Natural Resources in a Federal Myanmar

This paper provides observations and comments on four papers prepared on behalf of the Ministry of Natural Resources and Enviromental Conservation of National Unity Government relating to natural resources in a federal Myanmar:

- Marine and Coastal Natural Resources
- Biodiversity Conservation
- Federal Water Resource Conservation
- Mineral Resource Federalism (and fiscal arrangements)

In addition, it reviews a paper prepared by the All Burma Indigenous People's Alliance:

- Policy on the Rights to Territorial Governance of Indigenous People Burma/Myanmar

General Observations

Many of the issues these papers address are inter-connected and the eventual federal arrangements in Myanmar will need to reconcile the very significant differences between them. Moreover, the papers are pitched at very different levels: the first two are very detailed policy papers with relatively little examination of the constitutional provisions or the issues that federalism may pose for Myanmar. The paper on water goes somewhat further into issues of federal design as they relate to good water policy. And the paper on mineral resources provides quite detailed analysis of issues around resource revenue sharing, which is a key issue for future resource federalism, but little on ownership and control of resources or the constitutional provisions. The paper on indigenous rights addresses a key issue for future federalism, namely principles and positions regarding indigenous rights to territorial governance, notably land and resources, but suggests discussion of a federal constitution is premature until indigenous rights are clarified. Taken together, the five papers do not add up to a shared vision of Myanmar's possible federal future, so it is useful to see them together in terms of potential next steps towards developing a more integrated vision.

The basic structure of a federation is set out in the constitution. The federal constitutional arrangements should be designed to last for generations and capable of being adapted to different policies over time. That said, in designing federal arrangements, it is useful to have a idea of "good policy",

at least as currently understood, and to ask whether the arrangements are likely to encourage good policy.

This paper focuses on the potential constitutional issues that the five papers and their subject matter raise.[1]

Key issues in the design of a federal architecture

Before entering into the specifics of each paper, it is worth bearing in mind a few key architectural issues in the design of a federation:

- *Member-state structure*: how many states will there be in the federation? Is there agreement on what they are and their boundaries? Will there be a third tier of government set out in the Constitution or will it be decided by federal and/or state law?
- *Approach to the division of powers*: To what extent will the Constitution try to distinguish between exclusive powers assigned to each order of government? Will there be many concurrent or shared powers and, if so, will there be federal supremacy. Will federal laws in areas of concurrency be administered by the federal government or by the states? Will all state governments or other (indigenous?) governments have the same powers?
- *Central institutions*: Will the regime be parliamentary, presidential-congressional or a hybrid presidential-parliamentary? Will there be two legislative chambers? What will be the composition and powers of the second chamber? Will central institutions have any special protections for minorities—special representation or special powers?
- *Courts*: How will the court system be structured and appointed? Will there be a Supreme Court or Constitutional Court with power to interpret the Constitution?
- *Rights*: What rights will be written into the Constitution?

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[1] Discussion of these issues and comparison with other countries is necessarily cursory in this paper. For a fuller discussion, see my *Natural Resources in Federal and Devolved Countries,* Forum of Federations http://forumfed.org/2020/05/new-forum-report-natural-resources-in-federal-and-devolved-countries/

As we shall see, these issues can be highly relevant to land and resources and the subjects discussed in the five papers.

Papers on Marine and Coastal Resources, Water Resources and Biodiversity Conservation

These three papers provide impressive and quite sophisticated outlines of good, modern policy for the respective resources. However, the marine and coastal and biodiversity papers are relatively light on their examination of what the federal arrangements would be, specifically around the division of powers and any rights that might be constitutionalized. The water resources goes further into those issues.

Marine and Coastal Natural Resources:

A first distinction is between inshore (up to 10 miles) and offshore (to the limits of the Exclusive Economic Zone). The paper advocates Integrated Coastal Management, with ecosystem marine and coastal spatial planning out to the limits of the EEZ but also in adjacent onshore areas, and asks whether this would require federal legislation or simply a plan (as an initial step). The paper is heavily focused on what the major objectives of policy should be, with much less attention to the respective roles of the federal and state/regional governments (or of indigenous peoples). It seems to envisage the states/regions as part of integrated management, without elaborating how this might be done. It states that Myanmar has assigned jurisdiction of "local governments" over coastal waters up to 10 miles offshore (mainly for artisanal fishing) and recommends this be maintained. However, it is unclear on jurisdiction in the larger offshore, though it does question whether Myanmar should consider a strong coast guard to regulate and monitor marine areas. The paper says little about offshore petroleum, which this commentary discusses in relation to minerals.

The coastal paper could be complemented by a second paper that explores the following related issues, especially as they might be reflected in a new federal Constitution:

1. What is the offshore territorial limit of a state or region? This varies amongst federations between the high water mark, 3 miles and ten miles. If ten miles is confirmed, what constitutional powers would the federal government have in relation to integrated management of the inshore areas?

There can be complexities managing an offshore area divided between jurisdictions.

2. Does the federal government have exclusive jurisdiction over the EEZ beyond the state/region territorial boundary? In logic it should have, in that the offshore lies beyond the territory of a state/region.
3. Should the Constitution make "environmental protection" and/or "coastal management and protection" a concurrent responsibility of the federal and state/region governments? If so, would there be federal supremacy? This could be consistent with state/regional jurisdiction over inshore fishery and over local land use planning. It could also permit state/regional administration of aspects of coastal environmental planning by federal delegation as well as by state/regional legislation.
4. Should the Constitution establish principles relating to environmental objectives and management.. If so, would these be judicially enforceable?
5. Should the issues of coastal management be addressed in the Constitution or through federal and state/regional legislation and agreement?[2] Is there a need allocate jurisdiction and mechanisms for "coastal management" in the Constitution?

Biodiversity Conservation

This paper is very much a review of current policy and legislation in Myanmar relative to biodiversity conservation, with well considered observations and recommendations as to changes that may be needed. However, there is little in the paper that relates to governance arrangements in a federal Myanmar. The paper asserts that "it is only practical that powers and responsibilities for biodiversity conservation should be a sector where the federal government, state governments and local governments will have concurrent jurisdiction". The paper emphasizes the crucial need for significant finances to mitigate future damage and remedy cumulative

[2] See https://www.sciencedirect.com/science/article/pii/S0264837722002770 regarding the issues of coastal management in Andalusia, as part of Spain's federal structure. Given the complexity of the issues and the shifting understanding of the science, there is a case for dealing with government structures through legislation.

damage and it points to a variety of sources for such finance, including domestic taxes, natural infrastructure, offsets by resources developers, and green or blue bonds.
All of the papers regulatory and financial regulations would seem to be realizable through federal legislation were "environmental conservation" to be a concurrent legislative responsibility. However, the questions posed above about the nature of concurrency—federal supremacy? Administration arrangements?—will need resolution, at least in part, in the Constitution.

The paper does include limited recommendations regarding the new federal Constitution. It calls for the Constitution to embed:

- The duty to protect and use sustainably the natural environment;
- The duty to punish and charge compensation for remediation from organizations and private citizens that seriously deplete biodiversity.

These could be inserted as general principles, but a critical issue would be whether they were enforceable by the courts.

Two final areas where this paper touches on a federalism issue are environmental education and scientific research. It calls for the "incorporation of the biodiversity values into the federal education system". Whether or how this might be done will depend on the allocation of responsibilities for education, most notably for school curriculums in the new federal set-up. Responsibilities for the different aspects of education differ greatly across federations. However, in all federations the federal government plays the lead role in funding and guiding scientific research. This recognizes the advantages of scale associated with most research programs. However, federations vary in the extent to which states and even sub-state units are active in research. There are both regulatory and financial aspects to scientific research. The regulatory responsibility, which includes intellectual property, public health and safety and security, is almost always exclusively federal, though it can be concurrent with federal supremacy. Most federations provide both orders of government a "general spending power" that can provide the Constitutional basis for funding research, but in some federations there are constraints on a government spending beyond its areas of legislative jurisdiction.

Water Resources

Myanmar has abundant water, though with uneven spatial distribution and major variations in flows, with 80 percent during the monsoon. The are six

river basins, all involving more than one state or region and most connecting to neighbouring countries. The Aveyarwady-Chindwin is by far the most important, draining 58 percent of national territory; the Thanlwin drains 18 percent. The country's water use is well below potential and includes huge untapped hydro-electric possibilities. Irrigation is mainly in the dry uplands. Flood control is a major issue in the delta.

Water has been a highly contentious issue in many federations and often the source in inter-state rivalry or conflict. Many federal constitutions are not appropriate to modern water management challenges.

This paper sets out in an early paragraph how it envisages integrated water resources management in a federal Myanmar.

> The federal water policy is a national framework for managing water resources within which states, regions, federal territories, and administrative zones can develop their legal frameworks, guidelines, strategies, and action plans for sustainable development and management of water resources. The water resource is a national asset and is governed by the statutes of States, Regions, territories and self-administered zones. The States, Regions, territories and administrative zones exercise proprietary rights over the water resource and, therefore, have the authority to legislate on all aspects of water supply, use, pollution control, hydropower, irrigation and recreation, as does the federal government in the federal territories. The federal statutes, then, deal with fisheries, the protection of navigable waters, shipping, some specific aspects of environmental protection, drinking water in areas of federal jurisdiction, international water management, and the cooperation of states, regions, territories and self-administered zones, neighbours and regional countries, as well as international relations in water resources planning and management.

It sees the federal water policy as being based on integrated water resources management at the river basin level.

The paper endorses the need for "appropriate institutional arrangements for each river basin… with appropriate powers to plan, manage and regulate". At present, different functionalities have been institutionalized under separate government agencies with often competing mandates. Therefore, the paper advocates a strong lead role for the federal government regarding fair sharing, clear mandates, enhanced capacities, monitoring, and

strengthening management arrangements from the national to the village levels. A particular aspect of this will be encouraging the empowerment of indigenous and local communities, while clarifying the issues related to customary land use areas.

While the general scope and objectives of an integrated water management regime are clear, the paper is less clear about the roles of different orders of government. The statements in support of a strong federal lead might be seen as inconsistent with the statement that "states, regions, territories and administrative regions have proprietary rights" over water resources and therefore legislative authority on "all aspects of water supply, use, pollution control, hydropower, irrigation and recreation". Experience in other jurisdictions where states are given proprietary control over water resources has led to major conflicts between upstream and downstream interests, usually to the disadvantage of those downstream. Given that none of Myanmar's river basins is contained within one state or region, there are major risks in assigning to them unconstrained legislative authority over broad areas of water policy. Much of the paper appears to favour a strong federal lead, so there seems to be a contradiction that needs resolution.

The most modern constitutional models for water resource management are South Africa and Spain, both of which practice integrated water resources management. Spain has a National Hydrological Plan; inter-state rivers are a federal responsibility and each has a basin authority with a governing board including representatives of states, a stakeholder board, and a management capacity. The Spanish model may provide some inspiration for Myanmar, especially for the smaller river basins.[3] However, the scale and national impact of the Aveyarwady-Chindwin basin may require a distinct institutional design involving most states and regions.

A fundamental question is what provisions should be put in the Constitution regarding water resources. The simplest approach would be to make water a concurrent power, with federal supremacy; this would leave detailed institutional designs and devolved mandates to be settled through negotiation and federal legislation, which could be complemented by state legislation.

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[3] This paper describes the organizational arrangements in Spain along with some of the political challenges water management confronts. https://old.aecr.org/web/congresos/2012/Bilbao2012/htdocs/pdf/p539.pdf

The Constitution could also include some basic principles relating to water policy and the role of different orders of government. A key issue would be the rights and roles of the indigenous communities. However, if there were a desire to list at least some different exclusive powers of the federal versus state/regional governments, the list in the paragraph quoted above would need very careful review.

Fiscal Arrangements and Sharing and Management in Relation to Mineral Resources

Myanmar clearly has vast mineral potential, as the paper illustrates. The petroleum industry, which is largely offshore, has been a major source of government funding. Global Witness estimated the value of the jade industry in 2014 as over $31 billion, which, if true, was equivalent to half the GNP of the country. The Tatmadaw plays a central and corrupt role in both the petroleum and jade industries and much of the revenue is never reported. Hundreds of thousands of workers risk health and safety in mining jade. Various armed ethnic groups have major interests in jade as well, so the industry is a major factor in combat in Myanmar. However, to date, there have been very minor government revenues from jade because so much of the industry is illegal. Any peaceful and democratic future for a federal Myanmar will require the resolution of issues around minerals and this will likely be a step-by-step process.[4]

The paper "Mineral Resource Federalism" is perhaps the most comprehensively "federal" of any of the papers, but its focus is entirely on prospective fiscal arrangements and sharing as they relate to mineral resources in a federal Myanmar. While there is a listing of the current legislation and regulations relating to the mineral sector (including two entries of the Karen National Union), there is no consideration of the prospective roles of the federal versus state/region governments in management or on how ownership is assigned as between governments in a federal Myanmar.

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[4] https://asiafoundation.org/wp-content/uploads/2016/09/Natural-Resources-Subnational-Governance-in-Myanmar_Policy-Brief_ENG.pdf
https://www.globalwitness.org/en/campaigns/natural-resource-governance/jade-and-conflict-myanmars-vicious-circle/

Management arrangements for mineral resources are critical and have been the source of tensions or conflict in a number of federations. "Ownership" can be a highly symbolic issue (and federations differ in how they assign it), but its practical significance is subsumed by the constitutional allocation of management and fiscal powers, so in some federations states are deemed to "own" the resource but they do not manage it and have little or no say in relation to fiscal measures.

While management responsibilities for onshore mineral resources are typically assigned to the states in the older federations (USA, Canada, Australia, Argentina, Brazil), they are assigned to the federal government in the twentieth century federations. (The offshore areas beyond the boundaries of the states have been assumed by the federal governments, given that a state's authority does not extend beyond its boundaries.) The centralization of jurisdiction over minerals in developing countries reflects the national importance of the sector and the advantages of scale in one national administration (which might be particular to the resource, e.g. petroleum).

There is a need for a separate paper on the possible management arrangements for minerals in a federal Myanmar. While most federations in developing countries have centralized, federal management of minerals, this has frequently led to serious conflicts as well as social and environmental problems. There are interesting experiments in shared management or management that is subject to procedures that involve local communities. An increasingly important issue in many countries is the rights and role of indigenous communities in resource management. Given that the paper in hand does not discuss management arrangements, I do not review that subject here; a preliminary overview is available in my paper on natural resources in federal and devolved regimes.[5]

The main thrust of the paper is on sharing revenues from mineral exploitation. It reviews three alternative systems: derivation based distribution of revenues; indicator-based distribution; and, a mixed system. Its recommended approach is a mixed system that would assign the right to impose different taxes or imposts to the federal and state/regional

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[5] http://forumfed.org/2020/05/new-forum-report-natural-resources-in-federal-and-devolved-countries/ See especially pp 8-19

governments respectively. Of these, the most important are corporate income tax, specific goods taxes and customs duties assigned to the federal government and royalties and licence fees to the state/regional governments. It is proposed that production be split between the two orders of government for state owned enterprises and joint ventures. While there is some discussion in the paper of the more general revenue regime, including equalization arrangements, the paper makes no recommendations about the larger regime.

A number of countries have mixed systems, with both the federal and state governments having revenue raising powers related to minerals. *Such a mixed system can provide substantial advantage to the state/regional governments that have minerals, but is not guaranteed to do so*. In Australia, the resource revenues of the states are effectively offset when the Commonwealth Grants Commission calculates the larger fiscal transfers to the states, so they get little net benefit. Canada has made downward adjustments in equalization payments to take account of mineral revenues of the provinces. A mixed system can lead to competition between the two orders of government with each trying to use its taxes, royalties or fees to extract the maximum possible from the sector. Corporate income tax can have special high rates for mineral earnings, thus crowding royalities. Federal governments may not allow royalty payments as a deduction against income. During periods of very high oil prices, both Canada and Argentina imposed heavy levies on petroleum exports, which captured a significant share of the revenues (and also resulted in a lower-price for petroleum in the internal market, to the advantage of consumers and disadvantage of producers and producing provinces).

An alternative system, which the paper did not review, is that of Nigeria, where the federal government manages the mineral sector and determines and collects all taxes and imposts. However, the Constitution guarantees producing states 13 percent of all mineral revenues derived from their territory (and also from the adjacent offshore zone) and these payments are not offset in the calculation of other fiscal transfers to the states. The result has been a huge benefit to the producing states, but at high oil prices there have also been large disparities between the per capita government revenues in oil producing states and those in non-producing states—as much as 15 times more for the former.

There is no doubt that states/regions in Myanmar will want some guarantee that they will receive a significant net fiscal benefit from mineral production on their territory. This could be done with either a mixed regime or one in which the federal government collected all mineral revenues (as in Nigeria). In either case, there could be a calculation of the total mineral revenues collected in a state/region by the federal government or, in the mixed case, by the federal government and the government of a producing state. The producing state would be guaranteed a certain share of these revenues. To avoid the Nigerian problem of gross disparities in the incomes of producing and non-producing states/regions, there could be a formula:

- The formula could guarantee the producing state a high share (75%? 50%?) of all mineral revenues up to a certain level (for example in terms of revenues per capita compared to other states) at which point the share would decline in steps until it became very nominal or zero.

Such an approach would provide a guaranteed net benefit to producing states, which would be particularly high is revenues were modest but lower if they were very large; this, it would try to maintain some balance between the richest and poorest states/regions. One aspect of such a formula could be provision for depositing a share of revenues (depending on mineral prices) into a revenue stabilization fund and/or a sovereign savings fund. A revenue stabilization fund could be especially important in avoiding major swings over time in government fiscal capacity: in good times, revenues would go into the fund, in tough times, revenues would be withdrawn. If the mineral sector was providing a very high proportion of government revenues, it might be decided that some of these should be deposited in a long-term savings fund whose benefits would be available when mineral production had tailed off.

There are technical issues that need consideration.

- State owned enterprises have been the main vehicle for managing the petroleum sector in several countries and these often operate as states-within-the-state, with a great lack of transparency and frequently much corruption. Thus if there are to be state-owned enterprises in the mineral sector (and currently the army has significant interests) these should be regulated as private enterprises and subject to the same taxes, royalties, and other charges.
- The proposal in the minerals paper would have the states receiving royalties and licence fees. Royalties are normally associated with ownership, but the paper is silent on ownership. Licence fees would normally be levied by the government that manages the resource, but

the paper makes no reference to how mineral resources would be managed in a federal Myanmar; it does acknowledge that currently the central government manages minerals.

- Given that most of the offshore zone lies beyond the state/regional boundaries, should adjacent states get any special fiscal benefit from the areas of the zone off their coast? A number of federations have given a share of offshore mineral revenues to adjacent states.
- The minerals paper considers mineral revenue arrangements between the federal and state/regional governments, but says nothing about possible mineral revenue sharing with local or indigenous communities. This can be a critical issue in terms of the "social licence" of the industry and a number of countries have experimented with various approaches.

Rights to Territorial Governance of Indigenous People Burma/Myanmar

This paper, prepared by the All Burma Indigenous People's Alliance, raises the most fundamental issues of governance design in a federal Myanmar, touching issues that go far beyond the ownership, management and sharing of natural resources, though these are a major focus of the paper.

The paper presents a strong claim for the virtual sovereignty of ethnic nationalities and indigenous peoples over their lands and resources. Thus it states "there is no basis for discussion of 'resource federalism' or 'fiscal federalism', as to do so would negatively impact EN/IP title over and right to their ancestral domain." Without legal affirmation of EN/IP title to and rights over their ancestral domain there are no grounds to proceed with a federal design.

Myanmar, with its multiplicity of ethnicities, heavily rural population low income, and the dominant Burman majority, has a very distinctive ethno-political structure. The seven regions have Burman majorities, but some also have significant territorially concentrated minorities, notably the Naga people in Sagain region. The seven states are extremely heterogenous in make-up and despite being named after ethnicities perhaps only Chin state has a single ethnic group composing the majority (and even the Chin themselves are highly diverse). Shan state, which is much the most populous state, has five self-administered zones, each with a distinct ethnic majority.

To date, control of land and resources in Myanmar is highly centralized. In 2010-2013 Myanmar passed several laws relating to land and resources, with especially major implications for the uplands. The Farmland Law stipulates that land can be bought and sold with land use certificates and farmers who have used hereditary lands have had serious problems with the registration system. The Vacant, Fallow and Virgin Land Law permits the central government to reallocate farm and forestlands and this has endangered community managed land and resources while permitting land grabbing. The Foreign Direct Investment Law open the agricultural sector to large-scale private investment on very long leases, while the Special Economic Zones law provides incentives for foreign investors for such zones, some of which are planned in ethnic regions. These laws were rushed through and caused deep concern, notably amongst ethnic minorities. This legislation was followed in 2015 by a sixth revision of the National Land Use Policy, which has some positive elements but many negative ones, especially for small land holders and ethnic communities. In 2018, the legislature approved a new Forestry Law that appears inconsistent with the NLUP and applies equally to ceasefire and non-ceasefire areas, in violation of the National Ceasefire Agreement. Thus even before the coup, there was an urgency to dealing with the direction of land and resource legislation and policy in Myanmar, which will need attention when democracy resumes. It is likely that at least initially this would be done through national legislation prior to agreement on longer-term federal, constitutional arrangements.

This background and the positions advanced in the indigenous rights paper make clear just how challenging it will be to reach consensus on a federal design for Myanmar. As the paper recognizes, the EN/IP represent roughly a third of the population of the country. Excluding the Burmans, they include seven major national ethnic groups with some over 100 distinct ethnic groups. A key question in a federal design for Myanmar will be the division into the political units (states) of the federation: will they be the current 14 territorial units, perhaps with some adjustment, or will they be very different —and if so, how many would there be and on what basis would they be determined? Once the states of the federation were decided, there could be internal institutional arrangements to deal with smaller ethnic groups within the states—and these could vary from one state to another. However, a federal design will require a clear territorial definition of the states or regions, which will be the principal territorial units of the federation.

Federations typically assign the same jurisdictional powers to all their states. (Some federations have "territories", usually with small populations, that have lesser powers.) Asymmetry of powers is unusual and usually quite limited, but it can exist. Perhaps the most notable case of asymmetry is the United Kingdom, which is not a federation, but which has given extensive devolved powers to the governments of Scotland, Wales and Northern Ireland but not to England. However this has posed a problem, still not truly resolved, regarding the role of representatives of these devolved units (with 7 percent of the UK's population) in voting in Parliament on questions that do not affect them (but are limited to England). The paper on ethnic and indigenous rights in Myanmar envisages a degree of decentralization of powers, notably over land and resources but more generally, that goes beyond the experience in any existing federal or quasi-federal country. If that extent of decentralization applied only in the parts of the country populated primarily by ethnic and indigenous groups, it would apply to one third of the country—a much larger fraction than in the UK. If the remaining parts of the country, which are mainly Burman, chose a more centralized federal structure, there would be major issues regarding the design of the central institutions of the federation: would the representatives of the ethnic/indigenous states have voting rights on issues affecting only the Burman majority states? If there were a parliamentary system, how would governments be established? How would the federal government raise revenues in the highly decentralized states? And would this be limited in extent given that some important spending responsibilities the federal government assumes in Burman-majority states might not apply in ethnic-majority states? The point of these observations is to draw out some of the challenges in a highly asymmetric federal design. An alternative would be for the various parties to compromise in structuring the federation so as to try to maintain some degree of balance. If the ethnic minorities and indigenous peoples were concerned about certain powers being with the federal government, they could have protection through special voting procedures in the central parliament, as in Belgium, requiring their consent on matters affecting the vital interests of minority (ethnic and indigenous) groups.

A review of the allocation of powers across federations shows great variety, but there are also similarities in issues where federal governments always play a role, though this can vary in degree. Federal governments play a leading role in national security, foreign relations, the overall management of the national economy, major infrastructure, some national social

programs, research and (usually) some aspects of education. In developing countries they typically have a significant, even leading role in relation to natural resources and the environment. Increasingly, there is recognition and accommodation of indigenous rights, especially as they relate to traditional lands.

Given the number and variety of ethnic groups in Myanmar, a major issue might be the rights and institutions of ethnic or indigenous minorities within states. At one level, all citizens should have common rights. But distinct communities may want their own institutions for certain purposes. Arguably the federal jurisdiction whose experience with special arrangements for tribal peoples is most relevant for Myanmar is in neighbouring northeast India. The Indian Constitution's Schedules Five and Six provide for special governance arrangements for tribal peoples: Schedule Five applies in mainland India and its provisions are less protective of tribal peoples than Schedule Six, which applies in Assam, Meghalaya, Tripura and Mizoram states in the northeast; of these, Meghalaya and Mizoram are predominantly tribal states. The Sixth Schedule was originally intended for predominantly tribal areas in undivided Assam. The special provision is provided for under Articles 244(2) and 275(1) of the Constitution. It establishes Autonomous District Councils, based on the belief that the land is the basis of tribal or indigenous identity, and these councils have significant control over land and natural resources. The councils are empowered to make laws in respect of land, forests, agriculture, inheritance, public health, sanitation, local policing, marriage and divorce, mining and minerals, indigenous customs and tribal traditions. The have fiscal responsibilities for land revenues and certain other taxes. So each ADC is a mini-jurisdiction, like a state, with its own legislature, executive and judiciary. Their courts may hear cases where both parties are members of scheduled tribes and the maximum sentence is less than 5 years.

The ADCs established under the Sixth Schedule are qualitatively different from the Tribal Advisory Councils established under the Fifth Schedule. There are currently thirteen ADCs in the four states, with three having been created in 2020. The ADC in Meghalaya is coterminous with the whole state, which has caused frequent conflict with the state government, but conflict with state governments has been a common experience for all the ADCs. There have also been tensions and even violence between the tribal and non-tribal peoples, with the latter complaining about discrimination and the undermining of their rights to equality and to settle anywhere in India.

There has been land alienation through external threats, such as development initiatives by the state, but also displacement caused by intra-community land alienations. Those empowered by the formal structures of the ADCs have sometimes opposed traditional leaders. And there is evidence that the elite have used their powers for personal benefit on occasion.

The ADCs constitute in some way "states within states". Moreover, their authority over land and natural resources is generally greater than that of the states, notably in relation to sub-surface resources such as petroleum and minerals.

The Indian model of the Six Schedule with ADCs has some parallels with Myanmar and its self-administered zones within Shan state and Sagain region, though the latter are not nearly as empowered as the ADCs. It can be anticipated the self-administered zones will seek greater powers (along with the states) and that tribal groups in other states or regions might seek their own self-administered jurisdictions. So understanding India's experience could prove helpful for Myanmar. Two publications provide useful background.[6]

While Canada is a very different country from Myanmar, its recent attempts to more adequately address indigenous rights may have some insights for Myanmar. For example, the northern territory of Nunavut has a small population but an Inuit majority; it has been granted significant powers based on the concept of a public government that does not discriminate amongst its citizens, though it also has special rights and institutions for the Inuit as the indigenous people. Canadian claims settlements award indigenous communities different rights in relation to different classes of land—varying from those they own and control to those where they have a traditional interest and use, but not occupancy--which is a model of potential application in Myanmar. The Canadian claims settlements are extremely

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[6] https://www.cmi.no/publications/6243-tribal-representation-local-land-governance-in This paper is a case study of experience in Megalaya under the Sixth Schedule
https://tspace.library.utoronto.ca/bitstream/1807/17375/1/ILJ-7.1-Kurup.pdf
This book provides historic background to the two schedules and contrasts experience with both, with a particular focus on the negative experience under the Fifth Schedule of decentralization.

complex and they have developed many creative solutions for accommodating competing pressures.

Concluding Observations

This review of these five papers has sought to draw out some of the major issues that Myanmar will confront in designing a functional federal system. It has pointed out the important distinctions between Constitutional issues versus policy or program issues that may be dealt with by legislation, regulations or guidelines. The focus here has been on constitutional issues. It is evident reading the five papers together that they are far from sharing a common image of the country's propective federal regime. The four policy papers on water, biodiversity, coastal areas and minerals all envisage a leading role for the federal government, though the minerals paper is silent on how actual management of the resource might be done. Much that is in the policy papers represents excellent policy—though a challenge to deliver given governmental capacity in Myanmar—but is more relevant to legislation than to the larger federal design in the Constitution. The paper on ethnic nationalities and indigenous groups addresses the issue from a radically different perspective, reflecting the accumulation of grievances regarding how the highly centralized, corrupt and militarized regime in Myanmar has ridden roughshod over the rights and interests of these peoples. The paper asserts strong rights to a highly decentralized regime, where the federal government would have little or no role in the areas population by ethnic and indigenous peoples. These demands are not to be treated lightly and finding a resolution with the ethnic and indigenous populations will be critical for the country's longer-term harmony and development. This paper has made observations relating to the issues that it is hoped will stimulate thought and reflection as the debate on Myanmar's future progresses.

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