

The Republic of the Union of Myanmar
Constitutional Tribunal
Submission No. 2/2011

1. Dr. Aye Maung
2. U Kyaw Kyaw
3. U Khin Maung
4. U Maung Saw Phyu
5. U Khin Maung Latt
6. U J Yaw Wu
7. U Tun Kyaw
8. U Gan Sai
9. U Saw Aung Kyaw Naing
10. U Saw Nyein Thin
11. Dr. Banyar Aung Moe
12. U Waie Yein
13. U Naing Tun Ohn
14. U Saw Taw Pe Lae
15. U Kyaw Thein
16. U Paw Shan Lwin
17. U Sai Kyaw Zaw Than
18. U Sai Thant Zin
19. Dr. Tin Shwe
20. U Phone Myint Aung
21. Daw Khin Wine Kyi
22. U Min Myo Tint Lwin
23. U Zone Hlan Htan

(Representatives of the
Amyotha Hluttaw)

vs The Republic of the Union
of Myanmar

For the Applicants	- U Bo Min Phyu and U Aung Kyaw Sein (Advocates)
Responsible person to explain	- Daw Yin Yin Than Director Office of the Attorney- General of the Union (On behalf of the Union)

Judgment

Date - 14th December, 2011

23 representatives of the Amyotha Hluttaw including Dr. Aye Maung submitted an application in accordance with the Section 326(d) of the Constitution of the Republic of the Union of Myanmar and Sections 14(d) and 15(d) of the Constitutional Tribunal Law through the speaker of Amyotha Hluttaw, questioning whether the following matters are in conformity with the Constitution of the Republic of the Union of Myanmar:-

- the term "Minister of the National Races Affairs" under Section 5 of the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State and
- the exclusion of "Minister of the National Races Affairs" among the "Ministers of the Region or State" under the Section 4(c) of the said Law.

In this submission, it is stated that-

- the "Minister of the National Races Affairs" is the "Minister of the Region or State concerned" under the Sections 262 (a) (iv) and 262 (e) of the Constitution;
- the Minister of the National Races Affairs assigned by the President is the Minister of the Region or State under the

Section 262 (g) (ii) of the Constitution;

- such provisions grant equal status to the Minister of the National Races Affairs and Ministers of the other Ministries without any discrimination.

However, in providing a list of Ministers of the Regions or States in Section 4 of the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State, the Ministers of the National Races Affairs have the same status as the Judges of the High Court of the Region or State. Moreover in Section 17 of the said Law, Ministers of the National Races Affairs are granted less insignia of office than that of other Ministers of the Regions or States level.

Thus, it is submitted to the Constitutional Tribunal for the interpretation and decision whether the following matters are of constitutionality or not:-

- the Ministers of the National Races Affairs do not have the same status as other Ministers of the Region or State in Section 4(c) of the said Law;
- the Ministers of the National Races Affairs are regarded as having the same status as the Judges of the High Court of the Regions or States in Section 5 of the said Law;
- Less emoluments, allowances and insignia of office are granted to Ministers of the National Races Affairs than that of other Ministers of the Regions or States level in Section 17 of the said Law.

The Office of the Attorney-General of the Union explained on behalf of the Republic of the Union of Myanmar that:-

- under the Section 215 of the Constitution, the President of the Union is not the responsible person to defend this submission made by 23 representatives of the Amyotha Hluttaw including Dr. Aye Maung at the Constitutional

Tribunal which is performing the judicial function;

- regarding the reason No. 1 of the submission made by 23 representatives of the Amyotha Hluttaw including Dr. Aye Maung, Section 262 (a) (iv) of the Constitution is the provision of the entitlement of the Chief Minister of the Region or State to obtain the list of Hluttaw Representatives elected to carry out the affairs of National races in the Region or State; Section 262 (e) of the Constitution is the provision related to the appointment of the persons who are approved by the Region or State Hluttaw and the list of persons who are representatives elected to carry out the affairs of National races in the Region or State as the Minister of the Region or State to be submitted to the President.

It is not correct to say that Ministers of National Races Affairs are the Ministers of the Regions or States concerned as applicants mentioned in their submission. It was merely the process of nomination.

Regarding the other reasons of the applicants, under Section 262 (g) (ii) of the Constitution, it is true that the Ministers of the National Races Affairs are entitled to perform the duties as Ministers concurrently in charge of other Ministries in accordance with the Section 262 (i) of the Constitution. However, the consequence of the provision of entitlement, it cannot be interpreted that duties and functions of the Ministers of the National Races Affairs are the same as that of the Ministers of the Region or State Government. In addition, under the Sections 2 (f), 3 (a), 4(c) and 48 of the Region or State Government Law, it can obviously be seen that the responsibilities of the Ministers of the Region or State and the Ministers of the National Races Affairs have to take are different.

The applicants stated that:-

- In Section 4(c) of the Law of Emoluments, Allowances

and Insignia of Office for Representatives of the Region or State, Ministers of the National Races Affairs are not the same as other Ministers of the Region or State;

- In Section 17 of the said Law, Ministers of the National Races Affairs are granted less insignia of office than that of other Ministers of the Region or State level;
- The said Law is intended to grant emoluments, allowances and insignia of office which suit the status of the Region or State level personnel who are assigned the responsibilities in line with the Constitution;
- Rights and duties are interrelated. There cannot be right without the duty that deserves the right. Similarly, there would be no duty where there is no right. No one has the right to claim his right where he has no duty to perform. There are similar expressions by the jurists in the field of jurisprudence;
- There are differences in terms of the assignment of duties and performance of those duties the Ministers of the Region or State Government and the Ministers of the National Races Affairs who are only responsible for the national races affairs. Therefore, the rights and duties defined in the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State are in accord with the Constitution.

Advocate U Bo Min Phyu for 23 representatives of the Amyotha Hluttaw including Dr. Aye Maung argued that with the reasons in submission and reexplanations for statement of the Office of the Attorney - General of the Union on behalf of the Union:-

- Ministers of the National Races Affairs of the Regions or States are assigned their duty by the President of the Union to handle the national races affairs with Order No 19/2011

of the Office of the President of the Union (30.3.2011), and Ministers of National Affairs of the Region or State by Order No. 23/ 2011 of the Office (30.3.2011) under Section 262 (e) and (f) of the Constitution of the Republic of the Union of Myanmar.

- Therefore it is not true that the Ministers of the National Races Affairs are the Ministers of the Regions or States concerned, and the statement made by the Office of the Attorney - General of the Union that it is merely a process of nomination is wrong.
- The statement of the Office of the Attorney - General of the Union is inconsistent with the Constitution of the Republic of the Union of Myanmar in that assignment of duty to perform the national races affairs under Section 262 (e) and (f) of the Constitution is different from having different duties under Section 262 (g)(ii) of this Constitution;
- Ministers of the Region or State and Ministers of National Races Affairs of the Regions or States were appointed by the order of the President of the Union under Section 262 (e) and (f) of the Constitution;
- Those are the Ministries that came into existence in accord with Sections 15 and 17 (c) under the heading of Basic Principles of the Union of the Constitution;
- It is clear that the Constitution shall prevail under Section 198 (a) of the Constitution, if Sections 2(f), 3(a), 4 (c) and 48 of the Region or State Government Law are inconsistent with any provisions of the Constitution;
- Both of the Ministers of the Region or State and the Ministers of the National Races Affairs of the Region or State were appointed by the President of the Union;
- The only difference is that the assignment of duties of

respective Ministers was specified with the Ministries concerned;

- All of the Ministers of the Region or State and the Ministers of the National Races Affairs are the Ministers of the Region or State are equal in position and status.

Advocate U Bo Min Phyu for the applicants alleged that the statement in the reexplanation of the Office of the Attorney- General of the Union is inconsistent with the Constitution of the Republic of the Union of Myanmar as in the statement of the Office of the Attorney-General it is mentioned Ministers of the Region or State Government, and the Ministers of the National Races Affairs who are responsible for the affairs of the national races are different in the duties they are assigned and in performing their duties of office for Representatives of the Region or State the rights and privileges of those persons are merely provided.

The notice of the Scrutinizing Body of the Constitutional Tribunal of the Union was explained by Daw Yin Yin Than, Director of the Office of the Attorney - General of the Union on behalf of the Union. In her statement, she stated that the members of the Region or State Government have the responsibility of their Ministries concerned and Ministers of the National Races Affairs only have the responsibility for the national races affairs concerned. Therefore, there are differences of emoluments, allowances and insignia of office in accord with the extent of the responsibility and authority they have. The Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State provides the rights distinctly for the Ministers due to the different assignment of the duty and the responsibility the Ministers of the Region or State Government and the Ministers of the National Races Affairs performing national races affairs have to take. It also stated that the provisions of Sections 4 (c) and 5 of the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State are of constitutionality.

23 representatives of Amyotha Hluttaw including Dr. Aye Maung applied to the Constitutional Tribunal, asking it to decide whether the following facts are in conformity with the Constitution of the Republic of the Union of Myanmar or not:-

- the expression “Minister of the National Races Affairs” stated in Section 5 of Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State;
- the exclusion of Ministers of the National Races Affairs among Ministers of the Regions or States under Section 4 (c);
- the point that the Ministers of the National Races Affairs do not have the same status as Ministers of the Region or State under Sections 4, 5 and 17 of Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State, No. 3/2011 of the State Peace and Development Council, Union of Myanmar.

The main issues to be decided are as follows:-

- **whether the status of Ministers of the National Races Affairs is equal to that of the Ministers of the Regions or States concerned;**
- **whether they are entitled to the emoluments, allowances and insignia of office as the Ministers of the Regions or States.**

Concerning the appointment and the assignment of duties to the Ministers of the Regions or States, Section 262 of the Constitution of the Republic of the Union of Myanmar, it is provided as follows:-

Section 262 (a)-The Chief Minister of the Region or State shall:-

- (i) select suitable persons who have

prescribed qualifications under Sub-Section (a) of the Section 261, from among the Region or State Hluttaw representatives or from among persons who are not Hluttaw representatives concerned ;

- (ii) request for a list of suitable Defence Services personnel nominated by the Commander- in -Chief of the Defence Services to assign responsibilities of Security and Border Affairs;
 - (iii) obtain a list of Chairpersons of Leading Bodies of the Self- Administered Division or the Self- Administered Zone in the Region or State concerned;
 - (iv) obtain the list of Hluttaw representatives elected to carry out the affairs of National races in the Region or State concerned from the relevant Election Commission.
- (b) The Chief Minister of the Region or State shall compile the list of persons selected by him and the list of the Defence Services personnel nominated by the Commander- in -Chief of the Defence Services and submit them to the Region or State Hluttaw concerned for its approval.
- (c) The appointment of a person as a Minister of the Region or State nominated by the Chief Minister of the Region or State shall not be refused by the Region or State Hluttaw unless it can clearly be proved that the person

concerned does not have the qualifications of the Minister of the Region or State.

- (d) The Chief Minister of the Region or State has the right to submit against the list with a new name replacing the one who has not been approved by the Region or State Hluttaw for the appointment of a Minister of the Region or State.
- (e) The Chief Minister of the Region or State shall submit the list of persons who are approved by the Region or State Hluttaw or Chairpersons of the Self- Administered Division or Self-Administered Zone and the list of persons who are representatives elected to undertake the affairs of National races to appoint as the Ministers of the Region or State to the President.
- (f) The President shall appoint the persons who have been approved by the Chief Minister of the Region or State as Ministers of the Region or State. In doing so, he shall, in co-ordination with the Chief Minister of the Region or State concerned, designate the Ministry or Ministries which each Region or the State Minister to take responsibilities.
- (g) The President shall:
 - (i) assign duties to the Chairpersons of the Self- Administered Division and the Self-Administered Zone who are the Ministers of the Region or State, to perform the affairs of the Self- Administered Division

or Self- Administered Zone concerned;

- (ii) assign duties to the Hluttaw representatives who are the Ministers of the Region or State, to perform the affairs of National races concerned.

(h) * * * * *

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(n) * * * * *

Among the above mentioned provisions, if Section 262 (e) of the Constitution is appraised , it can be seen that the Chief Ministers of the Regions or States have to submit the list of the following persons for the appointment as Ministers of the Regions or States to President of the Union:-

- (1) persons who are approved by the Regions or States Hluttaw;
- (2) persons who are nominated in the list of Chairpersons of the Self- Administered Divisions or Self- Administered Zones and
- (3) persons who are nominated in the list of representatives elected to deal with the affairs of national races in the Regions or States concerned obtained from the relevant Election Commission.

Under Section 262 (f) of the Constitution, the President of the Union shall not only appoint the person who have been approved by the Chief Ministers of the Regions or States as Ministers of the Regions or States but also designate the Ministries to which each Minister to take responsibility.

Accordingly, under Section 262 (g) (ii) of the Constitution, the President of the Union shall assign duties to the Hluttaw representatives

who are Ministers of the Regions or States, to perform the affairs of their respective national races.

According to the above mentioned Section 262(e), (f) and (g) of the Constitution, it can be obviously seen that the President of the Union shall appoint and assign the duty to the persons who are approved by the Region or State Hluttaw, the persons who are nominated in the list of Chairpersons of the Self- Administered Divisions or Self-Administered Zones and the persons who are nominated in the list of representatives elected to undertake the affairs of national races as Ministers of the Regions or States and designate Ministries to Ministers.

Moreover, with reference to the provisions of Section 262 (e) (f) and (g) of the Constitution, it is necessary to evaluate the provisions of Section 19(c) and (g) of the Union Government Law in connection with Section 10(a) (ii) of the Region or State Government Law.

Section 19 of the Union Government Law provides as follows;

19. The President shall appoint the following persons in accord with the Constitution: -

- (a) the Chief Ministers of the Region or State ;
- (b) the Chief Justices of the High Court of the Region or State;
- (c) the Ministers of the Region or State;
- (d) the Judges of the High Court of the Region or State;
- (e) the Advocate-Generals of the Region or State;
- (f) the Auditor-Generals of the Region or State; and
- (g) the Chairpersons of the Self-Administered Division Leading Body or the Self-Administered Zone Leading Body.

Section 10 of the Region or State Government Law also states as follows;

Section 10 (a)- The President shall –

- (i) assign duties to the Chairpersons of the Self-Administered Division Leading Bodies and the Self-Administered Zone Leading Bodies, who are the Ministers, to manage the affairs of the Self-Administered Divisions or the Self-Administered Zones concerned;
- (ii) assign the duties to the Hluttaw representatives, who are the Ministers, to perform the affairs of national races concerned.

Therefore, the President of the Union issued the Order No. 23/2011 of the President Office of the Union of Myanmar to assign duties to the Ministers of the National Races Affairs of the Regions or States, by referring to Section 262 (e) and (f) of the Constitution of the Republic of the Union of Myanmar, and Section 19 (c) of the Union Government Law.

Moreover, the President of the Union designated the Ministries for the Ministers of the National Races Affairs of the Regions or States have to take responsibility in the Order No. 23/2011.

Therefore, the argument of the Director of the Office of the Attorney-General of the Union, on behalf of the Union argued which is the interpretation that Minister of the National Races Affairs is not the Minister of the Region or the State concerned under Sections 262 (a) (iv) and 262 (e) and electing them is merely the process of nomination is not true.

It is also clear that the statement “there is no intention to create equal status as such, though the wording of the Minister is the same”

was not properly interpreted in accord with the Constitution.

Section 48 of the Constitution provides as follows:

Section 48. The Basic Principles of the Union shall be the guidance in enacting laws by legislature and in interpreting the provisions of this Constitution and other laws.

According to the above mentioned provision, interpretation of the provisions contained in the Constitution and any other laws shall be guided by basic principles of the Union of the Constitution.

Under Section 15 of the Chapter 1 under the heading of the Basic Principles of the Union of the Constitution, representatives of the national races are entitled to participate in legislation of the Region or State concerned. Similarly, Section 17 (c) of the Constitution also provides that representatives of the national races may participate in the legislation of Region or State concerned to manage national races affairs.

Keeping the basic principles of the Constitution being as guidance, the President of the Union assigns duties, in its Order No 23/ 2011, to the Ministers of the National Races Affairs of the Regions or States as having equal status to Ministers of the Regions or States concerned, referring Section 19 (c) of the Union Government Law.

Therefore, if Section 262 of the Constitution is applied, it can be firmly presumed that the Ministers of the National Races Affairs have equal status to Ministers of the Regions or States concerned in accord with Section 19 (c) of the Union Government Law.

As the Ministers of the National Races Affairs of the Regions or States concerned are the Ministers of the Regions or States concerned, they shall be entitled the emolument, allowances and insignia of office as Ministers of the Region or State.

In connection with prescribing the status of Chief Ministers and Ministers of the Regions or States, the basic principles and detailed basic principles laid down by the National Convention Plenary Sessions are as follows:-

In connection with prescribing the status of the Region or State Chief Ministers and Ministers, the Region or State Chief Ministers are prescribed to be of the same status as Union Ministers and the Region or State Ministers are prescribed to be of the same status as Deputy Ministers, for the purpose of reference in prescribing, by law, responsibilities, rights and privileges of the Chief Ministers or Ministers of the Regions or States.¹

According to the above mentioned stipulation of status, there is no reason to dispute that Minister of the Regions or States are prescribed as Deputy Ministers and they are entitled to the emolument, allowances and insignia of office. Ministers of the National Races Affairs of the Region or State being Ministers of the Region or State are also entitled to the emolument, allowances and insignia of office as the same status as Ministers of the Regions or States in accord with the Constitution.

The Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State (Notification No.3/ 2011 of State Peace and Development Council) provides the rights of Ministers of the Regions or States as follows:-

Section 4. The following persons are entitled kyats 20 lakh as monthly allowances;

- (a) Chief Justice of the High Court of the Region or State;

1 The basic principles and the detailed basic principles late down by the National Conventional Plenary Sessions; Chapter 5 Executive, para. 25, P.137.

- (b) Deputy-Speaker of the Region or State Hluttaw;
- (c) Minister of the Region or State;
- (d) Advocate - General of the Region or State;
- (e) Auditor - General of the Region or State.

Section 16 of the said Law provides the allowances of the Ministers of the Regions or States as follows:-

- (a) Accommodation provided by the Government with free of charge. Before such an arrangement is made, they are entitled to appropriate rent;
- (b) Security guards;
- (c) Local free health care;
- (d) Free water supply;
- (e) Free electricity;
- (f) Free local calls;
- (g) A Personal Assistant;
- (h) A domestic helper;
- (i) A gardener;
- (j) Two motor vehicles;
- (k) Two drivers;
- (l) 60 gallons of fuel for each car per month;
and
- (m) Lubricant actually used for the two cars.

However, allowances of the Ministers of the National Races Affairs of the Regions or States concerned are not the same as enjoyed by the Ministers of the Region or State and Sections 5 and 17 of the

said law exclusively provides as follows:

Section 5. Ministers of the National Races Affairs and Judges of the High Court of the Region or State are entitled to kyats 10 lakh per month.

Section 17. A Minister of National Races Affairs is entitled the followings as facilities:-

- (a) Local free health care;
- (b) Free water supply;
- (c) Free electricity;
- (d) Free calls in one's city;
- (e) A motor vehicle;
- (f) A driver;
- (g) 60 gallons of fuel for the car per month;
- (h) Lubricant actually used for one car.

The provision of allowance for the Ministers of National Races Affairs which is separately defined under Sections 5 and 17 of the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State is of unconstitutionality for the following reasons:-

- there is detailed basic principle laid down by the National Convention; and there are also provisions that Ministers of National Races Affairs are the Ministers of the Region or State under the provisions of Section 262 (e), (f), (g) and (h) of the Constitution of the Republic of the Union of Myanmar; Section 19 (c) of the Union Government Law and Section 10 (a) (ii) of the Region or State Government Law.

The Director of the Office of the Attorney-General of the Union

on behalf of the Union pleaded, with reference to the expressions of the jurists, that:-

- it is the promulgation to grant the persons who are at the level of the Region or State the appropriate emoluments, allowances and facilities for their respective duty;
- there would be no right, where there is no duty. Similarly, where there is no right, there is no duty.

The statement of the Office of the Attorney-General of the Union which is “it is promulgation to confer the appropriate allowances” is not clearly defined in the Constitution and the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State. The references used in the interpretation of the expressions of jurists are concerned with the rights and duties of employers and employees, parents and children, and landlords and tenants. These are the explanation given for private rights and duties. It is not concerned with the rights and duties which are conferred by the Union. Therefore, the argument of the Office of the Attorney-General of the Union is not relevant to this submission. Since the President of the Union appointed the Ministers of National Races in accordance with the Constitution, allowances for the Minister of National Races have to be defined in accordance with the Constitution.

Section 198 (a) of the Constitution provides as follows:-

Section 198 - The effect of laws enacted by different levels of the Hluttaw and the Leading Bodies of the Self-Administered Area is as follows:-

- (a) if any provision of the law enacted by the Pyidaungsu Hluttaw, the Region Hluttaw, the State Hluttaw, the Leading Bodies of Self-Administered Division or the Self-Administered Zone or any existing Law is inconsistent with any provision of the

Constitution, the Constitution shall prevail.

Referring to the above mentioned reasons, it must be decided that Sections 5 and 17 of the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State are of unconstitutionality to section 262 of the Constitution of the Republic of the Union of Myanmar.

Therefore, the submission of 23 representatives of the Amyotha Hluttaw including Dr. Aye Maung, is allowed. It was decided and interpreted that since the Ministers of National Races Affairs of the Regions or States are Ministers of the Regions or States concerned and they are the persons defined by Section 4(c) of the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Regions or States and, Sections 5 and 17 of the said Law are of unconstitutionality.

x x x

(Thein Soe)
Chairman

x x x

(Khin Hla Myint)
(Member)

x x x

(Dr. Tin Aung Aye)
(Member)

x x x

(Tun Kyi)
(Member)

x x x

(Soe Thein)
(Member)

x x x

(Khin Tun)
(Member)

x x x

(San Myint)
(Member)

x x x

(Myint Kyaing)
(Member)

x x x

(Mi Mi Yi)
(Member)