

## BURMESE CONSTITUTIONAL DESIGN

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It is a privilege and pleasure to be here with you today. I am here today because I have had a number of Burmese students, and I have always admired them because they do not just think deeply but also feel deeply. In my view, both are necessary for great scholarship. And I now see that they are part of a democratic movement that encourages them to do both, so I thank you for the gift of these students that have come into my life. Please let me say that I deeply admire your courage, hope, idealism, and determination. I know that you carry forward the dreams of your parents and grandparents for a free Burma, and I pray that their dream will come to reality in our generation. And I am very happy to be here to talk with you about how a new set of constitutions might help bring that result.

What I will do over the next several days is to talk about the main subjects that one needs to address when designing a constitution. I cannot tell you what sort of constitution would be best for you; that is ultimately your work. But I hope that I can help you to think about that work, by highlighting the decisions that you have to make, the concerns that you will want to weigh, and the various possibilities that different constitutions open up. There is no perfect constitution, but it is possible to choose intelligently among the types of constitution, so that you end up with a frame of government that suits your experience and hopes. Given the time constraints, I will be talking primarily in general terms. The real work will occur in tailoring these remarks to your particular circumstances.

### A. THE PURPOSE OF A CONSTITUTION

So let me begin with the purpose of a constitution. A constitution is a law that is more fundamental than any other law; it is the basic law of a state. It organizes the state up and places limits on its operation. A law that is in conflict with the constitution is not valid. A government that seeks power beyond that given by the constitution has overreached itself. Most states these days have constitutions, and more are being written every day. So most people think that it is a good thing to have a constitution. But why?

There are three basic answers to that question. First, a constitution can express a popular identity or culture. Members of a culture think about who they are and who they have been and who they want to be. Then, they think about the way that they want their basic law to reflect that identity—and they write that down into a constitution, so that they will have a legal picture of themselves. And when they are uncertain or confused or divided, they can look to that picture to remind themselves of who they are most fundamentally. So a constitution can give guidance, unity, and purpose to a culture, if the members of that culture embrace it as their own. It can be a great help in troubled times.

But for a constitution to work this way, it must come from you, and you must see yourselves in it. You must ponder your past, present, and future, and you must decide who you are at root. When you write your constitution, therefore, you must also try to ensure that when the people read it, they will rally to it, because they think that it embodies their identity. So the constitution comes from you, and the most important thing is that it contains what is most important to you—regardless of what any other nation may think or want.

Sometimes that means that you want to put in something that no-one else necessarily understands. For example, the Chin Forum was especially keen that we should put in residency requirements for their state officials, because in the past, some of the officers of Chin State refused to reside at the seat of government. Now, coming from the outside, this is not the sort of thing that I would normally think belongs in a constitution, because it is very specific. But for the Chins in particular, with their special history, it mattered a great deal—and when the Chins look in this constitution, therefore, they can see their concerns mirrored there.

The U.S. Constitution has some similar provisions. For example, it bans the granting of titles of nobility. Few constitutions contain such a ban, and to many it seems a little strange. But you must remember that when the Americans were making their constitution, they had just fought a war of independence against a country with kings and nobles. They rejected the idea that you can inherit power from your father, as nobles did; instead, you had to earn it through the process of democracy. So when they wrote their constitution, they painted a picture of themselves: we are democratic, they said, we are not like the British with their dukes and earls and barons. And we must always remember that this is the kind of people that we are, so we put that picture in our constitution.

So while it is possible to learn from the experience of other nations, ultimately this is your constitution. It doesn't matter what the Americans or the Germans or the

Australians or the Chinese have done, and it doesn't matter what I think is best for you. What ultimately matters is what you want to do. When you look into your state constitution, you must see the people of your state mirrored there, so that they will hold their constitution dear. So I have a suggestion. As you think about drafting your constitution, you might begin by thinking about your respective state cultures: what does it mean to be a citizen of each of your states? And how can you reflect that identity in a constitution?

The other purpose in a constitution is to create a government, and, even more important, to limit that government, so that it may not commit mischief or worse. In general, we hope that our governments will be just and good—but we also know that it's not always true. So when we write a constitution, we try to anticipate when we can trust the government and when not. Ideally, we develop a list of subjects over which we can trust the government and a list of subjects over which we cannot trust them. As for the former—the areas where we can trust them—we give them discretion to do as they will. But as for the latter—where we cannot trust them—we seek to use the constitution to protect against governmental misbehavior. We entrench certain rights or procedures to ensure that the legislature will not be tempted to misbehave.

Now to make a constitution work this way, we need to do two things. First, we need to sort out those subjects that should belong to the government and those that should not. For example, it is probably safe to allow the legislature to set speed limits on public highways, because the legislators have no particular incentive to act badly on this subject. But when it comes to voting rights, we might be especially suspicious of the legislature: our elected representatives may want to manipulate the electoral system to ensure that they get re-elected again and again—even if it not really what the people want. And I know that there is some worry that the military regime is trying to do that right now in the constitutional process going on in Rangoon.

So we need two piles of things—the government guards one pile, but it must keep its hands off the other pile. But then, to make these constitutional protections effective, you need to appoint a guard to protect that pile from the government. You have to be able to trust that guard with this task, and it must have the strength and independence to be a good guardian. So who shall it be? Different constitutional systems appoint different guardians. Some think that the citizens are the best guard: if they think that the legislature is violating the constitution, then they will vote them out the next time around. Others think that local legislative bodies should do some of the policing. But the most common device used today is called judicial review, because the courts are appointed to ensure that the government stays within its constitutional bounds.

Again, I don't think that there is a right answer for all people at all times and places: it depends on your history and nature. If you strongly believe in the legal system, and if you believe that courts are likely to be brave, independent, and objective, then they are probably the right course. If you think that the people will be zealous and careful in protecting the constitution, then they might be best. And so forth. The one thing that is clear, however, is that for your constitution to be effective, you need a system in which some group assumes the duty to be faithful to the constitution, rather than merely to their immediate political gain. And who that should be cannot be answered in the abstract; to know whom you can trust, you must consult your own knowledge of your own society.

Another way that constitutions limit governments is to divide power so as to preserve freedom. As Burmese have reason to know, if you concentrate power into a small group of men, those men may feel free to act in arbitrary ways—ways that serve their own interests and power, rather than the interests of the whole. Now in any system, there is always a risk that powerful men will take more power to themselves, until they rule all without restraint. And there is nothing that one can do to guarantee that it will never happen again. But constitutions typically try to set the system up so that power is divided between different groups or government branches. That way, no-one can dominate completely. And because each of these groups will act to protect its own constitutional power against the others, we can hope that power will stay divided.

We therefore hope that these different groups will be watching and limiting each other, to make sure that the government acts only for the common good. If many people agree that the government should do something, it is likely that the government should do it. If only nine people in a military government think that the government should do something, you have no reason to trust that the action will be good.

The main subjects in a constitution are the different ways that we can divide power between different groups, so that they can check and limit each other so as to preserve freedom. I will now give a general summary of those different ways of dividing power, and in subsequent days, we will examine some of these ways in greater detail.

## 1. Electoral Systems

First, constitutions typically specify an electoral system—they tell us how the government shall be elected. In many ways, this is the most basic division of power on a democracy: the government makes the rules, but the people choose the government, keep

an eye on them, and can vote them out if they should prove corrupt. Now there are many different ways to structure an electoral system, and they produce different political systems. For example, you can deliberately design an electoral system to produce a legislature that includes people from all different political beliefs. In this case, your politics may well be contentious and divisive, because all sorts of people are participating, but everyone will feel that they have a voice, even the smallest minorities. On the other hand, you can design an electoral system that will produce a very moderate legislature, which consistently keeps to the middle of the road. In this system, minorities will feel that they have less power, but the system as a whole may be more stable.

So you have to decide which sort of system is right and desirable for you, right now in your history, with your particular culture and needs and hopes. And again, although friends can offer advice, no-one can tell you what is best for you. Because this subject is so important, we will be devoting all of tomorrow afternoon to it.

So the basic limit on government is that the people elect their leaders. Sometimes, however, this division is not enough because the government tries to deceive the people, or it tries to hijack control, even against the will of the people. So it is frequently useful to have other divisions built into the system—other government actors that will limit one another.

## 2. Separation of Powers

To that end, the next division is called the separation of powers—the division of power within the government between three different sorts of actors. First, there is the legislature, the body charged with making the law because it is the most democratic. Then there is a body that is usually charged with proposing law, enforcing law, and leading the country in war and foreign relations. In some systems, this part of government is called the executive branch; in others, it is called simply the government or the administration. And finally, there are the courts, charged with deciding cases and interpreting the meaning of the law. In many countries, the courts are also given the final say over the meaning of the constitution, so that they are the ultimate check on the other two branches.

The reason that we divide power in this way is that if it is done right, the branches will keep an eye on each other and ensure that no one of them achieves complete dominance. One branch may become corrupt and pursue only its own interests, but we hope that the others will stay true and so will keep the corrupt branch in line. For example, the legislature can pass laws—but it must still rely on the executive and the judiciary to

enforce the law in particular cases. So the legislature will be reluctant to pass truly awful laws, because it is worried about what the executive and the courts may do. The executive may refuse to enforce the law or enforce it only laxly, or he may go to the citizens and alert them to what their legislature is doing, or he may refuse to give those who backed the law any place in his cabinet. The courts may also refuse to apply the law, or they may interpret it in such a way as to eliminate its worst parts, or they may declare it unconstitutional. Similarly, if the executive behaves in irresponsible ways, the legislature may pass laws to restrain him, or it may publicize his bad behavior, or the courts may declare his conduct unconstitutional. In all these ways, if power is divided, it is less likely that any one person or group can seize control of the government to its own advantage.

But in order for this system to work, the branches must all be vigilant to protect their own space and to keep the division of powers in place. The system will not just work by itself; it depends on the people involved. And it is common that despite a constitutional division of powers, one branch—almost always the executive—ends up taking more and more power, on the claim that young countries need strong leadership. So it is important when one designs a constitution, that you give the other branches the resources and the incentives to block such a centralization of power in one man or one branch.

Now as in all of constitutional design, it is important to understand that this separation of powers is a balance: you want to divide the powers enough, but you don't want to divide them too much. If you divide not enough, the president or prime minister may make himself a king, and there will be no-one to stand in his way. But if you divide too much, the government may be so divided that it cannot act effectively. It cannot address the country's problems, and it may eventually fall apart in civil war. And again, where you should strike that balance depends mostly on your culture, your history, your tendencies, and your hopes for the future.

When we speak of the separation of powers, some countries add the military as a fourth and final branch of government—as a separate component in the system, designed to check and limit the others, on a par with the legislature, the executive, and the judiciary. And of course, in Burma, there are those who claim that only the military really stands for the common good of the whole of Burma, so that it must be given a central part to play in any future constitution.

Now I cannot say how transition to democracy will occur in Burma. I know that it will be the product of long negotiations. It may be that in order to agree to democracy, the current government will insist on an important military role. It is up to you to decide whether

you want to agree, so as to get a democratic system in place. No-one can stand in your shoes, so no-one can tell you what you should want. Nonetheless, constitutional democracies generally do not give the military this sort of role, and overwhelmingly, constitutional scholars think it a very bad idea.

The reason, of course, is that the military is not democratic. Democracy is a bottom up system; democratic leaders listen to the people below them, the voters. Ideally the voters control the whole government. That way, we can ensure that the government does not use its power tyrannically. So to have the best democratic government, the citizens and the officials must have certain habits of mind: they must listen to each other patiently; they must look for ways to compromise and work things out; they must seldom give orders; they must realize that disagreement is normal, healthy, and good, and that the way to deal with disagreement is by conversation, not by suppression.

Now, as you know, professional militaries do not usually act this way. The people on the top often do not listen to the people on the bottom. Instead, the people on the top give orders to the people on the bottom, who are supposed to obey without question, on pain of being shot. Disagreement is regarded as disobedience. For that reason, for good soldiers to become good citizens, they must commonly transform themselves. And if you give the military a formal role in government, you are giving power to a non-democratic institution at precisely the moment that you are trying to move to democracy.

I know that the military government claims that the military represents the soul of Burma, the common good. Lots of military governments make that claim about their armies. Very occasionally, they might be true. But usually, militaries obey orders. And that means that the soldiers carry out the will of those on top—which is often not congruent with the common good.

So it would probably be a bad idea to make the military a part of the government—but that does not mean that you can just ignore it in your constitution. For a long time, the military has been an important part of the Burmese way of government; to change that, you must take overt steps to change the role of the military. Probably most important, you must make the military subordinate to the civil government—not part of the government but its servant, so that it will be democratically controlled. But it's not enough just to write down on paper that the military should follow the orders of the civilian government, because when given an order that they don't like, the military may simply seize control again. So ideally, the constitution should restructure control of the military to make it more subordinate. There are a lot of ways to do this—change the makeup of the officer class and the method

of promotion, divide control over the military between different branches, and so forth.

But one of the most important things that you can do is to give the military a new and positive vision of itself. Since it will no longer be running the government, it needs something else to do, something that is noble and good, something that consumes its energies so that it will not be dreaming about retaking the government all the time. In other words, it is not enough simply to tell the military what it may NOT do; you also must tell it what it SHOULD do, so that it can be an honored and important part of a new democratic regime.

### 3. Federalism

The next division is called federalism, which refers to a division of power between the central government and more local governments. Federalism can divide power into any number of levels. The most common form is a simple division between the federal or central government on the one hand and the state or provincial governments on the other. But the state constitutions can further subdivide state power, between the state government and local governments. And local governments can then subdivide power into even smaller units.

Federalism serves four main purposes. First, if your society contains a number of distinct cultures, it can guarantee those cultures some measure of self-determination, so that the majority culture will not always be telling them what to do. We will talk about this function at length in a later session. Second, federalism can give local people the power to handle local problems, because they know and understand their problems best, and they can act quickly and without a lot of bureaucratic inefficiency. Third and relatedly, federalism can encourage local people to become involved in their own government and to solve their own problems, because they know that they have the power and responsibility to do so. So the citizenry becomes much more engaged and active, much less passive and angry. And fourth, the local government can act as a check on the central government. Often, central governments think that they have the wisest, most talented, most devoted public servants—so of course the central government should run everything. Now the problem is that even if the central government is wise and talented and devoted in the beginning, it may not remain so if it has all the power. When one government holds all the power, without any other government to limit it, it may forget that it is only the servant of the people, not their masters. So it is useful to have some local governments, with

constitutionally guaranteed powers, to remind the central government that it holds power only on trust from the citizens.

Burma has learned by hard experience the utility of all four of these benefits. At least since the beginning of military government, the center has tended to make policy for the whole country and to repress self-determination for local cultures. The center has also tended to administer the whole country from Rangoon, even when local people better understand their own problems and can more effectively address them. The center has encouraged local people to become disengaged from governing themselves, so that they will always look to the center for a solution. And finally, because there are no independent local governments to put up an argument, the military government has convinced itself that it alone knows what is good for Burma and it alone will protect that good. The creation of strong state and local governments may help change this situation.

#### 4. Individual Rights

The final division of power is individual rights. Governments have the power to make policy in certain spheres, but individuals retain a certain sphere of autonomy that the government may not invade. Commonly, the constitution lists those rights in a section that is called a Bill of Rights or a Charter of Rights. The idea of a written, judicially enforceable bill of rights originates with America, but more and more countries have chosen to adopt one.

A complete bill of rights commonly includes two types of provisions—private rights and public rights. Private rights guarantee the individual some protection for his private life, so that he can carry out the projects most dear to him, immune from government interference. Typically, these rights might include the right to get married and have children, the right to raise your children in the way that seems best to you, the right to form private associations such as literary clubs, and so forth. In America these days, people talk a lot about private rights.

But the bill of rights really originated in a concern about public rights. These are rights guaranteed to the people to ensure that they can check the government. In a democracy, the people are the government; they are not subordinate to the government. They should keep an eye on the government, and ultimately they should control government policy. Unfortunately, governments tend to forget this fact, and they treat the people as subjects, not citizens—and this is true everywhere in the world, even in the most

settled democracies.

So bills of rights guarantee that the people shall have certain public or political rights, designed to ensure that they may restrain the government. The most obvious example is the right to vote—so obvious and important that we took it up first, in a separate section, under the heading of electoral systems. These rights also include the right to organize political parties, and the government may not ban these parties just because it dislikes their views. Relatedly, individuals and party members have the right to speak their opinion on the issues of the day, and the government may not punish them for it. In addition, rights to fair criminal procedures ensure that the government cannot punish you except for good reason; it cannot, in other words, punish you merely because it does not like your views.

It is important that the protection for these rights be very strong, because government is always tempted to encroach on them. Many countries feel that it is especially important for judges to be in charge of these protections for individual rights, to safeguard them against the political branches. But more broadly, in order for the protection to be strong, the political culture must become comfortable with the idea that disagreement is normal and good—not a sign of treason. And again, Burma has had considerable experience with this issue. I know that some of you have been in prison for speaking your mind, so you know better than anyone else the importance of this issue.

So the people need to have strong, constitutionally protected individual rights. But there is a risk here: if the constitution protects these rights too much or in the wrong way, people may come to feel that they have the freedom to do as they please, without any obligation to the greater good. In other words, people may feel that they have rights without responsibilities. Frankly, I believe that in America, this is a significant problem right now, and it may become worse. It is good for people to be free to do as they choose, but they must remember that they have duties to their families, to their fellow citizens, and to their governments. And right now, too many Americans are thinking only about themselves—about getting money and power for themselves, even if it hurts their country. And they think this way in part because their constitution talks only of rights and not of duties.

So some believe that a constitution should also recognize certain personal duties, and it should indicate that rights must always be balanced against duties. For that reason, many constitutions newer than America's have included a charter of duties along with its charter of rights.

Now there is a risk, or at least a complication, in this balance of rights and responsibilities. I have suggested that a constitution might remind citizens that they have obligations to the greater good—to each other, to their families, to their nations, and to their governments. But frequently, governments like to imagine that citizens therefore have a duty uncritically to obey their government—to act and believe just as the government wants them to. And I know that you have had some a great deal of experience with this problem.

But that is not the nature of the constitutional duty that I am talking about. Instead, your duty to government is to ensure that it acts the way that it is supposed to act, as outlined in the constitution—in other words, that it promotes the public good, respects the rights of citizens, and behaves in a democratic way, taking its instructions from the people. If it behaves badly, it is not a citizen's duty to obey; quite the contrary, it is a citizen's duty to push the government to return to the constitutional path. Once you have written a constitution, your ultimate obligation is thus not to the particular people who hold governmental office at any given time; instead, your ultimate obligation is to the collection of ideals entrenched in your constitution itself. And if the government tries to convince you to do otherwise, you may use your individual rights to resist.

So in a well-functioning democracy, citizens have rights to be free from government when it is misbehaving, but also duties to the government when it is behaving well. And in the same way, governments have powers to make policy, but they also have duties to the public to govern well and to care for the people. Just as do individuals, governments tend to forget that they have duties, and they remember only their powers. And this tendency makes for a government that is likely to govern in its own interest, a government that has forgotten that its whole reason for existence is the people. Many therefore think it a good idea to include in the constitution itself a list of governmental duties, as well as the list of governmental powers. And again, the government's powers and duties are not actually in conflict, because the reason that the government has power is to perform its duty to the people.

This balance between rights or power on the one hand and obligations on the other is therefore extremely important to any well-functioning constitutional democracy. But it is often quite difficult to specify in advance exactly how to balance them: it all depends too much on the facts of history. For example, surely the government has a duty to educate its citizenry. But what if the government has very little money—how much of that should go to education? On what other things may the government first spend money, such as police officers to stop looting or judges' salaries or the costs involved in running an election?

For that reason, although many constitutions include a list of obligations, often that list is not judicially enforceable. You cannot go into court and insist that the government fulfill its obligation of educating you. Instead, it is intended a reminder to the legislature and the citizens that duties are as constitutionally important as rights and powers; and so we should all bear this fact in mind when going about our constitutional tasks.

So those are the main subjects of constitutional design. Clearly, a good constitution must seek to accomplish a good bit. It may express a popular identity; it must distinguish those matters on which the government can be trusted and those on which it cannot, and it must take the latter from the government's dominion and give it to some other constitutional guardian; it must divide power, so as to check and control it, through some arrangement involving electoral rules, separation of powers, federalism, and individual rights and duties. Finally, all of these parts of a constitution must somehow come together to form a unified whole, in which all the parts work together. For example, if you want strong individual rights, you may also want an independent judiciary to protect those rights. If you want a strong legislature, you may want to create an electoral system that will give the legislature great legitimacy. And so forth. Not surprisingly, nobody writes a perfect constitution on the first draft. It usually takes many attempts even to get something approximating a good system.

Our remaining time together will really be only an amplification of matters that we have introduced this morning. In future sessions, we will discuss how constitution-framers ensure that their constitution grows out of popular feelings, especially when the people are not themselves directly involved in the writing process. In another session, we will talk at length about federalism; in another, we will discuss electoral systems; and in still another, we will consider judicial review. Finally, if time permits, we will start to discuss the possible design of a union government that grows out of your state constitutions.

## B. SECURING THE BASIS OF CONSENT

As I mentioned earlier, it is critical important that your constitution come from you: when you look at it, you must seem yourselves. And for that reason, after the transition to democracy, your people will see themselves as well, and they will embrace the constitution as their own. If you try to push something on them that does not seem like them, they will ultimately reject it, and the constitution will not work. I am sure that you keenly feel an obligation to your people, people who are not at this table, to make a constitution that

reflects their history, ideals, traditions, and hopes.

But while their constitution must reflect them, it is not possible for them directly to write it. For logistical reasons, it is not possible for a whole people to write a constitution; instead, a committee must do it in their name. In some ways, the process of writing a constitution is therefore a little odd. A small group of people writes the constitution, but the document that they write claims to speak for the whole citizenry. To outsiders, it sometimes looks as though the committee has tried to take over the process, and it illegitimately claims to speak for the people. And when this accusation is made, often the constitution-writers become very uncomfortable. They worry that people will think badly of them. And if you have lived under a system in which the military government has seized power for itself, everyone is especially sensitive to the charge that the constitution-writing committee is seizing power for itself.

Now on this subject, when we look over the history of constitution-writing, we should learn two lessons. First, it is always the case that committees write constitutions, because as a practical matter, there is no other way. It would be nice for the whole people to meet in some enormous room and write their constitution, but it just cannot happen that way. And for that reason, someone has to take a leadership role and initiate the process. To be a leader in this way takes courage and energy, and even well-meaning people might suddenly start to suspect you. But someone has to do it, even if it is a thankless task, and really people should be grateful that you had the courage to risk their disapproval. So although people may accuse you of seizing power merely because you are taking a leadership role, constitution-makers have always faced that charge and always will, and they cannot let it stop them.

But here is the second lesson: although the process must start with the committee, it must not end with the committee. As you know, it is very important that you write a constitution that you think will find favor with your people; it is important that you consult with them as much as possible during the writing; it is important that you give them a reasonable chance to approve or disapprove it before it goes into operation; and even after operation, it is important that your political leaders implement it in such a way that the people willingly give it their support. Indeed, most new democracies first adopt provisional constitutions, so as to allow the government to function, but then during the first several years, they actively explore popular opinion on the outlines of a final constitution. In Burma, this process will probably be especially important because of course, right now, your ability to communicate with your people is limited. After the transition to democracy, however, you will be much better able to secure the basis of consent.

Now as you know, the Chins have been writing a constitution for several years. It is still unfinished and tentative, and it will change many times. Today, they bring it before you only by way of illustration: this is what a constitution might look like; it covers the main subjects that a constitution might cover; but you will have to make your own decisions about the precise content of your constitution. And as you think about how to write a constitution that will win popular support in your respective states, you might be interested in the experience of the Chins. We therefore have with us Pu Lian Uk and Mr. Andrew Lian to talk about their experience in this process. I now turn the microphone over to them for that discussion.

### C. FEDERALISM

In this session, we will speak about federalism. Presently, Burma is governed by a military regime that is not democratic; the people do not elect their leaders in free and fair elections. It is important that Burma becomes democratic. But it is also important to understand that even a democratic government can be oppressive unless you have other protections in place. For many countries, federalism is one of those protections.

Federalism means that the constitution divides power between the central and local governments: the former receives one set of powers, and the latter a different set. There are a great many way to divide these powers, and different countries take different paths. As a result, there are many different kinds of federalism. All that they really have in common is that they involve some constitutional division of power between the center and the states. Accordingly, there are federalisms in which the center holds almost all the power, and there are federalisms in which the center holds almost no power.

Worldwide, the most common rationale for federalism is the self-determination of local cultures. Sometimes a country contains regions that have different characteristic cultures. The people in those different regions hold different ways of life or customary laws or styles of government, or they even dream different dreams for their future. In a simple, unitary democracy, without federalism, there is only one government—the center, and that government is governed by majority vote. In this situation, the minority cultures will never control the center, because they are by definition the minority. But if the center is the only government and the minorities will never control the center, then they will have very little opportunity to control their own destiny. So unitary democracy does not promise real freedom for these groups; instead, they vote and they vote and they vote but they never

win, because they are the minority. Federalism helps to solve this problem by giving some self-determination to minority cultures, with some power that the central government cannot invade.

If you want to protect these local cultures, it is probably a good idea to do so in the constitution itself, rather than leaving the matter up to the discretion of the central government. The reason is that if you do not put it in the constitution, the center may fail to understand the importance of local self-determination. For example, in the United States, Native Americans very much desire to govern their own affairs, and federal law gives them some measure of self-determination. If the USA were a unitary government, these Indians would be in trouble, because they would have almost no political powers: they would vote but always lose. The major drawback in this system is that the US constitution does not protect tribal self-government; the tribes have power only because the central government allows them to do so. From time to time, the federal government has eliminated self-government for certain tribes, and at times, it has threatened to eliminate self-government for all tribes. So Native Americans live under threat of extinction. This is a deficiency in the American system, and it may be that you will want to protect your federalism in your constitutions.

Now right at the outset, I should speak a little about the relationship between local self-government and ethnicity. I have suggested to you that federalism can help regional cultures have some control over their futures. Frequently, the people in these regions believe that their different life ways come from their different ethnic identity: the Corsicans, for example, might claim that they are different from the French because they are ethnically a different people. I believe, however, that this is a risky direction, and it often leads to great ethnic anger in new democracies. I will talk about the reasons at greater length at a later time, but here let me introduce the topic.

When people have a different culture, then they need some degree of self-determination to express that culture. Often, those cultures will grow out of the old lifeways of a particular ethnic group, so that a particular regional culture will draw heavily on the traditions of that ethnic group. I believe that in order for that culture to govern itself, it must be free to cling to those traditions if it wants. As an example, Chin state may want to protect Chin customary law—and if they want that, they should be allowed to so, and their constitution gives their government that power.

But it is one thing to say that local governments may protect local cultures that have their roots in an ethnic tradition. It is quite another thing to say that only those who are

members of that ethnic group may fully belong to that state. It is always dangerous to treat people differently merely because of their ethnicity, because that approach tends to stir great anger between people. So while Chin state may protect its own regional culture, the current draft of the Chin constitution also prohibits the government from discriminating against people who are not ethnically Chin. Non-Chins are entitled to full individual rights under the Chin constitution, the same as Chins. In the long run, the experience of other countries suggests that this arrangement will be better for Chins and for non-Chins. Local governments will have the power to govern according to local culture, but no-one will be treated badly merely because of his ethnicity. And that means that Burma will celebrate all of its traditions and cultures, and that all Burmese may be able to live together happily.

To elaborate this point in the context of Burma, let me draw from a series of e-mails that I have received from Uncle Eugene. First, he wrote, "We have had cries and demands for federalism or a federal union based on the equality of ethnic groups, with ethnic identity -- rather than territories, i.e., the states -- becoming the focal point. Actually, the problem is not so much conflict between ethnic groups, nor is it between the majority ethnic group and the minority ethnic groups. It in reality involves the centralizing, monopolizing impetus of Rangoon and its encroachment of what are states' jurisdictions and spheres, so that the constituent states in Burma exist only in name. The problem and the confusion is compounded further by the distortion of the military regimes and successive juntas of federalism -- misrepresenting federalism, equating it with secession and the break up of the union."

At a later point, Uncle Eugene explained that local government can allow local cultures, rooted in ethnic traditions to express themselves. But he added that it is very important that local ethnic groups should not oppress others around them because of their ethnicity: "As I see it, if there is emplaced in Burma a system of local governments with real power and real responsibility (as in Western countries, or real democracies, federal or otherwise), local governments will as a matter of course become 'ethnic'. That is to say, in a certain local-government (LG) area (in, say, the Shan State), where the majority population there is, say, the Pa-O ethnic group, the local government and the said area will become Pa-O (or Lahu, Palaung, Danu, etc.) -- without a need for a superior body (the state or provincial, or the central/federal government) having to designate it as such. I think that too much focus on ethnicity is like going nowhere and everywhere. At the bottom, what ethnicity and ethnic-based politics and demands are all about is recognizing their place as equal to any other ethnic group within, say, a country, or a nation-state formation. I believe real LG will meet this need. Of course, there will always be minorities -- like for eg., a Tai, or Danu minorities in a LG area that is Pa-O. There are many ways to deal with this, but

the advantage of real de-centralization in a democratic way is that LGs will be small, very local, not powerful enough to be used as a vehicle to dominate and repress other minority groups in the area. The majority group will have to accommodate, compromise, communicate, etc., in order to keep the LG running, and to win elections. In such a small government, small politics context, cross-cutting cleavage (and loyalty) will become more significant than ethnic-ones. It is only when ethnicity, ethnic identity is repressed and people are not allowed to live and grow in their own 'skin' or tongue that we sow the seed of ethnic conflict and ethnic politics.”

So the principal argument worldwide for federalism is that it can allow local cultures to govern themselves in their own way—and as long as these local cultures do not become rigidly or oppressively ethnic, federalism can therefore create greater freedom for everyone. In addition, there are several other reasons for federalism. First, local people may know more about local problems and be able to handle them more efficiently. Second, if local people know that local government makes many of the most important decisions that govern their lives, then they will be more likely to get involved in the democratic process. In the long run, democracy cannot survive unless the people participate, so as to express their views and keep control of government. Democracy cannot long survive unless the people set the terms of their lives. If they are always looking to the center for a decision or money or guidance or initiative, then democracy will never really come alive. The final reason for federalism is that state and local governments may be able to check the central government, so that it will never concentrate absolute power into its hands.

Federalism can occur at many levels. I know that you want to protect state power against the federal government. But you may also want to protect local power against the states. In other words, you may want to put federalism in the union constitution, so as to divide the states and the union government, but you may also want to put federalism into your state constitutions, so as to divide power between the states and more local units. You may particularly want to do this if you feel that empowering those local units will serve the values of federalism. Those local people may stand in the same relation to the states that the states stand in relation to the central government. Local people may understand local problems better; they may be more efficient at handling problems; they may have a distinct local culture so they do not want to be governed at the state level; and giving power to local governments may inspire their citizens to become involved and proactive in their own governance.

So there is much that is good about giving power to state or local governments. But as in everything else in constitution-making, there is a balance here, because although

there is much good about local government, there is also much good about central governments as well. If there weren't, then there would be no point in forming a union in the first place. Here are some of the advantages to being part of a larger country. Most people feel that a large country can better defend its territory from outside aggression. It can better negotiate with other governments, because it has more diplomatic power. And most people think that a larger market system makes for greater prosperity for the people in that system, so you will need a larger government to regulate the larger market in a unified way. So at least for defense, foreign relations, and the market economy, it can be a great advantage to build larger union structures, rather than just staying with local governments. And even very large nations are now trying to develop unions with other nations to handle some of these matters.

So we need to create a constitutional structure that will balance the advantages of local government with the advantages of central governments. How do we do this? We need to address at least three basic subjects. First, we need to figure out the basic structural relationship between the states and the union government: do the states come from the union, or does the union come from the states? Second, we need to decide which governments will have jurisdictions over which subjects. And finally, we need to make federalism real and significant by creating a local administrative apparatus that can make a difference in the lives of its citizens.

So let me begin with the first question: who comes first, the states or the central government, and why does it matter? We might imagine two basic answers to this question. First, we might imagine that the nation begins as a unit, a single being, and the central government possesses all the power. This government then delegates, of its own will, some powers to state governments. If the government does this by statute, it may revoke the power at any time, and this system is therefore not technically federal, because the constitution does not guarantee a division of power. The states possess no independent power; they are merely instruments of the federal government to perform its will.

We might imagine, however, that the federal government goes further: it delegates power to the states, and it then gives those powers constitutional protection. If the powers delegated are broad enough, we might call this system federal—even though the powers come from the center, they now constitutionally reside with the states.

In some countries, this sort of system works to produce real federalism. But there are risks associated with it. First, if the central government comes first, then it decides how

much power it wants to delegate—and that is seldom as much as local people want it to delegate. Second, everyone concerned—the states, the central government, and the citizens—tend to perceive the central government as the real government—more permanent, more important, more powerful than the states—because it came first and because it created the states. The states, in this version, are mere creatures. Because everyone perceives the central government as more fundamental, it is likely to end up with dominant power. The central government is more likely to assume more power to itself; courts and citizens are likely to accept the central government’s assumption of power; and states are unlikely to fight back very hard. Now when the country does not have a strong tradition of central power, none of this might matter. But if you have a history of authoritarian governance from a central point, all these dangers are real.

As a result, many prefer a different model: we imagine that the states came first, and then they joined together to form a partnership, a union, giving certain powers to the central government to promote their aims. In this model, the union government is an agent of the states: it has only those powers that the states give it, cannot exceed those powers, and must always imagine its role as serving the common good of the states, considered collectively. Citizens owe obligations to their states first, and then to the central government. Courts begin with a presumption of state power, so that when they are in doubt, they are likely to find for the states. And the federal government remembers that it has been entrusted with certain goals by the states, and those goals do not include the subordination of the states themselves.

Again, as a practical matter it may not seem to matter very much whether the federal government or the states came first. Either way, we will end up with a constitution that divides power between the states and the federal government. So why does it matter how this constitution came to be? Again, the answer is psychological. If the states came first, then their legitimacy is presumed, in all their variety. They do not depend on a central authority to give them their legitimacy. And so built into this model is the idea that it is legitimate for states to be different; we need not be all the same; and disagreement is not treason. It can therefore be a useful device for making the transition from a unitary government to a federal one. I understand that some time ago, the NRP made the decision to adopt this model. You are beginning by writing your state constitutions, and then you will create a union government with powers delegated from the states. I assume therefore that you are already quite familiar with the benefits of this model.

So at the level of the union, you have already decided which comes first, the states or the union—the answer is the states. But in your state constitutions, you must also make

a similar decision: which came first—the state governments or the local governments? Perhaps the local governments existed first, and then they created the states by delegating power to them. Or perhaps the state existed first and then delegated power to local governments. And if the state came first, is local power to be guaranteed in the constitution, or can the state government decide when and how much power it wants to give away from time to time?

There is no one right answer to this—it all depends on your perceptions of your own needs and goals. You are trying to strike a balance here that is right for you. If you give too much power to the local governments, then the state may be divided, weak, inefficient, and full of strife. But if you give too little power to the local governments, the state government may become over-powerful and bureaucratic, stifling all local initiative. Now how you deal with those two risks—how you strike the balance—will depend on how much you worry about each risk in your particular context. Do you have many local cultures that need protection from the state? Do you worry that your state legislature may become too powerful? Are you afraid that the state government may bog down in bureaucracy and keep anything from getting done? Then maybe you want strong local government. Are you worried, on the other hand, that many strong local governments may take the loyalty of their citizens away from the state? Are you worried that these governments may adopt different rules for governing things, and these rules may be in conflict, and that may frustrate the creation of common rules across the state, in areas where a uniform system is important, such as the economy? Are you concerned that local governments may even become seedbeds of violent resistance to the new states? Then you may want to leave most of the power in the state government.

The Chins disagreed among themselves on this question, and so they asked me to draft up two different versions of the section of their constitution that deals with local government. In one version, their local governments are mere creatures of the state government, which can decide how much power it wants to give them. In the other, the constitution protects certain local powers from state meddling, and it carefully gives the local governments their own tax powers and administration. In the Chin Forum, people disagreed precisely over the sort of worries that I am here outlining. Some thought that the legislature could be trusted to make these decisions, and too many local governments would be inefficient and might block a spirit of unity. Others worried that local governments needed constitutional protection because the state cannot so readily be trusted. These people worried that the state would take all the taxing power from local governments, would favor some localities over others, and would block local initiative.

I suspect that the Chins will be discussing this question for some time, and they may never all agree on an answer—which is fine. But the important thing is that they are talking about the right issues. They have their eye on what matters. And so their question is your question: you want both a spirit of unity within the state and also local freedom, so how do you balance these two?

In answering that question, one critical issue is our second subject: we need to generate a list of subjects over which the central government shall have primary power and a list of subjects over which more local governments shall have primary power. In pondering this large question, it is worthwhile to bear three sets of subordinate questions in mind, and this list applies whether you are dividing power between the union and the states or between the states and local governments.

First, you must try to identify areas where you need uniformity, provided by a single system of rules. Again, many people think that in the area of national defense, foreign relations, and the economy, it is important to have one system of rules. So in these areas, you may want to give primary power to the union government, less power to the states, and no power at all to the local governments.

Second, you will want to identify those areas where it is very important to states and localities that they retain power so as to assert their particular identity. Many people feel, for example, that more local governments should control culture, primary education, and religion. So you may want to ban the union government from acting in these matters, and you may want reserve power to the states. You may even want to give the state the power only to set general guidelines, and then reserve the rest of the power to local governments. So, for example, the state might be able to prescribe general standards of excellence for the schools, but the local governments might be able to control curriculum, teaching method and the like. The Chin Forum has adopted essentially this general division of power in their constitution.

So when thinking about federal powers, you need to think about those areas where you need unity. When thinking about state powers, you need to think about those areas particularly important to your culture as states. And then finally, when thinking about the division of power, you always need to be thinking about issues of trust: which arm of the government can you trust in which area and why?

For example, perhaps you think that local governments should make most educational decisions. For that reason, you constitutionally reserve power over education

to local governments. But then you think some more, and you might conclude that the state legislature can actually be trusted to make this decision: if local governments should have control over education, you can trust the state to realize that fact. So in that case, instead of constitutionally reserving power to the local governments, you may want to give full power over education to the state, in the expectation that the state will delegate to local governments when appropriate. But, on the other hand, perhaps you don't trust the state with the taxing power because you fear that it will keep all the money. In that case, you may want to constitutionally guarantee some independent taxing power to the local governments, and to keep the state from interfering with it.

Now in deciding which government should have power over which areas, it is also important to remember that it is possible to give both governments some power over a given area. In the USA, for example, both the Federal Government and the states have power over commerce. In this case, we say that the governments have concurrent power over the subject—meaning that they can both exercise power at the same time. Often the two governments will work together on a problem, and that is all to the good for everyone. Sometimes, however, the governments will disagree about how to handle a problem, and they cannot work out a compromise. In such cases of conflict, the constitution should specify which government will win. For example, in the area of the economy, perhaps the union government should set the basic rules, but states can add extra ones, as long as they do not conflict with union policy. If they do conflict, the central government's rules win. But in the area of education, you might want just the opposite arrangement: the federal government can develop educational policies only so long as they do not conflict with the states'. And so forth.

When you divide power in this way, of course, it is critical that the constitution designate somebody reliable to enforce the divisions. Often, enforcing the division calls for interpretation of the constitution, and for that reason, many constitutions give this power to the courts. For example, suppose that you give the union government power over the economy, but you give the states power over culture. The central government then starts to regulate schools on the grounds that education has a big effect on the economy. Who wins—the state or the federal government? Is this economy or education? Someone must decide.

If you decide to give such decisions to the High Court, then you need to help the court in a variety of ways. You need to guarantee that it will not be punished for disagreeing with powerful politicians. You need to pay it enough so that the judges will not be tempted to take a bribe. You need to train the judges into a deep respect for the rule

of law, rather than political power. And you need to give it enough respect so that the country will follow its decisions, rather than disintegrate into civil war whenever people disagree over a constitutional question.

But it is not required that you assign the courts alone this task. It is possible to give other actors, such as the state legislature, the responsibility for interpreting the division as well—and the Chin Forum has chosen to do so. If you pursue this course, however, it is important that the legislature exercise this power with the greatest care and balance, rather than acting merely for its political advantage. If you worry that the legislature will behave badly, it might be best to stipulate that it can invalidate federal legislation only by a super-majority vote—or it might, in the end, be better to give it no role in this particular process.

OK, so now imagine that you have made some important decisions. You have decided which comes first, the states or the union government. And you have decided which comes first, the local governments or the state governments. And you have decided which powers to give to each set of governments. And you have appointed someone to enforce that division of powers. None of that is worth anything unless you then create an administrative apparatus to ensure that each level of government is actually able to use its power to benefit its citizens. Federalism cannot be merely a theory; it must also be a lived reality. People must feel it in their daily lives. Local officials must have real power, and local people must take it upon themselves to make the system work. Only if people actually become fond of their local or state governments will they defend and support these governments. Federalism works because everyone in the system has a sense of how it works, and they are personally committed to the system.

So how does this happen? How do we make local government into a lived reality, instead of only a theory? There are several important parts to a good answer.

First, the constitution must give to the state and local governments a form, a body that allows them to function; in other words, they need executive officials, legislators, and courts. And so your state constitutions need to specify the form of government, both for the states themselves and localities as well, if you are going to give local governments some constitutional protection.

Second, the constitution must not only give state and local governments power in the abstract; it must also specifically give them the ability to carry out those powers, to act in the way that governments generally act to pursue the goals assigned them.

Third, the constitution must give these governments some degree of immunity from the actions of higher governments. For example, state officials should not be punished by the union government for attempting to carry out their job. State institutions should not have to pay exorbitant federal taxes, so high that they cannot do their job. Similarly, the federal government cannot just take over the states and tell them what to do. That would destroy state independence. For that reason, you might want to block the federal government from forcing the states to carry out a federal policy—at least in certain areas. The job of the states is to carry out state policy; the job of the union is to carry out union policy itself. On the other hand, if the states want a role in carrying out federal policy, it is possible that they should have one, as they might be better able to execute policy near to the people. But the important point is that states cannot be forced to be mere instruments of the union government. And if you really are concerned to protect local governments, you could grant them similar immunities against the state governments.

Fourth and finally, if you want to give real life to local or state governments, you must give them an independent ability to raise taxes. There are several ways to do this. Some constitutions let the higher government raise taxes, but it must then pay a particular share to the lower governments. The downside to this procedure is that the higher government may never pay the monies out, or may pay out only a small fraction of what is actually due. Another alternative therefore is to let the lower government collect all the taxes and pay to the higher government what is due to it. And then some constitutions completely divide the taxing powers of the various governments: they give certain taxing powers to the central government (for example excise taxes), other taxing powers to the state government (for example income taxes) and still other taxing powers to the local governments (for example real property taxes). Each level has its own ability to collect taxes as it will. Under the right circumstances, any of these schemes will work. The important thing is that the lower government be guaranteed a certain amount of money; otherwise, they will simply cease to function.

Finally, let us talk a little about the administration of local government. All of this wonderful federalist theory will be meaningless unless state and local governments have an administrative structure that will put it into practice. For federalism and local government to work, the people must actually experience it in their daily lives. When one is used to looking to the center for money, decisions, and initiative, it can be hard to imagine such a world. So even after you have designed a constitutional structure to create federalism, officials and citizens must still put it into practice. To this end, training and direct experience in federal systems are invaluable.

I cannot, of course, offer you such training or experience in this context. But perhaps I can offer a picture of how one federal system works by explaining to you the way that I spend a typical day back home, with reference to the way that my life intersects the various levels of government. I live in Monroe County, Indiana. The county has a government. Inside the county is the city of Bloomington, which has a separate government. Above both the city and the county is the state of Indiana. And above the state of Indiana is the federal government of the United States.

When I wake up in the morning, I am in my bed in my own house. I own this house under a system of property law that is run by the state of Indiana but that is administered through Monroe County. The house is in the Lake Monroe watershed, which means that it is subject to environmental regulation run by the state of Indiana. I pay real property taxes on this house to Monroe County, and those taxes go to support the public school that my children attend. If I do not leave the house, there is no reason for me ever to interact with the federal government.

But I do leave the house: I drive my children to school. I drive on roads that are owned, maintained, and regulated by Monroe County. I arrive at my children's school, which is financed from local taxes. Most of the decisions about my children's education are made at that school, by the principal, teachers, and parents in association. Some are made at the county level, such as the school calendar and opening and closing times. A few are made at the state level, such as educational standards. And an even smaller number are now made at the federal level, though that is a recent innovation and many people are unhappy about it.

After I drop my children off, I might go to the post office. The post office is run by the United States Postal Service, which is a semi-private organization under contract to the federal government to run the postal system. Employees of the post office are therefore not exactly federal employees, but the federal government performs certain services through this organization. Today, I mail some packages, and I apply to have my passport renewed. The states have no role in the postal service or foreign relations, so for this moment I am really in federal territory. In my whole day, however, this is the only moment during which I interact with the Federal Government.

Now I drive into work in the city of Bloomington. I pass by a recycling center run by Monroe County, where I drop off some bottles and trash. If I commit a crime on the way, I will be arrested by the Monroe County police, or if I have reached Bloomington, by the city police. They will prosecute me under state criminal law. The federal government

prosecutes a few crimes, such as drug trafficking and political corruption, because it is thought that we need a uniform approach to those areas.

I work at Indiana University School of Law. The university—the most important in the state—is owned by the state of Indiana. Technically, the state can make law for the university, but it rarely does. Instead, the state leaves the administration of the university to the faculty and administration of the school. The university even has its own police force. Under the state constitution, the state must maintain a public university, but its primary role is to give us money. The law school also sets and collects its own tuition, and it raises money from private sources, so that we have an endowment that the state cannot touch.

At the law school, the faculty acts as the local legislature. We set policy by democratic vote in faculty meetings. In many ways, the university is the most important government in my life. This arrangement makes me quite happy, because it means that the important decisions about my life are made by people that I know and that are generally like me in their interests and values. I am eager that the state legislature should not become over-involved in the life of the school.

At the close of work, I pick my children up and go out to dinner with them and my wife. The restaurant must get a license from the state, and it must undergo periodic inspections by state health officials. Smoking is not allowed because the city of Bloomington has recently adopted a regulation prohibiting smoking in public places anywhere within the city limits. After a good dinner, I go home and go to sleep.

Now notice that over the course of this day, I have been subject to laws made by the federal government, the state of Indiana, Monroe County, the city of Bloomington, and Indiana University. Because the jurisdictional arrangements are generally clear, each government knows what it can do and what it cannot do. They often work together to make sure that they are not intruding on each other's territory. Because I live under this system, I know which government to call if I have a problem. If I see a crime, I call the county sheriff. If I want to offer a new course, I bring it before the law school faculty.

Notice also that I am most affected by those governments that are closest to me, and as you go up the ladder, I am less and less affected. The result is that most of the decisions about my life are made locally, often by people that I know, people that live in the same place as me. In many cases, I can just pick up the phone and call these people. Because I am their neighbor, they are generally polite, friendly, helpful, and honest.

Now this system works well because it has been in place a long time, and everyone knows more or less what is expected of them. But it was not always so: once, there was no such system, and it had to be created—just as you are in the process of creating a federal system for yourself. The important thing to remember is that even if you design a good system, that is not enough. You must then make it work and live in the lives of your friends and neighbors. In addition, you need a fairly clear structure of responsibility, so you know that who is responsible for what. The day that I just described can occur only because the state government and the local governments keep that structure clearly in mind.

#### D. ELECTORAL SYSTEMS

In this session, we will be discussing electoral systems and their role in producing a stable, representative democracy. An electoral system is the method by which we elect our representatives. In particular, it refers to the way that we count votes to choose a winner. There are a number of different ways to do this, and different countries do it in different ways. In other words, there is not just one legitimate form of democracy. Different electoral systems will produce different sorts of politics and will distribute power in different ways. Each electoral system will thus produce a slightly different kind of democracy, and each kind of democracy is good in different ways and for different purposes. And because each nation has its own particular problems, each nation may need its own particular democratic design.

For example, some nations might want to ensure that every group, no matter how small, has some representation in the legislature to make its views known. These nations think that the right to be heard is very important, and they also think that it's a good way to keep small groups committed to the system—because they have some stake in it. On the other hand, other nations might be concerned to have as stable, steady, and moderate a politics as possible. They want to encourage people to move toward the center of the political spectrum, and they want to discourage extremist groups from getting any real access to power. These nations may take this position because they have recently had difficulties with civil war or ethnic hostility or both.

The important thing to understand is that different electoral systems can help to produce different sorts of politics. And so different nations with different problems may need different electoral systems; there is no one-size-fits-all scheme. And for that reason, each of your states may want a different electoral scheme, and you may want still another

and different scheme for the union government. But the way to start thinking about designing such systems is to begin by thinking about the problems that your states will face after the transition to democracy. Those problems will not necessarily be the same for each of your states, nor will they necessarily be the same for the union government. So there is no reason to think that your electoral systems all have to be the same.

There is an infinite variety of electoral systems, but let me offer you three general categories. The first is a family of systems generally called majority/plurality systems. The second is a family of systems that use some form of proportional representation. And the third is a group of systems that explicitly guarantee various minority groups some amount of representation. All three of these kinds of systems seek to do two things—to ensure that minorities have some voice and some power, but also to promote a sense of the common good, so that minorities do not become warring factions. We need to recognize that we are different, and that's OK, but we are also the same in some fundamental sense, so that we have a unity to bind us together. The question is how best to balance these two desires, and the different systems answer that question in different ways.

In a plurality/majority system, whoever gets the most votes wins. In a majority system, you need to get 51% or more (the majority), and in a plurality system, you just need to get more than anyone else, so you could win with much less than half the votes if there are a lot of candidates who split the vote. The simplest form of plurality/majority election is one in which the voters are choosing someone for just one office: so, for example, in an election for President, the candidate with the majority or plurality of the votes will become the president.

The situation is a little more complicated when you are electing a body with many members, like the legislature. Then, most typically, a plurality/majority system divides the voters into geographical areas called districts. The voters in each district then choose one person to represent them in the legislature by majority or plurality vote. Again, what makes it a majority electoral system is that within each district, the majority chooses the representative, and the minority is left without any real control.

This system has one clear advantage: because it divides the people into relatively small geographical districts, each voter has a real opportunity to know and call upon his or her representative. For a people who are learning to govern themselves, who don't have a lot of experience making their will known in a distant central government, it can be a great advantage to have someone close to home whom you know and who can make your views felt in the legislature. It is also easy to hold that person accountable for his actions:

because you can keep an eye on him, if you don't like his performance in the legislature, you simply vote him out at the next election.

But there is an aspect of this sort of system that might be more troubling: plurality/majority systems tend to misrepresent the relative strength of different voting groups. In each district, the winners send their candidate to the legislature, but the losers get no representation at all. They just lose. So if we have an election in District A in which the voters divide 60/40, then 40% of the voters in that district feel that they have no direct representation.

Now suppose that we multiply this effect across the country. Suppose there are two groups, the pinks and the greens, and they don't like each other and share very little. Suppose that the greens are 60% of the voters and the pinks are 40%. And now suppose that they are both spread out pretty evenly across the country. In every district, therefore, the greens outnumber the pinks: the pinks are 40% of the population as a whole, and because they are spread evenly, they are 40% in every district. What is the result? In every district, the greens are a majority and the pinks a minority. Therefore, in every district, the greens will elect the representative—in every district! The legislature will therefore be all green. Although they are 40% of the population, the pinks have no representation at all.

I have described an extreme case, but less extreme cases are very common. Majority/plurality systems almost always over-represents the majority, in the sense that they majority commands a greater share of the legislature than its share of the voters. This sort of misrepresentation gives rise to a number of problems. First, small groups are excluded from their proportional share of power—a situation that many regard as undemocratic. Second, those groups may grow so dissatisfied that they will resort to civil unrest, making for an unstable country. And third, because they are so secure in their power, the ruling group may ignore the needs and interests of the minorities altogether.

Now to counter these problems, constitutional designers have developed slightly different versions of the plurality/majority system that will empower minorities somewhat more fully. The simplest of these versions is called alternative voting. In this system, you have relatively small geographical districts but with multiple candidates running for each office. Each voter then lists these candidates in order of his preference. After the votes are counted, very likely no candidate will have 50% or more of the first place votes. In that case, the candidate with the fewest first place votes is eliminated. We take all the ballots that put him first and we go down to their second choices and make them into first place

choices, giving them to the appropriate candidates. Then we check to see whether anyone has 50% or more of the first place votes under this new distribution.

Now all that sounds complicated, but it is a lot simpler in practice, because it gives the candidates a clear incentive. If you are a candidate in a district with multiple groups, you realize that you will not be able to win with the first place votes of just one group. So you will need to appeal to other groups to get their votes as well. And even if they won't give you their first place votes, they may give you their second place votes, and those may be necessary for your election. Now that means that you can campaign primarily to pick up voters of your group, but you must also try to appeal to others, so you are unlikely to spread a message of division and hatred. And the result is commonly that you have legislatures that are trying to govern the country well, instead of legislatures that are always angry and divided against each other.

So alternative voting has a lot of promise: you can keep your small districts, so voters know their representatives, but minorities also have some influence because candidates need their second place votes. But again there are drawbacks to alternative voting as well. Imagine that we have several groups—pinks, greens, blues, and greys. Now if the pinks are an absolute majority of the district and the pink candidate can count on their votes, then he has no incentive to appeal to other groups. So the system works best when no group has an absolute majority. Even then, however, if the animosity among these groups is severe, people from one group may simply not vote for people whom they regard as their enemy. Everyone knows this, so candidates may not even bother making appeals to voters from certain other groups.

But suppose that the system works as it is supposed to—suppose that the animosity is not profound and no group holds an absolute majority, so you need some second place votes from voters outside your group. There is still a problem, or at least people could regard it as a problem. Here is the promise of alternative voting: candidates from the pink group will try to appeal to the greens to get some of their second place votes. Now if the pink candidate wins, we can hope that he will feel grateful and will support the interests of the greens in the legislature. But the greens have influence only through this legislator; they have not actually managed to get one of their own elected. In many cases, that influence may matter a great deal. But we can also imagine that the pink candidate will think of the pinks first, and he will help the greens only secondarily. And meanwhile, the blues and the greys are totally out of luck; they have no-one to represent them even partially.

So alternative voting may help reduce the tension between groups, but only to a limited degree. And it may help to make the system more representative, but again only to a limited degree.

Now the most significant alternative to plurality majority systems is proportional representation (PR). You create quite large districts, and each district sends multiple representatives to the legislature—let's say 100. Parties then run lists of candidates, generally one candidate for every slot open, and they are ranked, 1 to 100. After the votes are counted, the party gets a number of seats in the legislature that is proportional to their share of the vote. So if the pink party gets 35% of the vote, then their top 35 candidates become members of the legislature. If they get only 2% of the vote, then they send two people to the legislature. And the result is that even very small parties can get their fair share of legislative power.

So the first big contrast with plurality/majority voting is that PR is more representative. In a plurality/majority system, in each district, only the majority sends any representatives to the legislature. In any given district, if you are in the minority, you just lose. If your party is in the minority in every district, it will elect no-one—even though nationwide it may have 20 or 30 or even 40 percent of the voters. By contrast, with PR, even very small groups sometimes manage to send someone to the legislature, because if they have 1% of the vote, they will elect 1% of the representatives.

That kind of inclusiveness has several advantages. First, it more accurately represents the will of the people, which makes it more democratic. Second, even small minorities may feel that they have some influence in the current system, so they may feel more committed to the process. So if it is very important to include all voices in the discussion, this is a good system.

But this system has drawbacks as well. First, for this system to work, you need large districts because they will be sending a number of people to the legislature. In some states, the whole country is one large district. And the result is that people do not feel a close connection to their representatives. The legislators are not familiar with the people of their district, and they may not push vigorously for their interests. So you get more accurate representation, but you lose close connection and familiarity. And that does seem to be a real tradeoff.

Second, in traditional PR, the parties have a lot of control. They choose candidates, and they list them in order. The people then just choose one or the other list. So the

political elite have a great deal of influence. Now this arrangement can be good or bad. If you worry that your political party leaders may be corrupt or power-hungry or manipulative, then you want someone else to choose the candidates and their rank order. On the other hand, your political elites may be more moderate and responsible than the rank and file. Because they have to run the system, they may choose only candidates who will work responsibly within the system, and they may better understand what makes someone a good candidate. Because they want to appeal to a lot of voters, they may choose candidates who are moderate in their views. And for the same reason, they may develop a list of candidates with all different sorts of candidates on it—people from different groups, from different regions, and so forth. And when different sorts of legislators interact in the legislature, they may find ways to work together, even across their differences.

Third, some have claimed that unlike alternative voting, PR gives political parties no incentive to compromise with each other because all are assured their share of the legislature—so why should they bother? Again, however, it depends on the circumstances. As just noted, sometimes in a PR system, if the divisions are not too severe, the parties will put out candidate lists with people from all groups, in an effort to broaden their base of support. And if there are a number of groups in the legislature, none with an absolute majority, then they must form coalitions in order to form a government or to get legislation passed—so they must compromise and learn to live together. The one time that PR does not do much to encourage compromise is when one party, based on group identity, has an absolute majority; then it has no need to compromise or to build coalitions.

Some people think that PR has still another drawback: it makes governments less stable and more divided. Remember that in a majority/plurality system, you need to have a large number of votes to get any representation at all, because you have to win a majority or plurality of votes in any given district. The result is that only large parties tend to have any power. Indeed, most often there are only two significant parties. By contrast in PR, you don't need a majority of the votes cast. In fact, you may need only 1% in order to send someone to the legislature. PR countries therefore tend to have a lot of parties represented in the legislature, and none may command a majority. As a result, to form a government or to pass legislation, the parties have to enter into coalitions with each other. But those coalitions are made up of people who have different views and agendas, and so they may be unstable, breaking apart on any controversial issue—which is precisely when they need to stay together to govern the country. (On the other hand, if they do stay together, then they all have to moderate their views, compromise with others, and move to the center. That pressure to the center makes the legislature less representative of the country as a whole, but accurate representation was the whole promise of PR to begin

with).

In addition, because small groups may manage to elect representatives under PR, you may end up with extremist candidates in the legislature—candidates who are pledged, for example, to restoring the generals to their place of power, or something like that. And these people may make all kinds of trouble. Now remember that the promise of PR is accurate representation, and in sending these extremists to the legislature, it is simply delivering on that promise, because some voters want these candidates. So if you don't want these extremists in the legislature, you are really saying that you do not want the legislature to be that representative. But many people think that when it comes to representation, you can have too much of a good thing; in this view, irresponsible extremists should not have power in the constitutional structure, especially if they are pledged to the destruction of that very structure by unconstitutional means.

Empirically, it is not clear how great these problems are for actual PR systems. As to the claim that PR systems are unstable, many PR countries turn out to be quite stable. In some countries, the political culture is centrist enough that they in fact have only a couple of major parties. In others, though they have many parties, the difference between them is not so great, so the coalitions tend to be fairly stable. So whether PR is in fact unstable will in part depend on just how politically divided the society is.

As to the worry about extremist parties, you can eliminate them simply by adopting a threshold requirement: in order to send anyone to the legislature, a party must get more than a certain percentage of the vote—2% or 5% or 8% or something like that. So to elect a representative, you must appeal to a certain number of voters, and inevitably that means that you will be more moderate. But there is actually a question about whether you really want to keep those small parties out of the legislature. It may be better to allow them to send a couple of people, who will have little power anyway, but then they feel that they have had a chance to express their views, and the rest of the legislature can keep an eye on them.

So in practice, PR and majority/plurality systems may not differ very much when it comes to extremism and instability. Instead, the choice between PR and majority/plurality systems may ultimately boil down to one difference: because it uses small districts, a majority/plurality system allows a closer connection between voters and their representatives, but PR leads to more accurate representation of different groups, especially of minorities. So you need to decide what matters most to you. And again, that decision need not be the same for each state constitution or for the union constitution,

because the people of each government have different issue and problems.

It is also possible to combine the two systems in different ways. I know that some of you have studied Germany's electoral system, and they use a combination. Some of the seats in the legislature are elected by plurality vote from relatively small geographical districts. And then some are elected by proportional representation, and they are allocated in such a way that the legislature as a whole is roughly proportional.

And finally, there is one other kind of system that may be relevant to Burma: by formal law, one might reserve certain offices to people from certain groups or certain areas. So, for example, one might reserve a number of seats in the legislature for people of a threatened minority group: only people from that group may vote in elections for those seats, and only people from that group may be a candidate for those seats. You might adopt the same sort of system for the cabinet or the high court: under the constitution, these bodies would have to include people from a number of different groups.

Usually it is new democracies that choose this sort of system. These countries may have been wracked by civil war. Sometimes various minority ethnic groups feel that they have never had appropriate influence, and they are very concerned to ensure that they get a certain share of the power. Neither plurality/majority systems nor PR absolutely ensures that minority groups will get any significant representation. In a plurality system, minorities will elect someone only if they are geographically concentrated so that they are 50% of the votes in some electoral district. If they are evenly spread out, they will be a minority everywhere and so may elect no-one at all. In a classic PR system, minorities are more likely to elect someone, but even here there is no guarantee. They must organize, they must create a party to represent their interests, and they must get their members to vote. So if your overwhelming goal is to ensure that a particular group gets a particular share of power, you may want simply to guarantee that group a certain share of power.

But there is a risk in this method of proceeding: by law, it divides people into groups. As a result, they may come to think of themselves primarily as members of groups, and they will contend with other voters as members of other groups. Pretty soon you may have a deeply divided citizenry, with different groups feeling that they are all in competition. As a result, the politics may be deeply divisive, and eventually the system may break down entirely—and you are plunged back into civil war.

So it is good to hesitate before you adopt this sort of practice. If you do adopt a system of reserved seats, it is perhaps best to view it as a transitional scheme. It may be

necessary to guarantee traditionally oppressed groups some power, and those groups may insist on it. But you hope that as the country gains some experience with democracy, as the groups come to interact with each other, group lines will appear less significant. Even though group identities will not and should not disappear, people in different groups will not distrust each other or the government so much, because the system has worked for them. So, again, you hope that voters from one group will come to care about voters from another group, and vice-versa. And they will all come to think that what they have in common is as important as what they don't. All countries must struggle with this task: we need to allow diversity, but we also need to instill unity. Now the risk of a system of reserved seats is that it tends to institutionalize division, and so it can make it very difficult to move to a system characterized by trust and unity.

So you ideally want a system that will do two things at the same time. It should allow particular groups of people to express their identity as a people, to tell their story, but it should also allow people to form bonds between groups, so that you can create a unified nation. Now one way to do that is the way that the Chins have proposed in their constitution. Instead of reserving seats for particular ethnic groups, the Chins have proposed that the union constitution reserve seats for certain regions—the traditional states of Burma—Chin State, Shan State, Karen State, and so forth. So, for example, the Chins think that the government should include ministers from each of these states, and the High Court should include judges from each of these states, and the upper chamber of the legislature should include an equal number of representatives from each of these states, regardless of their population. And all these provisions are designed to ensure that the people in each of these states are guaranteed a certain share of power.

But these provisions guarantee power to geographical regions, not to ethnic groups as such. To be sure, most of the people in Chin state are Chins, and so the effect of these provisions will, in the short run, be to guarantee ethnic Chins a certain share of power. But the constitution does not recognize this ethnic difference as such. It guarantees power to people in Chin state as citizens of that state, whether they are ethnically Chin or not. And that means that the law does not divide people into contending ethnic groups; it merely divides them into geographical areas. In some states, the population may be very mixed, and as time goes on, the ethnic composition of all the states may become increasingly heterogeneous. Yet regardless of their ethnic identity, the people in these states hold power based on where they live, not on their ethnicity. The result is that the law does not create hard and fast divisions between people based on their ethnicity. It guarantees to local communities some share of power, but it does not divide these communities based on their language or religion or ethnicity or clan. And the hope is that as a result, people

from very different groups may learn to live and work together, to trust each other and support each other. So again we try to achieve unity in diversity; we recognize and allow for difference, but we also hope to create a state with enough unity to work.

And again, you must make these decisions at the level not only of the union government but also at the state. Even if you want some reserved seats in the union government, it may be that you want no reserved seats within your state governments, because you do not feel that there are any minority groups within your borders that need a guaranteed share of power. Or, on the other hand, maybe you do want to create some reserved seats, because your state contains a particular, sharply defined and politically militant group, and they do not particularly want to be included in your state. One way to appease them, to buy their support, may be to give them some sort of special status through reserved seats—at least until they come to trust you, so that the special status is no longer needed.

So where does all this leave us? For now, let us put to one side the union constitution and instead talk about your various state constitutions. It may be that you do not even want to prescribe a particular permanent electoral system in your constitution. Instead, you could prescribe some method to elect the first legislature and then leave it to them to choose the electoral system for the future, which may change with time. This approach has some advantages: the legislature is likely to know a good bit about conditions in the state, and they can easily respond as they learn more about what might work for the states. The drawback to this approach is that the legislature may prove resistant to change, because they will want to keep the system that put them in power, so that it will continue to put them in power into the future. If they change it at all, it may only be to make even more sure that they will retain their grip on power.

So if you are worried about the legislature's motives, you may want to prescribe a constitutional method of election, and if you need to change it, you can still do so by constitutional amendment. But which method? The conventional wisdom is that alternative voting may be a good choice if the divisions between your groups are not too severe and the groups are geographically intermixed. Remember that under alternative voting, voters rank order their preferred candidates, and the winning candidate may need some second place votes from people outside of his own group. Now if the groups are intermixed, then a candidate will have to appeal to a number of groups to get elected, so that people will start building bridges. And if the groups are not too divided, then people will feel comfortable listing candidates from another group as their second or third choices. So alternative voting under these circumstances can lead to greater trust and connection

among citizens. Even under these good circumstances, alternative voting still may not be very representative: in each district, some minorities may not be able to elect the person who is their first choice, but they may still have some influence on their representatives, because their second choice votes were essential to his election. So, in short, under these conditions, you may give up a little in representative accuracy, but you gain by giving candidates an incentive to appeal across ethnic divisions, and also by keeping the close geographic link between representatives and voters.

On the other hand, if your divisions are severe and/or if your groups are concentrated in particular areas, then alternative voting will not deliver on its promise of mutual accommodation. If minorities are concentrated in particular areas, so that they form a majority, candidates will not need to appeal across ethnic lines—resulting in so-called “ethnic fiefdoms,” where the majority always wins and the minority goes without any representation at all. If minorities are intermixed but the divisions are severe, then candidates just will not appeal across ethnic lines, so you will still end up with extremist politicians. And because the minorities are all spread out, they will be a minority in almost all districts, so that the majority group will win the election in almost all elections. The result is that under these circumstances, alternative voting will suffer from the primary defect of all majority/plurality systems: it tends to give the majority even more control than their numbers would suggest. So we end up with a legislature in which politicians appeal only to their own groups and the larger groups are over-represented.

So the conventional wisdom is that proportional representation is probably best if the divisions among your groups are rigid and intense, and/or if your groups are geographically concentrated in particular areas. Above all, PR will ensure an inclusive, broadly representative legislature. In a divided society, it is critically important that everyone feel that they have a voice in government; otherwise, those who feel on the outside may just take up arms again. So PR is a good choice for countries with deep divisions or when groups are geographically concentrated. In those cases, if you use a plurality majority system, the dominant group will always win, and the minority will have no representation. By contrast, in a large PR district, those minority voters may still have enough of the vote, even if a minority, to send some representatives to the legislature. And so again they feel that they have a stake and a voice, and they may become committed to the system.

But even in this situation, PR is not without its faults. It still uses large districts, so the close connection between voters and representatives will become more attenuated. And because all groups have a real chance to elect representatives on their own, they may

feel little requirement to build bridges beyond their groups. The party leaders may try to field lists with people from every group, so as to get a lot of votes—but if the divisions are severe, the leaders may be as unwilling to work with people from other groups as the voters are. So there are clearly drawbacks, but most feel that the benefits of broad inclusion are worth it.

In conclusion, let me say that I know that this material is technical, and it is something that you have to work with for a while before you become comfortable with it. But it really matters. We have good evidence that choosing an electoral system can make a big difference in how a democracy functions. It is never possible to control the future through constitutional design with perfect certainty, but getting the right voting method can really help.

## E. THE UNION CONSTITUTION

We come at last to perhaps the most important, most difficult, and most delicate question of all: the construction of a Union government. And the reason that it is important is also the reason that it is difficult, and the reason that it is delicate. And that reason is that Burma has historically experienced some tension between the center and the margin, and we must speak frankly about that tension.

I am told that those wounds have started to heal, as the ethnic Burmans and the ethnic minorities have built a common cause in opposition to the military government. And all agree that the primary goal here is to move to a democratic government in Rangoon. But at the same time, there are groups within Burma that want some control over their own future, with some independence from the center—even if that center is democratic.

Now a society like Burma is sometimes called a plural society—meaning that there are a number of groups within it, who have their own distinct life ways. I intend to use that term. I do not intend to use the term divided society, which suggests hostility and division between the groups. I will not use that term because I don't think we know whether a democratic Burma will in fact be divided. There is a history of tension, but there is also a history of struggling together against a common foe. So we don't want to assume that there will be bad feelings between the center and the margin after democracy arrives.

But even if Burma is not divided, plural societies always present special problems in constitutional design. Some believe that the best path is to encourage everyone to forget

their differences and ignore their distinctive cultures. In this view, the overriding goal of a constitution is to dissolve difference. And in some places, where the anger between groups is absolutely poisonous, that may be the only possible course.

I think, however, that you have concluded that is not the best course for Burma. You have already had too much of the government demanding that everyone should be the same. Instead, I think that you have decided to try to strike a balance, and I think that you are wise in this decision. On the one hand, you want to assure local groups the right to measured self-determination and to a meaningful share of power in the center, because you do not want them to be swallowed up by the majority. But on the other hand, you are still one country, so you must create a common enterprise that binds you together. You want to be many, but you also want to be one.

And it is important to remember that both are important and that you cannot just choose one over the other. If you are only one, all the same, with no local control, local people will still feel out of control of their own future, and the peace may not last very long. But if you are not one in any way, the nation will surely fall apart in short order, and again the peace may not last very long.

Now in practice, as I understand the project in which you are engaged, you wish to do two things. First, you want some protection for the states, but second, you will want to encourage all groups to work together to form a common framework. You want local government, but you also want a central government that all experience as their government, as their agent. You cannot ignore either. The whole system has to work together to accomplish both.

And it is extremely important to remember this: you cannot design a constitution that makes anyone feel oppressed, because in the long run that sort of constitution will not survive. If any group feels that they have really been left out, then they will eventually start to resist the government. Burma cannot afford to return to civil war, and that means that the ethnic Burmese must strive to make the ethnic minorities happy, and the ethnic minorities must strive to make the ethnic Burmese happy. If you are in one country, you depend on each other, and you must therefore care for each other—and at the same time, allow each other to be different.

So let us take those two pieces in turn. First, you need to protect local government; second, you need to make the central government a place of unity and mutual regard. How do we do this?

Start with local government. We talked yesterday about federalism, and that discussion is of course relevant here. Your very method of proceeding rests on a federalist view, because each state is here drafting its own constitution to govern itself. Now when it comes time to create a union government, you will want to delegate certain powers to that government. You want to keep for yourself everything that is critical to your own identity, but you want to give away those powers that you think can best be exercised by one central unit.

And so I remind you that many countries have taken the view that a union government has advantages in putting together an economy, in waging external war, and in handling foreign relations. I will suggest shortly that you may also want to give the central government two other powers: first, the power to protect individual rights for all; and second, the power to equalize tax revenues between poorer and richer states. So the central government needs some powers of its own. But on the other hand, many plural societies have taken the view that local governments should retain powers over culture and education. On other matters—such as criminal law, environmental protection, and the like—different nations proceed very differently, and there is not one general answer.

So in the Union constitution, you want to insert some protection for local governments, so as to ensure that your own local cultures have a chance to rule. But you do not want these states to become hostile and angry at each other; you want them to feel some sense of connection. How do we accomplish this end? First, I believe that you may want to ensure that all Burmans are welcome in every state, regardless of their ethnicity—so that a Chin can move to Burma proper, or a Kachin to Shan State, or an ethnic Burmese to Karen State, and they will feel safe and protected there. Now that means that in general the various states should not create legislation to favor their own primary ethnicity over other people. To be sure, the whole point in federalism is to allow a people to protect their own distinctive life way. And so the various states may be allowed to protect their own culture and preserve their customary law. But at the same time, each state constitution should protect the fundamental rights and opportunities of all people under its jurisdiction, regardless of ethnicity.

As always, the question is how to strike the balance. If you are from Arakan state and you are living in Chin state, you may inevitably feel a little out of place. People speak a different language, they have a different customary law, and they just do things differently. But you knew that when you moved there, and you may not feel too angry. Imagine, however, that the legal system systematically treats you worse than your friends and neighbors who are Chin: you cannot vote, you will be punished more harshly for

crimes, you cannot speak your language in public, you are prevented from pursuing your occupation. Very soon, you may become very angry. And instead of making friends, you make enemies.

So the state constitutions need both to create a haven for local cultures and also to welcome those from outside these local cultures. The way that the Chin constitution tries to strike this balance is this: on the one hand, it allows the government to promote Chin culture and customary law; but on the other hand, it discourages the government from discriminating against outsiders, especially with regard to their basic rights. So again, you are different, but you are also connected.

Now to help realize this goal, you may want to empower the union government to protect people from one state who are living or visiting in a different state. For example, suppose that someone from Mon State goes to live in Kachin state, and the Kachin government, for some reason, refuses to allow him to buy a house. The Kachin government is not supposed to do this under its own constitution, but they do it even so, and their courts go along with it. What can this poor Mon man do? One option is to say that we are very afraid of the union government, so we do not want them to intervene, so the man should simply go back home or go without a house. But remember this could happen to any of your people: they go to a different part of Burma for a job, and they need some protection there.

So another alternative is to conclude that the federal government must step in. Because we have structured it to represent everyone, we hope that it will not discriminate and it will stop the states from hurting outsiders. Now in this case, we may want to give the union government some power to protect individual rights against the states. One possibility is to include an expansive bill of rights in the union constitution, and then give the union high court the power to enforce it. Another is to give the union legislature the power to adopt legislation to ensure the well-being of all Burmese when they are in other parts of Burma.

Now if all this works, then Burma will look like this: each state will have its own culture and way of life, and the state legislature may promote those things. But people from every state will also feel comfortable going to other states, where they will be welcome guests or even equal citizens if they choose to stay. And so Burma will be many peoples but also one. Hopefully, over time, people from all over Burma will feel part of their own state, but they will also feel fondness and respect for Burmese people everywhere and for the union government as well.

But all of this will work only if the central government really does care for all alike and is not the servant of any one group. And so we must figure out how to structure the federal government itself so that you can all view it as your agent and not as your master. I know that many of you are worried about any central government, and many might be in the mood to give it almost no power and to spend all your time protecting yourself against it. But in the long run, the experience of other countries suggests that such a deeply defensive mood will not work. It is critical that in addition to protecting the states, you find a way to create a union government that you can actually trust. This task is critical for several reasons. First, you will be giving the federal government a certain amount of power, and you really need it to perform its assigned works in a trustworthy way—such as creating a vibrant economy, equalizing tax revenues, and protecting your people when they are in other states of the union. Second, if the union government is not trustworthy, it will simply ignore the barriers that you set before it in your constitution, and it will take all the power to itself. Third, in the long run, if people from all over Burma cannot trust each other when they meet in the center, then Burma may well dissolve again into war. So, in short, it is not enough to protect yourself from the central government; you must also remake the central government so that it does not cause such fear.

Now obviously the most important part of that remaking is that the central government must be democratic. But as we have seen, there are many ways to be democratic. Imagine again a plural society—a society with many different groups and peoples. In this society, there is a majority group with 60% of the population and several minority groups totaling 40% of the population. And imagine that these groups have different ways of life. Suppose now that we hold a simple election to decide whose way of life should win, and the election shall be decided by a majority vote. Well, obviously, the majority group here will always win, and the minorities will have very little self-determination. For them, this system is unlikely to feel like democracy. It is more likely to feel like prison.

So how do we change this system, so that we still keep it democratic, but we also protect these local groups? Well, the first piece of an answer is federalism, as we have seen: we create state governments and give them some power. But that's not enough: we must also ask how we make the central government itself more truly representative of all local cultures?

Many think that in a plural society, it is important to avoid majoritarianism—that is to say, a system in which you decide things by simple majority vote, so that the majority wins everything and the minority loses and has no real power. Now in the legislature, what this

means is that proportional representation is probably better than a majority/plurality system. I remind you that in a majority system, you create districts and elect one person from each district by a simple majority vote. The result is that the majority wins everything—winner-take-all—and the minority loses everything. By contrast, in a PR system, you create large districts, with many seats, and you win a fraction of the seats that corresponds to your fraction of the vote. So if you win 10% of the votes, you win 10% of the seats. And that means that the minority is not wholly excluded from power; it has a say in the government that corresponds to its numbers. And so in a PR system, governments are often very inclusive, broad coalitions.

There is another implication to the idea that you should avoid majoritarian systems: parliamentarism is probably a better choice for a plural society than is presidentialism. I remind you of the difference. In a parliamentary system, the legislature chooses the executive branch from among its members. If there is no majority party, then various smaller groups must band together to form a coalition government. Usually, the government has ministers from all the different parties that went to make it up. And at the end of the day, the government is responsible to the legislature, which means that the legislature can dissolve the government by a vote of no confidence and choose a new government.

By contrast, in a presidential system, the president is elected independently of the legislature by a direct, majoritarian nationwide vote. He holds his office for a fixed term. The legislature does not choose him, and the legislature may not unseat him. So as a result, he has a great deal of independence. In presidential systems, rival groups find it very important to hold the presidency, because the president tends to be powerful and important. But remember that the president is just one person, elected by a majority vote. That means that only one party or one group will hold the presidency, and everyone else will be left with nothing. A minority with 10% of the votes will not have 10% of the presidency; that minority will have zero percent of the presidency. So we have here again, a winner take all system.

By contrast, in a Parliamentary system, the government often has more balanced membership, because it includes members from all the groups that together formed the coalition that put it in power. In addition, the various minority groups still have some influence over the executive, because if they don't like it, they can try to put together a vote of no confidence to unseat the executive.

A parliamentary system might have another advantage for Burma as well. In a

presidential system, all the executive power is concentrated in one person, the president, who ultimately makes all the executive decisions. In a state like Burma, where the military government has tended to concentrate power in itself, it may be very important to make executive power broadly accountable and to break up the concentration of power. And parliamentarism probably does that better than presidentialism.

So in short: in a fairly large, plural society, it is very important to give everyone a share of power, and the best way to do that may be through a parliamentary system elected according to proportional representation.

But in the end, suppose that Burma breaks up into ethnic parties: these parties represent the interests only of their groups, speak only for their groups, and are hostile to other groups. Now in this system, the ethnic Burmese party is still more than half the population. Even with proportional representation, it will control more than half the seats in the legislature, and so it will be able to put together a government without entering into a coalition with anyone else. So if you have pure ethnic parties, even PR and parliamentarism will not save you from the tyranny of the majority. What is to be done? We must find some way to make the government accountable to all, and to make these groups interact with each other in a better way.

One path is to reserve some seats for the various minorities as such. Yet this course might harden the ethnic lines even further, as everyone comes to think of politics in ethnic terms, as us against them. A different and, I think, better plan may be to guarantee the states some share of power. Each of these states may have a core ethnicity, but they are not defined by their ethnicity. Anyone from Shan state may vote for the reserved representatives for Shan state, regardless of their ethnic identity. So this might be a way of protecting minorities without fueling the fires of ethnic hatred.

I should stress, however, that as always, there are both risks and promises in using reserved seats. The whole point in reserved seats is to recognize that in a plural society, majority rule is not the only value; in fact, majority rule can become oppressive. So the general use of reserved seats is to give minorities more power than their numbers would suggest in a purely majoritarian system. Used rightly, such an arrangement can give to minorities some real self-determination, and it can cause them to be committed to the regime. But used wrongly or too much, reserved seats can prompt anger from the majority, who feel that they have lost control of their own self-determination and who will therefore abandon the regime—causing, perhaps, another war. So for reasons of both justice and stability, it is important to get the balance right.

How might you reserve seats in the government for the various states? There are at least four possibilities, and they can be used together or separately. The Chins believe that all four should be present in the union government, and so we have included them in the draft constitution that you have before you. First, you might reserve seats on the high court of the federal union. The current Chin draft calls for one judge from each state, regardless of population. Now this arrangement clearly gives the minorities more representation than their proportional share, but that does not seem much of a problem because judges are not supposed to represent voters anyway. Their loyalty is to the law, not to the political will, so presumably their origin should not make too much of an impact on their decisions. The reason to spread the power around among the different states is simply that they will keep each other honest and they may each bring a different perspective to bear. But they should not think of themselves as politicians representing a state. With luck, the High Court, committed to law and drawing from all groups, might become an institution trusted by all the peoples of Burma.

The second method is to create an upper house of Parliament designed not to represent population but the states as states. So, each state might send the same number of representatives to this body, regardless of actual population. This arrangement is not uncommon in the world; indeed, the United States Senate works this way. The idea is that in a legislature, you might want to represent two sorts of political actors: first, you might want to represent individuals on a population basis; and second, you might want to represent the states as states, on the view that different states have different interests, and you need to protect the smaller ones against the larger. Now usually, the upper house at a minimum has a role in making law: a statute must secure the approval of both the lower and the upper house, and so the states as states effectively have a veto over the content of the legislation.

Customarily, if the upper house represents states as states, then the lower house represents population. The Chin Forum was concerned, however, that if the country divides along ethnic lines, the ethnic Burmese would hold an absolute majority in the lower house. So, to balance the power, their current proposal is that the seats shall be shared fifty percent between the ethnic Burmans and all the other ethnic groups combined. To be frank, this is an unusual step, but it was based on the Chin Forum's concern that no one group should be able wholly to dominate any organ of government. And they particularly wanted balance in the lower house, because they are thinking that the lower house will form the government. In that case, if one group has an absolute majority in the lower house, then it will also be able wholly to control the executive branch.

And finally, just to be safe, the Chin Forum also would like to stipulate that the executive department should be balanced as well, such that every state has at least one minister in the government. Balance in the executive branch is surely quite important, as it prevents any one group from taking control of the government and bending it to its will. And again, in a country with a pattern of military government, it is particularly important not to concentrate executive power into one set of hands.

In truth, there are a number of ways to secure balance in the executive branch. The Chin Forum has adopted a method to make doubly sure: in their view, the constitution should require that the lower house, which chooses the executive, must be balanced between ethnic Burmans and everyone else, and it should also require that the executive be balanced. But it may be that in practice, you only need one or the other. If the constitution, for example, requires that the executive be balanced, then it is less important that the lower house also be balanced into halves. You might then make the lower house elected on a purely population basis. So in this arrangement, the ethnic Burmans would dominate the lower house; the ethnic minorities would dominate the upper house; and the executive would be balanced.

Or, on the other hand, you could keep the requirement that the lower house be balanced, so that no group will hold more than fifty percent. As a result, in order to form a government, any group must form a coalition with other groups, so that the government will automatically be balanced between those groups. It is also possible to mandate that the upper house choose the government. Then, because the upper house gives power to the ethnic minorities, it will ensure that the minorities also have power in the government.

So there you have the four possibilities for reserved seats for the states: the high court, the upper house, the lower house, and the government. And now we have three elements that might go into a union government. We might protect state government through federalism; we might ensure that the union government broadly represents everyone through proportional representation and parliamentarism; and we might experiment with reserved seats to protect the states.

But there is one more piece. In some ways, it is the hardest of all, but perhaps the most important. In the long run, the only thing that will keep any constitution, any government, from dissolving is that the people of the country, all the people of the country, feel committed to each other. People in a country stay together because they want to stay together. To be sure, people often disagree, and they fight things out in the political arena. And that's fine—dissent and disagreement are a natural part of democracy. But at the same

time, all these people recognize each other as fellow citizens—so that even when they are disagreeing, they feel closely connected.

Now in practical terms, to achieve this goal, the politicians in the union government must seek to serve all the people of Burma, not just their own ethnic group. And so it is important to build into the system some incentives for politicians to be moderate, to appeal to a number of groups, to work for compromise and mutual support. How do we do this?

Again, the first answer is that the constitution itself should not divide people into ethnic groups—we have local state government, for example, not ethnic government. Second, a system of proportional representation and reserved seats will ensure that minority groups have some power in the union government. We have some evidence that simply having minority people around and having to work with them helps to create good relations. If they hold key positions, it is harder to ignore them or treat them with simple hostility.

Third, we want to find a way to reward politicians who have support among a broad number of groups. Constitutional designers desperately search for ways to realize this ideal, but we know much less about this subject than we would like. One possibility is to design electoral systems that will encourage politicians to appeal for the votes of people other than their own ethnic group. The more that we can build this into the system, the better. For example, suppose that you choose to have some office filled by a majority vote. You might use a majority vote, for example, in electing representatives to the upper house or filling legislative seats in your state assemblies or choosing a president if you decide to have one. In these circumstances, it is always better to use alternative voting rather than a simple majority vote. I remind you that under alternative voting, if no-one has a majority of first place votes, then you consult the second place votes and add them into the count. The result is that politicians will seek to get the first place votes of their own group but also the second place votes of other groups. To do that, they will have to develop a message that appeals broadly to people.

I noted another method earlier—you might choose to have the upper house elect the executive department. Because by definition the upper house includes equal numbers of all states, to get elected the executive will have to appeal broadly to a large number of representatives from a large number of groups.

In addition, proportional representation for elections to the union parliament might lead politicians to be conciliatory toward ethnic groups other than their own. If there is no majority party in the parliament, there is a built in requirement of compromise, because in

order to form a government, the parties must put together a coalition. If there is a majority party, the pressure is much less, but there is always the possibility that dissidents within the majority party will split and make common cause with minorities.

It is also possible to create a PR system that directly gives incentives to politicians to moderation. For example, I have said that under classical PR, a party that gets 20% of the votes will get 20% of the seats. But you could add a rule that if any party gets a lot of support in a large number of states, they get some additional seats in recognition of their broad appeal. And if a party gets its only real support in just one state, they correspondingly lose some seats. Because they are aware of these rules, parties will try to develop a message that appeals to a lot of people, and they will seek to avoid calls for ethnic hostility.

And finally, it might be wise to create some independent commissions staffed with experts, especially in the area of economic policy. Expert commissions may set policy for the good of the whole, rather than for the political advantage of some political party—especially if you protect them from political pressure. If they do good for the country, they will also make the system more stable, because people will feel committed to the nation, rather than to some narrow ethno-partisan ideology. And if the commissions are themselves multi-ethnic, then some of the leading people from every state may have the experience of working together for the good of the whole, and that experience usually causes people to be committed to each other, even across ethnic boundaries.

I am sure that there are other possibilities, and I am eager to hear your ideas. The important thing is to remember always to be on the lookout for these possibilities, to try to build into the system an incentive to moderation wherever possible.

So those are the four elements of a constitutional structure that might promise real political freedom to all the peoples of Burma after the transition to democracy. The first is federalism, some constitutionally guaranteed self-government for the states. The second is a union government that is broadly inclusive, that has representatives from all the major groups—and this might best be achieved through proportional representation and parliamentarism. The third is some reserved seats, perhaps on the High Court and the upper house of the legislature, to give the less populous states some protection against the majority's sheer weight of numbers. And the fourth is a system that gives national politicians an incentive to moderation, compromise, and broad appeal, so that all citizens of Burma will feel committed to all other citizens of Burma.

## F. JUDICIAL REVIEW

We have this morning talked about the four structural elements of a safe, stable, and democratic union government for Burma. But lying under beneath all of them is a profound belief in the rule of law. The rule of law is an idea that people can govern themselves in accord with principles and ideals, instead of always pursuing only their own interests or desires. For any country to make a constitution work, it must embrace the rule of law. Otherwise, you may adopt a constitution, but then people will just ignore it, because they don't really believe that people can or should govern themselves according to law. There are new democracies where democratic constitutionalism becomes stable and reliable; there are other new democracies where democratic constitutionalism last for a few years and then dies. One of the biggest differences between these two is culture. In countries where democracy thrives, the people are deeply committed to the rule of law.

In this connection, the organizers of this conference have asked me to speak a little more about judicial review. I remind you that judicial review is the practice of having judges test government action—a statute, an executive order, or whatever—for its constitutionality. If the judges think that the government has acted unconstitutionally, then they strike it down. In this way, for those areas where judicial review applies, the court is the ultimate judge of the meaning of the constitution, and in a certain sense the ultimate authority in the country.

The rationale of judicial review is that judges are more likely to be faithful to the constitution than the political branches. Ultimately, of course, for the constitution to live and be significant, the people must embrace it and put it into practice. Judges therefore cannot be the only guardian of the constitution; all must be involved to some extent. But on a day to day basis, you need someone responsible for putting the constitution into effect, and many think that judges are a good choice.

Judges are a good choice because their ultimate fidelity is supposed to be to the law. In this sense, they are different from politicians, whose ultimate loyalty is supposed to be to their constituents. Sometimes, under pressure from voters or just their own ambitions, politicians might be tempted to behave in unconstitutional ways. But the whole point in a constitution is to limit the politicians, to bind them to a permanent structure. And so we ask judges to intervene and protect the constitution against the politicians.

But if we go down this path, it is important to ensure that judges really are faithful to the law, rather than to political pressure. How do we achieve this goal? First, it is

important to give judges some structural immunity from political pressure. Most particularly, they need long terms in office—either for life or for a number of years—so that they need be re-elected or re-appointed for a long time. The hope is that they will therefore rule according to the law, rather than according to the whim of whoever would re-appoint or re-elect them. In addition, many constitutions contain a guarantee that judges' salaries shall not be diminished during their term in office, so that regardless of how they rule, even if they displease powerful people, they will still have an income.

So it is important that judges structurally be immune from political pressure. But that's not enough, because that immunity has merely freed a bad judge to rule badly. So in addition to these structural measures, judges must be deeply acculturated into the ideals of the rule of law—the idea that everyone should receive justice according to the merits of the case, rather than according to favoritism or bias or power. It is infinitely valuable for a culture to prize the rule of law, and so it needs to be a daily part of everyone's life. Mothers and father should instruct their children in these ideals and tell them stories about heroes who struggled and even died for the rule of law. So everyone needs to embrace these values. But judges especially need to embrace them, and in most countries judges believe that going to law school was an important part of acculturating them to rule of law ideals. I certainly believe that the primary goal of a law school education is to introduce students to the idea that they are servants of the rule of law, not of their own interests or ambition or greed.

OK, so for judicial review to work, for judges to be faithful to the constitution, you need them to have long terms in office, a guaranteed salary, and an acculturation into rule of law ideals. If you have all that, does judicial review work? Do judges remain faithful to the constitution even when everyone else has fallen away? Well, there is evidence both ways.

America is the country that created judicial review, and there, the practice is the subject of enormous controversy. There are many people who feel that the judges do not show the requisite fidelity to the rule of law. Instead, they are partial toward certain sectors of the population or certain classes or certain political parties.

On the other hand, outside America, judicial review is spreading very rapidly. More and more countries have introduced it into their system, and once they have gotten a taste of it, they apparently like it, because they have not since rejected it. So the judgment of the rest of the world is increasingly more positive than the judgment of America itself.

The reason for the difference may be a difference in expectations. For the rest of the world, judicial review is very new, and they notice that it improves their system for the better, on balance. In America, judicial review is so familiar and traditional that people expect it to be perfect, to satisfy the ideal—and it may never do that. So it may be that Americans need a more realistic approach to the practice.

My own view is that judicial review is a critical piece in the constitution of any new democracy. New legislatures are often turbulent, and they sometimes do things that they later regret. New democracies are often fragile, as people are not yet fully committed to the system. In this sort of situation, a high court can serve many functions. It can remind people of the importance of the rule of law; it can place limits on the legislature; and it can act as a stabilizing factor in this unruly time. In the end, if the country is really committed to getting rid of the constitution, the judges cannot stop that. But if the people are on the court's side against a corrupt legislature, judicial review can help to keep the country attached to its constitutional system and thereby avoid a renewal of civil war.

Having said that, however, I should also stress that judicial review is not appropriate for all types of cases and subjects. For that reason, I think it best that a constitution should specify which parts of it are judicially reviewable and which not. Otherwise, if the constitution does not say, you are setting up a conflict between the courts and the other branches for control of the constitution.

So let me summarize the general view on when judicial review is appropriate. Most people think that judicial review is clearly appropriate to protect individual rights, because individuals need a guardian to stand against the legislature. Most people think that judicial review is not appropriate for foreign affairs, because the judiciary does not know enough about that field to have good answers. For the same reason, many people would say that military affairs should not be reviewable, but in the special case of Burma, I think there is a strong case that military matters should be governed according to the rule of law, not the will of the officer corps.

On federalism, people are divided on how strong the judiciary's role should be in policing the boundaries. In America, the tradition has been that the Supreme Court has been active in defining the relative powers of the states and the federal government, because it has been thought that the justices could serve as an outside, neutral umpire. More recently, some have begun to argue that federalism is like foreign affairs: the Court understands little about the real workings of the different governments, and so it is not in a position to judge where their boundary should be. Despite this argument, the Supreme

Court continues to hand down federalism decisions. I suspect that in a democratic Burma, federalism will be politically controversial, and it might be useful to ask the court to act as a neutral umpire, so that arguments can be settled short of war.

Let me again reinforce one idea. The most important function of judicial review may be broadly cultural: the court stands as an icon for the possibility of the rule of law. It reminds us that life is not just about the pursuit of money or power or fame. Instead, it can be about a commitment to deciding questions according to general rules, for the common good, without bias or hatred or partisanship. The broad diffusion of this hope is one of the most important elements in constructing a new democracy.