace deals with such groups. The creation of these rights can

⁸² See for example *New Light of Myanmar*, ‘Priority given to self-administered zone/ division, state/region for development tasks’, 16 August 2012, p 10; *New Light of Myanmar*, ‘Paddy seeds presented to chairmen of Self-Administered Zones/Division’, 21 June 2012, p 1.

therefore be used to legitimise the role of the quasi-civilian government and the function of the Constitution in controlling ethnic rights. Yet the meaning of these rights is dynamic not static, and they must continue to be assessed over the coming years in order to gauge the impact of these provisions on the shifting nature of central-local relations more broadly.

Further readings

- Burma News International, *Deciphering Myanmar's Peace Process: A Reference Guide 2014*. 2014, www.mmpeacemonitor.org
- Burma News International, *Deciphering Myanmar's Peace Process: A Reference Guide 2013*. 2013, www.mmpeacemonitor.org
- Crouch, M and T Lindsey (eds) *Law, Society and Transition in Myanmar* (Hart Publishing 2014).
- Crouch, M, 'Rediscovering 'Law' in Myanmar: A Review of Scholarship on the Legal System of Myanmar' (2014) 23(3) *Pacific Rim Law and Policy Review* 543-577.
- Nixon et al, *State and Region Governments in Myanmar* (Yangon, The Asia Foundation and MDRI-CESD, 2013) www.theasiafoundation.org
- Silverstein, J, 'Politics in Shan State: The Question of Secession from the Union of Burma' (1958) 18(1) *Journal of Asian Studies* 43-57.
- Smith, M, *Burma: Insurgency and the Politics of Ethnicity* (2nd edition. Bangkok, White Lotus, 1991)