Notes on Indigeneity in a Prospective Federal Myanmar

We had a very good conversation about the paper on the rights to territorial governance of indigenous people in Myanmar. It raised a number of very complex issues, so I've done some further reading and thinking, which you will find reflected in the observations below. Squaring strong indigenous rights with a devolved federal regime that protects the interests of the whole population is a challenge that will require balance and good will. The issues discussed below go somewhat beyond those in the IP paper, whose main focus was on rights relating to land tenure and management, but they will need to be considered in the design of any new regime. I cannot pretend to resolve these issues but hope these notes help advance thinking on possible arrangements.

1. Who is indigenous in Myanmar?

The government of Myanmar's traditional position is that the 135 peoples listed as part of the eight "major national ethnic races" are indigenous. Thus this includes the Bamar people and totals about 90% of the population. Populations that are not listed, including the Rohingya and others groups deemed to have arrived in Myanmar since 1823, are considered non-indigenous.

There is no definitive definition of "indigenous peoples" in international usage. The United Nations' working definition is "indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories consider themselves distinct from other sectors of the societies now prevailing on those territories or parts of them".

The approach taken in the IP paper excludes almost all Bamar from being "indigenous" and so concludes that the indigenous population of Myanmar is around one-third of the population, heavily concentrated in the seven states. This approach fits with the UN's working definition, notably the aspect of being distinct from the prevailing sector of Myanmar's society, which is Bamar.

An important consideration in the IP approach is that the Bamar parts of Myanmar were directedly controlled by the British and came to have a British imposed land tenure regime, while the indigenous groups had autonomy with various customary land tenure regimes. So if the issue is "indigenous land rights", they are tied to customary land tenure, which exists in the states.

Such an approach to indigenous rights in Myanmar would mean that such rights do not exist for the Bamar two-thirds of the population. In most countries with indigenous populations, the majority of the population is deemed non-indigenous; this is true both in countries whose population largely descends from colonial settlers and in countries in

Asia and Africa where there is often a distinct between the majority groups on the one hand and traditional, "tribal" peoples on the other hand.
The land tenure regimes of the seven states are likely to be a mix of communal, customary land tenure and private, freehold tenure, depending on location. Thus Bamar and other non-indigenous peoples may own or occupy lands in some areas of the states (and perhaps even on indigenous land, depending on the local land tenure rules). There are parts of the Bamar majority regions which have indigenous majorities, so there is a question whether some parts of the regions should have indigenous land regimes. Both the states and regions would need to distinguish between areas of indigenous vs. non-indigenous land tenure (and this would include consideration as to whether non-indigenous land tenure had been properly obtained). Would many people of indigenous background live within the states in areas where traditional land tenure does not apply or where it does apply but the land belongs to a different indigenous community?

2. What should be the extent of indigenous rights in Myanmar?

The focus of the IP paper was on indigenous land and resource rights, so it did not go into the larger issues of the possible extent of indigenous self-governance in a federal Myanmar. The introduction of federalism with genuine devolution of powers to the states/regions would mean that the seven states (or their successors) would have governments responsible to electorates that is overwhelmingly indigenous—and in most cases, heavily from one of the major indigenous groups (which are, of course, usually composed of many sub-groups).

At one level, federalism would bring "indigenous self-government" to states because of their indigenous majorities. However, there is an important distinction between "public government" and "indigenous government": a state government should be a public government that serves all of its population and is responsible to all of its electors. Even if one indigenous group forms the majority in a state, the state should not favour that group.

The Salween Peace Park in Karen State is a very creative approach to conservation and land management. It and other Indigenous Community Conservation Areas are potentilal models for areas with traditional communities and customary land tenure. The Salween Park is home to 348 villages and 70,000 people. The communities mapped the park, delineated 132 areas of customary land holdings, and documented biodiversity. Most of the park is under communal kaw management. While other communities and states may adopt such models for certain areas, there will parts of the states where these models are not appropriate and these may require distinct land tenure regimes promulgated by the states. The Karen and Mon EAOs have already developed land policies and others are being developed. Once a federal regime is in place, the states would need to assume this responsibility (perhaps subject to certain national conditions).

If federalism is to be effective at the state level, the majority of the population must accept the state government as legitimate for developing laws and delivering many programs within the state. In most federations, state governments play a key role in the delivery of education, health services, social benefits, roads and infrastructure. They often decide what forms of local government there will be and what powers these governments will have. Even where local governments have important responsibilities, they operate within a larger framework of state or national policy. Only the national and state governments will have the scale necessary to design and deliver certain programs or laws, though some program delivery might be devolved to local communities. Even in regard to resource developments, where there may be a strong interest by local indigenous communities in the terms required for the development to proceed, the technical expertise required to deal with large resource companies may be available only at the state or even national level. This does not mean that local or indigenous communities would not have a central role in the decisions: the policy of full, informed prior consent could apply, though there is a question whether this would always involve a right of veto.

Thus in thinking through the role of indigenous or local communities in relation to land and resources, it will be important to put their role or rights in the context of the roles and responsibilities of the state and federal governments and the practicalities of administering complex regimes.

3. What should be the state structure of a federal Myanmar?

The IP paper makes the point that the EAO and EN/IP administrations and laws do not follow the delineation of 2008 constitution's states and townships. A key question will be whether the creation of a federal Myanmar requires a major revision of the territorial map to create new states, minor adjustments to the current state/regional boundaries, or no adjustment.

It would be impossible to draw a new map of potential states in Myanmar that put all the people of the main national ethnicities in their respective states. Any attempt to create such a map could be extremely time consuming and risk major tensions (though there may be some adjustments that could be widely agreed). It is also important to recognize that each state must "belong" to all of its people, including distinct minorities. One risk of "ethnic" federalism is that it can create two classes of citizen, those belonging to the dominant population and the minorities, which may be marginalized. So it is important that states embrace the concept of "public" government and work to accommodate all of their population. The more this is accepted, the less there will be a call to redraw boundaries to fit with ethnic populations.

The current state/region structure of Myanmar could work quite well in a federal context. Fourteen states would be a manageable number in a country of 50 million (or 100 million

in a generation or two). Moreover, having seven states with indigenous majorities and seven with Bamar majorities could provide a good potential balance at the national level between the Bamar and indigenous populations. It might even lead to equal representation in the second chamber of the parliament. Of course, there is no magic in the current set-up, but in considering the future state structure of the federation it is important to recognize that states must belong to all their communities, that there are limits to how far boundary changes can concentrate each major group into "its own" state, and that a major redrawing of the state map could be very time consuming and conflictual.

In many federations, state governments are responsible for the structure of local or municipal governments. If this were the case in a federal Myanmar, the state government could work with local communities in creating self-governing areas, indigenous community conservation areas and so on. Thus the existing township structure could be modified or abandoned.

4. Who is to be a citizen in a federal Myanmar?

The current policy in Myanmar that requires membership in a recognized indigenous group for citizenship is inconsistent with international human rights law. Article 15 of the 1948 Universal Declaration of Human Rights affirms that "Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality or right to change his nationality". The initial citizenship law of 1948 was racially based and discriminatory. Since then, the law and practice have been tightened further so that as many as twenty-five percent of people in Myanmar may lack full citizenship and face significant barriers to education, social services, employment and political participation. The 2008 Constitution has extensive provisions on rights, but a striking and negative feature is that those rights, as in the 1948 Constitution, are attached to "citizens" with very few attached to "persons".

A key issue for Myanmar will be whether it is prepared to cut the link between ethnicity and citizenship, thus bringing all of its population into the larger community. A new definition of indigeneity, in which only about a third of the population would be indigenous, would provide the opportunity to delink citizenship from indigeneity. Citizenship should not be tied to ethnicity and governments at all levels should respect all members of the community—indigenous majorities and indigenous minorities, Bamars, and non-indigenous—on an equal footing. There may be some special indigenous rights, notably tied to communal land, local self-governance and traditional practices, but with

these exceptions public government should treat all citizens and persons on an equal footing.[1]

5. Minority rights in a federal Myanmar

Each of the seven main indigenous groups is a minority within the national context of Myanmar, while there are scores of sub-groups that are minorities at the state or local level. A key issue in multi-ethnic federations is minority rights, which may be set out in the federal or state constitutions or in legislation. Federalism itself, as discussed above, can address minority rights in a major way through devolution, but there are other issues, such as language rights that are often carefully defined. This issue goes well beyond indigenous rights to land and resources, but given the links it is important for this larger context to be born in mind. An introduction to the subject can be found in this paper, which I co-authored some years ago: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3025966

6. Fiscal federalism and Indigenous Land Rights

The IP paper proposes (3.4.1) that recognition of IP title and rights over their ancestral domain must be enshrined in a new federal constitution as a prior condition for other actors to engage with the EN/IPs on the terms of the new future federal system. Such a requirement could prove a major hurdle to effective engagement because, as this note suggests, the application of the principle can give rise to many issues that may need good faith discussion before all parties can agree. A preferable approach would be one in which "nothing is agreed until everything is agreed": this permits open discussion without undermining the right of indigenous representatives to ensure that they are satisfied with the provisions around IP rights.

The IP paper states that in all EN/IP areas, "all natural resources exploitation… related taxation, revenue and duty collection, harvest and extraction rates, concession granting, etc. will be determined by the EN/IP governance, in accordance with their laws, land use plans, and customary practices". This position goes well beyond the idea of "full, informed and prior consent". There are huge practical issues here: where will the technical expertise reside that is necessary to regulate these industries and to negotiate with what are often large, highly sophisticated multinational corporations? How would basic laws, such as those on environmental and biodiversity protection and conservation fit into such a regime? What is meant by EN/IP governance: would this be the states or modified versions of the states? And what would it mean to view the states as being EN/

[1] https://www.icj.org/wp-content/uploads/2019/06/Myanmar-Citizenship-law-reform-Advocacy-Analysis-Brief-2019-ENG.pdf

IP governance if they are to be true public governments, representating all their inhabitants?

The IP paper does open the door to a potential discussion of the sharing of revenues from natural resources, but "only after" constitutional recognition of EN/IP title etc. Such a discussion could take place without prejudice along the lines proposed above. The issues are very complex and will need broad engagement and considerable discussion to reach agreement. I have commented on the fiscal federalism and the ownership and management of natural resources in relations to the minerals paper. It would be useful for the minerals and IP groups to engage one another.

7. Protecting indigenous rights and resolving disputes in a federal Myanmar

The IP paper calls for the constitutionization of IP rights, but it does not go into the issues of how to protect them once they are constitutionalized or of how to deal with disputes over such rights, which may take many forms.

Given that most indigenous communities are overwhelmingly within the states, which in a federal Myanmar would have large indigenous majorities, a key question is what should be the role of the state governments in defining and protecting indigenous rights. Some EAOs have developed land laws that protect indigenous rights, so it is likely that in a federal context all the seven states would develop such laws. However, there may be occasions when a state government and an indigenous community disagree. A community may believe it has not been adequately consulted and accommodated in relation to a prospective resource development. The government may believe that the community is engaging in practices that are harmful to conservation or biodiversity and forbidden by environmental law. (A further issue, which has arisen in NE India, is that some indigenous communities have been captured by corrupt elites.) In many countries, the courts play the role of final arbiters in disputes over indigenous rights, but this is not always appropriate, e.g. when the dispute is highly political, and it does depend on the courts being viewed as balanced and legitimate by the various parties. There is no easy solution to these issues, but they merit consideration and recognition that indigenous communities themselves cannot always be the final interpreters of their own rights.

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This paper is meant to inspire reflection and discussion, not just within the IP group but also with the authors of the other papers.

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