

A NEW CONSTITUTION FOR MYANMAR

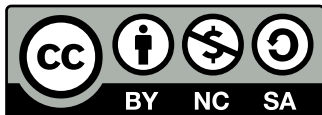
Towards Consensus on an Inclusive Federal Democracy



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Abbreviations

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| AFPFL | Anti-Fascist People's Freedom League |
| CDM | Civil Disobedience Movement |
| CRPH | Committee Representing the Pyidaungsu Hluttaw |
| EAO | Ethnic armed organizations |
| FCDCC | Federal Constitutional Drafting and Coordinating Committee |
| FDC | Federal Democracy Charter |
| FPNCC | Federal Political Negotiation and Consultative Committee |
| FPTP | First-past-the-post (electoral system) |
| JPCCA | Joint Parliamentary Committee on Constitutional Amendment |
| KIO | Kachin Independence Organization |
| KNU | Karen National Union |
| LGBTQI+ | Lesbian, gay, bisexual, transgender, queer, intersex and asexual |
| NCA | Nationwide Ceasefire Agreement |
| NLD | National League for Democracy |
| NUCC | National Unity Consultative Council |
| NUG | National Unity Government |
| SLORC | State Law and Order Restoration Council |
| SNLD | Shan National League for Democracy |
| UNFC | United Nationalities Federal Council |
| USDP | Union Solidarity and Development Party |

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EXECUTIVE SUMMARY

This Report analyses the constitutional history and trajectory of Myanmar, and the positions of certain key stakeholders in the emerging constitution-building process. Its aim is to help Myanmar's democratically legitimate decision makers, political parties and civil society organizations better understand the range of constitutional options open to them, the areas of possible convergence and divergence in their demands and the areas of constitutional design in need of further consideration. It is also intended, secondarily, to help the international community working in or on Myanmar to make sense of these choices.

Points of convergence

There is a broad commitment among the pro-democracy movement in Myanmar to democracy, parliamentarianism, human rights, federalism, constitutionalism and civilian control of the armed forces. This provides a solid foundation for constitution-building. Turning this into a workable constitutional text, however, will require careful attention to be paid to matters of detail.

Points of divergence

There is substantial divergence within the pro-democracy movement on the following issues:

1. secession, dissolution of the union and rights to internal and external self-determination;
2. the principle of 'state sovereignty' as opposed to the sovereignty of the people of the union as a whole;

3. the distribution of powers, competences and resources between the union and the states;
4. the existence, content and limits of state constitutions;
5. state citizenship vs citizenship of the union—and citizenship rights more generally;
6. voting rights in the states;
7. freedom of movement between the states;
8. the existence of state-level armed forces;
9. the number and designation of states or ‘states and regions’, and the boundaries of constituent units;
10. local government, the protection of ‘minorities within minorities’ and self-administered zones;
11. secularism and the status of Buddhism and other religions; and
12. gender issues and lesbian, gay, bisexual, transgender, queer, intersex and asexual (LGBTQI+) rights.

Points for development

There is a need for further detailed thought on the following constitutional issues:

1. the powers and composition of the Chamber of Nationalities;
2. the electoral system for the lower house;
3. the resolution of disputes between the two houses;
4. recognition of the Leader of the Opposition;
5. the composition and powers of the independent commissions;
6. the definition and protection of human rights;
7. the structure and independence of the judiciary;
8. the role of the Constitutional Court and its relations with the Supreme Court; and
9. gender equality and gender-based rights.

Priorities

In order to help participants reach an informed consensus on contentious issues, and develop their thinking and positions on neglected issues, these ‘points of divergence’ and ‘points for development’, should be the focus of constitutional decision makers and the priorities of international support in the form of technical assistance and capacity-building. Aspects of practical implementation and transition challenges must be factored into discussions on constitutional design and addressed in a people-centred and human rights-based approach.

INTRODUCTION

Chapter 1 (Context analysis) provides an overview of the current constitutional background, in terms of the constitutional situation since the 1 February 2021 military coup. Chapter 2 (Historical analysis) looks further back into Myanmar's constitutional history to assess whether there are precedents and examples that might be helpful in finding solutions to contemporary problems. Chapter 3 (Participant analysis) examines the major actors in Myanmar's political landscape and their constitutional preferences. These are all brought together in Chapter 4 (Preference analysis), which examines in detail where stakeholders' preferences align and where there are points of tension or incompatibility between them.

For the reasons set out in Chapter 2, the preference analysis focuses on the draft constitution produced by the United Nationalities Federal Council (UNFC) in 2016, which was in turn based on an earlier draft produced in 2008 by the Federal Constitutional Drafting and Coordinating Committee (FCDCC). The chapter examines the 2016 draft in some detail, while noting the points of convergence and divergence that the main actors have with that text. This is appropriate because these earlier constitutional blueprints formed the basis of parts of the Federal Democracy Charter and are considered legitimate reference documents for the ongoing constitutional debates in the national unity bodies. Since these current deliberations have so far not been accessible to outside observers, they cannot yet be systematically analysed, but it is assumed that there is a degree of continuity in the positions of the various stakeholders. Chapter 5 concludes with some constructive but not prescriptive ideas, recommendations, and considerations for

action, in the form of the constitutional priorities to be discussed and a menu of constitutional options to clarify the choices of Myanmar's decision makers.

Chapter 1

CONTEXT ANALYSIS

Myanmar's 2008 Constitution was put in place by the military as part of its intended strategy for a gradual and partial transfer of power to an elected civilian leadership. At that time, the military needed to find a way to broaden the basis for its legitimacy and withdraw from the burden of day-to-day governing while still protecting the personal and institutional interests of the military leaders and entrenching their vision of a unified Myanmar. However, the 2008 Constitution was always contentious. It was criticized for its content—a centralized, 'disciplined democracy' with significant avenues for continuing military involvement in politics—and for the manner of its adoption, as the drafting process was neither inclusive nor transparent. In the period of relative opening up that occurred under that constitution, many political actors in Myanmar sought to amend or replace it. Nonetheless, the 2008 Constitution represents a 'pact' accepted—pragmatically and with some reluctance—by the National League for Democracy (NLD) with the military (Tatmadaw),¹ based on which free elections were held in 2012 (by-elections that brought the NLD into parliament), in 2015 and in 2020.

The NLD landslide in 2015 enabled the formation of an NLD-led, but still military-controlled, government and a period of—at least partially elected—civilian rule. In return, however, the NLD had to accept that any further constitutional advances would take place within the confines of the 2008 Constitution—meaning that amendments

Myanmar's 2008 Constitution was put in place by the military as part of its intended strategy for a gradual and partial transfer of power to an elected civilian leadership.

The 2008 Constitution was always contentious. It was criticized for its content and for the manner of its adoption.

¹ 'Tatmadaw' is a term of honour that the military leadership applies to itself, and which harks back to the status of the military in the pre-colonial Burmese state. Some pro-democracy forces object to applying it to the current military. However, it is used here as it has become conventional to use it when writing about Myanmar. No political statement of support for the military regime is intended by its use in this context.

would have to be made in accordance with the process set out by the 2008 Constitution. As this would require a 75 per cent majority in parliament, with 25 per cent of the seats in the legislature reserved for the military, any further constitutional change would have had to be agreed between the NLD and the military. The NLD also accepted that constitutional developments would have to proceed in step with the peace process, and that the substantive principles agreed at the various sessions of the union peace conferences, or 21st Century Panglong, of September 2016, May 2017, July 2018 and August 2020, as compiled in the Union Peace Accord, would inform the content of any constitutional amendments. These realities limited the NLD's constitutional proposals to modest reforms, such as the 2019 constitutional amendment proposals envisaging only an incremental reduction in the number of military members of parliament over successive electoral cycles. At the same time, the NLD rejected many of the proposals for increased devolution put forward by the ethnicity-based political parties, such as on the power of state and regional legislatures to appoint their own Chief Ministers. These proposals were rumoured to enjoy some support from the military and the military-allied Union Solidarity and Development Party (USDP)—and therefore to have been achievable within the institutional constraints, but were obviously not in the NLD's interests.

The military coup of 1 February 2021 changed everything. The delicately poised pact between the NLD and the military was unilaterally broken by the latter, and the military's previous strategy of a gradual and partial transfer of power to elected civilian government was replaced with a strategy of force and repression. One result of this is that the NLD no longer finds itself morally or practically bound by the 2008 Constitution. A 'constitutional moment' has opened up in which Myanmar's constitutional order can be renegotiated. In contrast to previous periods, the military is no longer considered by others to be a legitimate stakeholder in the constitutional process.

As constitutional amendment would require a 75% majority in parliament, with 25% of the seats in the legislature reserved for the military, any further change would have had to be agreed between the NLD and the military.

In response to the military's unconstitutional takeover, a Federal Democracy Charter (FDC) was issued on 31 March 2021. This document is an agreement between the Committee Representing the Pyidaungsu Hluttaw (CRPH), which represents around 80 per cent of the parliamentarians elected in the 2020 general election, the Civil Disobedience Movement (CDM), civil society groups and

strike committees, as well as many—but not all—of the ethnic armed organizations (EAOs). It expresses the common terms on which they would mount a collective resistance to the military and set up a National Unity Government and lays the foundations for a transition to a new, federal democratic constitutional order.

Although the FDC clearly envisages the replacement of the 2008 Constitution, it does not explicitly seek to abolish it. A separate decision by the CRPH, however, issued on the same day as the FDC was launched, declares the abolition of the 2008 Constitution, leaving the status of that constitution ambiguous but essentially rendering it defunct and inapplicable as a result of the military's own actions.² At the same time, the CRPH declared continuity of the applicable law, albeit within the principles established by the FDC. This creates an opportunity to design a new constitution that is genuinely suitable for Myanmar and meets the needs of its complex array of stakeholders, rather than just trying to patch up a flawed design. A new constitution could help to put an end to the various conflicts in the country—between the central state and the EAOs, among the various EAOs, between the civilian authorities and the military and between different ethnic groups. However, if the 2008 Constitution has been abolished, this leaves a constitutional and legal gap. The FDC, while possessing some of the characteristics of an interim constitution or proto-constitution, 'is not in itself a new constitution for Myanmar, nor does it purport to be'.³ This means that a new Myanmar constitution remains to be written.

The status of the FDC in both legal and political terms is not uncontroversial. Immediately after its adoption, there were moves to renegotiate parts of it, and to do so in an inclusive and consensus-based process within the National Unity Consultative Council (NUCC). Although details at the time of writing remain uncertain, it is likely that there will be an increased role for the NUCC and to some extent a reduction in the powers of the CRPH, in order to ensure that the NLD, which dominates the elected parliament, cannot act unilaterally.

The FDC, while possessing some of the characteristics of an interim constitution, is not in itself a new constitution for Myanmar, nor does it purport to be.

2 The full text of the 'Declaration of the abolishment of the 2008 constitution', 31 March 2021, is available on the official website of CRPH Myanmar, <<https://crphmyanmar.org/crph3103212>>, accessed 2 March 2022.

3 For more on the Federal Democracy Charter's political and legal status, see International IDEA (2021). The version of the FDC quoted in this Report is that available on the CRPH website.

Nonetheless, a change in the interim governance arrangements will not necessarily determine the eventual choices of political actors on the future design of the constitution. For the time being, at least, the FDC remains the highest expression of agreement on future constitutional principles between the NLD/CRPH, the CDM and allied EAOs, which remains in place even after months of negotiations. It sets out the basic parameters for constitution-building, in terms of both process and substance. With regard to process, it specifies the essential contours or stages, such as the establishment of a Constitutional Convention to negotiate a federal constitution, and a requirement for the new constitution to be approved by referendum. With regard to substance, the FDC includes explicit—but not detailed—commitments to a federal system, parliamentary democracy, a bicameral parliament, independent commissions, human rights and security sector reform.

These commitments are important. They provide the ‘baselines’ or parameters on which any agreement must be built. Similarly, they must be respected and adhered to in any subnational constitutions that might emerge in the interim. They indicate the outer boundaries of acceptable institutional design choices—at least insofar as what might broadly be defined as the ‘pro-democracy’ side is concerned. They take certain constitutional options, and therefore certain constitutional models and examples, off the table. In other words, many (but not all) of the macro-level decisions—such as on parliamentary democracy and federalism—have already been made. As long as the FDC remains the principal working foundation for constitutional development, decision makers do not have to waste time arguing about the relative merits of presidential and parliamentary systems, or arguing for or against federalism in principle. In addition, the subordination of the military to civilian rule and democratic oversight is no longer a matter for discussion. Instead, more attention can be given to meso- and micro-level decisions of constitutional design. These include, for example: (a) deciding how specific constitutional provisions or parliamentary Standing Orders, with regard to matters such as votes of no-confidence, are to be established in a Myanmar context; (b) the ‘self-rule’ aspects of federalism, such as the specific allocation of powers, responsibilities and resources between the union, the states/regions and local authorities; (c) the ‘shared rule’ aspects of federalism, such

The FDC includes explicit—but not detailed—commitments to a federal system, parliamentary democracy, a bicameral parliament, independent commissions, human rights and security sector reform.

as representation at the centre and the participation of states and regions in Myanmar-wide policymaking; (d) detailed provisions on independent commissions, such as a federal election management body; and (e) establishing an effective and independent judicial branch. These details are complex and will be strongly contested, but an ability to focus on them while regarding the broader principles as settled within the pro-democracy side would at least simplify the negotiating process with those who oppose such principles.

Adopting a new constitution will require holistic solutions to complex, interrelated and multidimensional issues of constitutional design. These encompass both structural matters—the distribution of powers ‘horizontally’ between branches of central government, and ‘vertically’ between central institutions and the states and regions, as well as sub-state entities such as autonomous areas and local government—and substantive matters, such as rights, recognition and statements of purpose and identity. Even if broad political agreement can be reached on general principles such as civilian rule, parliamentary democracy, federalism, minority rights, ethnic recognition and the territorial distribution of power and resources, developing a new constitution requires the operationalization and translation of these principles into a robust and workable legal form. It will also require the drafting of a coherent and complete constitutional text that covers even the non-contentious, or little-considered, aspects of constitutional design. Specifically, while questions such as the election of Chief Ministers or the adoption of constitutions at the state and regional levels have been widely discussed over many years, with more-or-less detailed proposals being articulated by some policy actors, much less attention has been devoted to questions such as the rules on government formation or the dissolution of parliament. As recent examples in Malaysia, Nepal and Samoa demonstrate,⁴ however, such details of constitutional design can be vital to promoting the stability of a democratic parliamentary constitutional order.

In negotiating these details of constitutional design, Myanmar’s decision makers do not have to start from scratch. Since 1990,

Even if political agreement can be reached on general principles, developing a new constitution requires the operationalization of these principles into a robust and workable legal framework.

⁴ Malaysia, Nepal and Samoa are all parliamentary systems that have suffered recent constitutional crises in which a lack of clarity and precision with regard to the rules by which prime ministers are chosen and removed, or the circumstances in which parliaments can be prorogued or dissolved, played a crucial role.

a considerable amount of preparatory constitution-building work has been undertaken both at the union level and within the states and regions. Several constitutional drafts were developed between 1990 and 2008. These drafts coalesced in the FCDCC 2008 draft, which represented more than 15 years of consensus-building. The most recent and complete elaboration of a draft federal democratic constitution for the country to have emerged from a process of multi-stakeholder negotiation is the one produced in 2016 by the UNFC, which included some, but not all, of the EAOs. This draft was a further development of the FCDCC draft and can be regarded as an amended iteration of that document. The FCDCC-UNFC draft (the 2016 draft) could not be put into effect as the political space was dominated by the military-imposed 2008 Constitution. Nonetheless, it still enjoys a certain legitimacy, at least in parts of the pro-democracy camp, which stems from the sincerity of the intentions behind these texts and from the relatively open and inclusive way in which they were drafted. The FDC was itself partly based on the 2016 draft. However, not all political groups are satisfied with the UNFC's 2016 proposals. The NLD, for instance, was not directly involved in its development. It is also worth noting that the consensus-building behind the 2016 draft was limited to those active in the constitutional discussion before the 2021 coup, and that new stakeholders in the process have appeared since then. Therefore, while the 2016 draft is a convenient starting point for constitutional negotiations, it does not by any means represent a full consensus among the pro-democracy forces in Myanmar.

Imposed constitutions rarely thrive. A workable constitution must, as a minimum, reflect sufficient consensus among the relevant political actors. In Myanmar, there are broadly speaking three main groups of actors. First, the military is a hegemonic oligarchy that seeks to protect the power and economic interests of its senior members, while also possessing a particular vision of conservative, centralized, uniform Myanmar nationalism that is also exhibited in the military's proxy party, the USDP, which has its roots in the military's dictatorship-era social mobilization schemes. Then there is the NLD, the majority party that emerged from an earlier pro-democracy movement against military rule and won the 1990 election by a landslide. It is arguably the only major Myanmar-wide political party committed to democracy. (It is Myanmar-wide in the sense that

A workable constitution must, as a minimum, reflect sufficient consensus among the relevant political actors.

it contests seats across the whole of Myanmar, while most other democratic parties are tied to a particular ethnic group and campaign only in their specific ethnic areas.) However, the NLD has traditionally been tied to a Burmese-centric view of Myanmar statehood, in which the national minorities are permitted some recognition and autonomy, but sovereignty rests in Myanmar as a whole and the Bamar people are numerically and culturally dominant. Third, there are the political parties and the ethnic armed groups that represent the national minorities. These are committed above all to the self-rule of their own communities and to the preservation as much as possible of their own national sovereignty within—or, historically, outside of—a federal Myanmar. It should be noted that these three categories are not hermetically sealed groups of actors. Many members of ethnic minorities vote for the NLD in elections and there are significantly divergent approaches within the NLD, which has led to breakaways in the past. In addition, the formally USDP-dominated government of President Thein Sein (2011–2016) was closer in some of its positions to the democratic camp than most had expected of a military-installed administration.

In the period 2015–2020, the ‘pact’ on which the constitution rested was between the military, which had crafted the 2008 Constitution, and the NLD, which had consented, if only on pragmatic grounds, to work within it. This followed the initial opening up and reform-orientation of President Thein Sein, who famously reached out to Aung San Suu Kyi in 2011. On the basis of that ‘pact’, the NLD then sought to make minor amendments to civilianize and democratize Myanmar’s government without provoking the military, while also making only minimal federal concessions to the EAOs and other ethnic parties through the peace process, the views of which were largely excluded. The NLD was in an impossible position. Any amendment to the constitution that would meet the aspirations of the EAOs would be unacceptable to the military, on whose sufferance the NLD governed after 2016. Now, with that informal pact ended by the 2021 coup, the FDC represents a different alignment: a pact between the NLD and the EAOs and ethnic parties, as well as the wider pro-democracy CDM. In agreeing to the FDC, the NLD has moved further than previously towards an explicit recognition of, and commitment to meeting, the demands of the non-Bamar ethnic groups. Whether the NLD’s commitment to federalism proves sufficiently sincere

and expansive, once it gets down to constitutional details, to meet the demands of the ethnic minorities, including the EAOs, remains to be seen. Even if sufficient consensus can be reached between the NLD and the EAOs, however, it is also unclear whether a constitution acceptable to them could ever be accepted even by a transformed military under a new leadership. Unless the military can be completely removed from power as a political actor, achieving a lasting democratic federal constitution would require a positive answer to both these questions.

Chapter 2

HISTORICAL ANALYSIS

Myanmar has had a long—albeit fraught and interrupted—history of parliamentary democracy dating back to the Burma Act of 1935. Modern Myanmar has had four constitutions: the Burma Act 1935, the Constitution of 1947, the Constitution of 1974 and the Constitution of 2008. There was also a short period of Japanese occupation under an interim constitution in 1943, as well as long periods of non-constitutional rule where military governments ruled without a clear constitutional basis. A brief survey of this history makes it possible to identify the institutional continuities and volatilities arising from various attempts to meet the persistent underlying constitutional challenges facing Myanmar. It also enables lessons to be learned and historical examples of good practice to be extracted so that, where possible, new constitutional designs can be based on Myanmar’s homegrown traditions.

Modern Myanmar has had four constitutions: the Burma Act 1935, the Constitution of 1947, the Constitution of 1974 and the Constitution of 2008.

2.1 BURMA ACT 1935

The Burma Act of 1935, an Act of the British Imperial Parliament, separated Burma, as it was then known, from India and established self-governing institutions in the form of a bicameral parliament and a Burmese ministry. In a system known as ‘dyarchy’ (dual rule), Burmese ministers had relatively autonomous authority over most internal affairs, for which they were responsible to the Parliament of Burma, while foreign affairs, defence, security and the Frontier Areas were left under the control of the British Governor.

The division between 'Ministerial Burma' and the Frontier Areas left enduring problems for Myanmar's subsequent constitutional history that have never been fully resolved.

Two features of the Act are worthy of note. First, although it did not establish a federal system, it did make a distinction between so-called Ministerial Burma (the Burmese-majority areas, broadly equivalent to the current regions, previously known as divisions) and the 'Frontier Areas' (the ethnic-majority areas, broadly equivalent to the current states).⁵ While the Frontier Areas were largely outside the direct control of the Burmese Cabinet and subject to the direct supervision of the Governor, this supervision was mostly exercised in a hands-off manner, and local elites applied customary law.

Although the 1935 Act has long been superseded, the division between 'Ministerial Burma' and the Frontier Areas left enduring problems for Myanmar's subsequent constitutional history that have never been fully resolved. The division created an imbalanced, asymmetrical structure of governance, in which the experience of government, and the relationship between the people and the state, were very different in different parts of the country. Those in the Frontier Areas had a more direct—and, at least for the elites, more congenial—relationship with the British authorities than those in Ministerial Burma. During World War II, the Frontier Areas raised troops to support the British against the Japanese at a time when the Burmese Independence Army was fighting on the Japanese side. It is highly unusual in a federation for the constituent states to have their own armed forces, but this demand, which has been a persistent feature of debates over federalism in Myanmar ever since, goes right back to the experiences of that time.

It is also from this division that notions of secession arise. The idea of Shan State becoming independent as a separate Dominion, on a par with India, Ceylon and so on, was briefly considered, but ultimately rejected during the British colonial era. Although some of the ethnic states agreed to form a union in return for internal self-government at the Panglong Conference in 1947, their different historical relationships—in which the ethnicity-based states had a stronger and more direct relationship with the British Governor, and a weaker, more 'semi-detached' relationship with their Burmese fellow-citizens—have continued to pose difficulties with political integration.

⁵ Rakhine State was included in Ministerial Burma as Arakan Division.

Second, although the 1935 Act contained some genuinely democratic elements, it conferred vast reserve powers on the British Governor, who was able to influence and intervene in the political system—in principle to promote ‘peace, order and good government’, but also to protect British economic and strategic interests. These reserve powers cast a long shadow. It is remarkable—but not coincidental—that the powers available to the Commander-in-Chief under the 2008 Constitution, such as the power to intervene in an emergency and to exercise control over the security sector, are similar to those of the Governor under the Burma Act 1935. In both cases, elected democratic politics was allowed within a certain sphere, limited to domestic, internal and civil affairs, while matters essential to the defence, security and unity of the state were removed from democratic control. Just as the British Empire was willing to allow democratic politics up to a point, so long as its vital interests were protected, so the military under the 2008 Constitution was willing to allow democratic politics up to a point, with the same caveat.

Understanding the legacies of the 1935 Act therefore enables us to better understand the basic problem facing democrats in Myanmar today: the need to establish a democratic system that works across the whole of the geographical space, in both the Bamar-majority core areas and the ethnic former Frontier Areas; and the whole of the policy space, including on matters of defence, security and foreign policy, free from the supervision of an unaccountable and undemocratic institution.

2.2 THE CONSTITUTION OF 1947

The Constitution of 1947⁶ was the first constitution of an independent Burma, as it was then known. Although flawed in some respects, it remains a powerfully iconic democratic document and continues to be a source of practical inspiration for addressing certain questions of constitutional design.

It is remarkable—but not coincidental—that the powers available to the Commander-in-Chief under the 2008 Constitution are similar to those of the Governor under the Burma Act 1935.

The Constitution of 1947 was the first constitution of an independent Burma, as it was then known.

⁶ There are some excellent, comprehensive works on the 1947 Constitution. The best are by J. S. Furnivall (1960) and U Maung Maung (1959), both of which were written close to the time of that Constitution's failure at the hands of a military coup.

The democratic credentials of the 1947 Constitution stood on two foundations. First, it was adopted by an elected Constituent Assembly, chosen under the terms of the 1935 Burma Act, so it had democratic legitimacy from the outset—although it was not submitted to a referendum. Second, it was the constitution under which Myanmar enjoyed a period of genuine, if difficult and ultimately doomed, democracy.

The 1947 Constitution sought to give effect to the Panglong Agreement, principally through a complex asymmetric federal structure.

The 1947 Constitution was in many ways a typical example of the Westminster model of parliamentary government, as that model had evolved into its mature form by the middle of the 20th century. There was a ceremonial president who acted as constitutional head of state, while effective executive power was exercised by a prime minister and cabinet, which were chosen by and from—and were politically responsible to—the Chamber of Deputies. Much of the institutional architecture of that constitution is very similar—and in some technical respects arguably superior—to other Westminster model constitutions in the region, such as those of Bangladesh, India, Malaysia and Pakistan.

The 1947 Constitution sought to give effect to the Panglong Agreement, principally through a complex asymmetric federal structure that gave different degrees of autonomy to different nationalities, according to their demands and perceived capacity for self-government. However, this federalism took a very unusual form:

- Federalism was not applied to the whole country: the Bamar-majority areas, carved essentially from the old ‘Ministerial Burma’, in effect existed under a unitary state, and the Union Parliament legislated for them directly. The only clear (but not exact) parallel for this arrangement in a major democracy at the time was the situation in the United Kingdom with respect to Northern Ireland, which had its own devolved parliament while the other parts of the UK did not.
- Those areas that did have special autonomy did not have it on equal terms. Shan State, Kachin State and Karenni State (which became Kayah State in 1952) had the full range of state powers. Prior to becoming Karen State in 1951, the Kaw-Thu-Lay region had a lesser degree of autonomy as a ‘Special Region’. The Chin

had no state of their own but did have more limited administrative autonomy as a 'Special Division'.

- There were no separately elected state legislatures. Instead, the members of both houses of the Union Parliament who represented a state formed its State Council, or legislature.
- The leaders of the state governments were members of the Union Government. Therefore, the Head of Shan State was a minister in the Union Government, known as the Union Minister for the Shan State. Similarly, the Head of Kachin State was the Union Minister for the Kachin State, and so on. There were also ministers of Karen Affairs and Chin Affairs.

This unusual form of federalism worked tolerably well for as long as politics was dominated by the ruling Anti-Fascist People's Freedom League (AFPFL), which meant that differences could be mediated within the party and governments could be formed at state level that enjoyed the confidence of both the State Council and the union prime minister. It proved utterly unworkable, however, after the AFPFL split (Maung Maung 1959) and proved to be an arrangement wholly unsuited to competitive multiparty politics. If one party had a majority in a State Council while another party had a majority in the union Chamber of Deputies, a prime minister might have to appoint a minister for that state from a different party. The essential coherence and logic of the Westminster system were undermined, throwing the conventions of responsible party government and parliamentary democracy into disarray.

The other unusual, although not unique, feature of the 1947 Constitution was that it set out (in Chapter 10) a right to secession for certain states—Shan and Karenni (Kayah). This right came with certain conditions: it could not be exercised within the first 10 years of the constitution coming into effect; the State Council of the state concerned had to approve secession by a two-thirds majority; and a plebiscite (referendum) would then have to be held in the state to 'ascertain the will of the people' (article 205). In addition, 'all matters relating to the exercise of the right of secession' would be regulated by law (article 206). These provisions could in theory have allowed the centre broad scope to influence the referendum process in ways that would have made secession more difficult. For example, there was nothing explicit in the 1947 Constitution to stop the Union

This unusual form of federalism proved to be an arrangement wholly unsuited to competitive multiparty politics.

Parliament from providing by law that secession would not take place unless endorsed by a super-majority of the votes cast. In the event, however, the elasticity of these provisions was never tested.

The secession provisions have caused the 1947 Constitution to divide public opinion. For those most concerned with the autonomy of ethnic nationalities, it has attained iconic status and continues to represent a high point in Myanmar's constitutional development as a constitution that truly embodies the 'Panglong spirit'. For those concerned with keeping Myanmar together, the 1947 Constitution has a more a problematic legacy as a weak centre that could not maintain the unity and territorial integrity of Myanmar without collapsing into military rule.

Another unusual feature of the 1947 Constitution was that it had a strong ideological basis. Although not by any means a communist constitution, it was bound up with ideas of Gandhian agrarianism. A chapter devoted to workers and peasants, for instance, provided for the nationalization of land. It also contained a set of progressive Directive Principles that would be seen by some today as overly restrictive in committing the state to a command economy.

The 1974 Constitution can be seen as an attempt to institutionalize military rule by transforming the regime from a military dictatorship to a consolidated party dictatorship.

2.3 THE CONSTITUTION OF 1974

Following the breakdown and collapse of the 1947 Constitution at the hands of military rulers in the early 1960s, Myanmar entered a period of military rule with no constitutional basis. The 1974 Constitution can be seen as an attempt to institutionalize military rule by transforming the regime from a military dictatorship to a consolidated party dictatorship. The resulting constitution was the opposite, in just about every respect, from its 1947 predecessor: the 1947 Constitution was bicameral, the 1974 unicameral; 1947 was a multiparty democracy, 1974 a one-party state; 1947 was an attempt to apply British forms of Westminster model parliamentarism to a Myanmar context, 1974 was an adaptation of the Soviet-/Yugoslav-style constitution prevalent across the communist bloc in the Cold War era. However, the 1974 Constitution clarified and standardized the state organization at the subnational level by creating three new states and one new division, and introducing the concept of formal

equality between states and divisions. The territorial set-up of seven states and seven divisions is essentially the same as that of the 2008 Constitution, the only difference being their designation.

The 1974 Constitution was abolished after the 1988 coup, in which a military junta deposed the erstwhile military-chief Ne Win, who had held power since 1962. The military established the State Law and Order Restoration Council (SLORC), which later became the State Peace and Development Council, and claimed to be leading the country to a democratic constitutional order. It took another 20 years of arbitrary, unconstitutional and unaccountable rule to create the semblance of such an order, albeit on the military's own terms and enshrining its vision of so-called 'disciplined democracy'.

2.4 THE 2008 CONSTITUTION

The 2008 Constitution was imposed⁷ by the military as part of its strategy for a gradual and partial withdrawal from power, handing over authority to an elected civilian government while retaining both a veto power and substantial influence over key aspects of policy. The key features of this constitution were:

- That 25 per cent of the seats in both houses of the union legislature, as well as 25 per cent of the seats in state and regional legislatures, should be reserved for the military. As noted above, this gave the military a power of veto over constitutional amendments and enabled them to dictate the pace and direction of any subsequent constitutional change.
- A separation of the roles of president and Commander-in-Chief, with the latter being a senior general exercising substantial autonomy in relation to the government.
- That appointments to the key 'power ministries' (e.g. defence, home affairs and border affairs) should be made by the Commander-in-Chief, essentially placing these ministries under the direct control of the military. This included the powerful General

The 2008 Constitution was imposed by the military as part of its strategy for a gradual and partial withdrawal from power.

⁷ The military organized a nationwide referendum to adopt the Constitution but no one seriously claims that this was a genuinely democratic vote. Initially, therefore, the 2008 Constitution existed without any democratic legitimacy.

Affairs Department, the backbone of state administration, under the ministry of home affairs.

- A system for choosing the president and two vice-presidents that would ensure that one of those offices was always held by the military.
- A 'union system' in which state and regional legislatures were given limited powers, and the Chief Ministers of states were appointed by the centre.
- A patchy bill of rights with broad, open limitations and weak enforcement mechanisms.

The 2008 Constitution was a long, awkward, complex and at times inconsistent document.

Partly as a result of this hybrid, semi-democratic institutional structure, the 2008 Constitution was a long, awkward, complex and at times inconsistent document. It was deeply flawed not only in terms of its concept and institutional design, when assessed against contemporary international democratic norms, but also technically, in terms of its lack of clarity, precision, completeness and coherence. It might have been possible to improve it but without extensive change, it would have been very difficult to transform it to provide for a workable and fully democratic federal system. Such changes would have required a significant shift in political will by the military, which was clearly not in place. Instead, the military's aim was to halt the trend for further democratic opening up and transforming society that the tentative transition had allowed. The military saw the 2008 Constitution not as the beginning of a democratic transition, but as an end point of a transition it had designed and managed itself. When it became clear to the military that the opening up it had allowed was gaining a momentum that it could neither control nor contain, as exemplified by the NLD's renewed landslide victory in November 2020, it sought to regain the upper hand. When it overplayed this hand in February 2021, the people of Myanmar—strengthened in their resolve after a decade of relative freedom—rose up with a determination to eradicate military rule once and for all.

In many countries, often even after quite abrupt political changes, a new constitution often resembles its predecessors

2.5 ANALYSIS OF CONSTITUTIONAL TRAJECTORY

Historical influences help us to understand why constitutions are drafted in the way they are. In many countries, often even after quite abrupt political changes, a new constitution often resembles its

predecessors (Elkins, Ginsburg and Melton 2009). There are two main reasons for this. First, 'path dependency' means that the most natural solution is often to change only what must be changed while retaining what works. This has its own inertia but also simplifies decision-making, making it easier to reach agreements because there are fewer variables in play. It also reflects the fact that constitutions are embedded in a particular legal culture, which makes use of accepted legal 'terms of art', doctrines and thought processes.

This path dependency may be tied to previous experiences of colonial rule or to foreign influence. Thus, for example, Westminster-derived parliamentary systems can be found in Bangladesh, India, Malaysia and Pakistan, where there was historical exposure to British institutions. While Bangladesh and Pakistan experimented with presidential systems under authoritarian rule, both re-democratized with parliamentary systems. Elsewhere in South and South-East Asia, other forms of foreign influence have left marks on the constitution. Some countries with a history of communist influence, such as Laos and Vietnam, have based their constitutions on the Soviet Constitution of 1936. Myanmar, as demonstrated above in the brief examination of the 1947 and 1974 constitutions, has been subject to both these diametrically opposed influences. The waters of its constitutional history are therefore very muddled. There is no single, unbroken tradition on which to build, although there are historical fragments that could be capable of being repurposed.

The second reason for constitutional continuity is that constitutions encapsulate, in legal form, the agreements that arise from political settlements. The parameters of these settlements arise from the underlying cultural, social and economic needs of a country, and from its demography, geography and strategic situation. These needs and situations are remarkably persistent over time. Thus, small and homogenous societies have different needs from large, complex and heterogenous societies—and those realities are reflected in successive constitutions. For this reason, macro-level constitutional changes—such as from a presidential to a parliamentary system, or from a unitary to a federal system—are comparatively rare.

This historical understanding helps to guide decision makers towards the types of constitutional change that are likely to 'take root'—to

Constitutions encapsulate, in legal form, the agreements that arise from political settlements.

There may be elements of historical constitutions that, even when bringing about radical change, can be usefully restored or reapplied.

be recognizable and familiar, and thus accepted and workable—and those which are not. The reality is that political culture is ‘stickier’, more immutable and less open to change than institutions. There might be much to be said, for example, for a Dutch-style democracy based on proportional representation, multiparty politics, coalition government and continuous negotiation and compromise (Lijphart 1999). However, to adopt such a system in a country that has no history of it, which is used to majoritarian elections and winner-takes-all politics, and which has an adversarial political culture rather than a culture of compromise and negotiation, can be very difficult. In the Myanmar context, where the year-long experience of democratic resistance and mass-mobilization has already had a significant effect on the political culture and the way political decisions are made, democratic reformers want a constitution that breaks decisively with the past—especially the recent past. Nonetheless, there may be elements of historical constitutions that, even when bringing about radical change, can be usefully restored or reapplied. This also applies to the extra-constitutional existence of ethnic armed controlled areas and their institutions, which previous constitutional frameworks ignored, that are now likely to see a different approach to their status as legitimate building blocks in a new constitutional framework.

Even draft constitutions or short-lived constitutions may have this inspirational power.

2.6 WHAT CAN BE SALVAGED?

Historical constitutions may be a source of inspiration, especially when these embody and represent periods of genuine democracy. For example, the Afghan Constitution of 1964, Argentina’s Constitution of 1853, Latvia’s Constitution of 1922, the Polish Constitution of 1791, and the Syrian Constitution of 1950, were recognized as workable and relatively liberal-democratic constitutions for their times, and have sustained hopes for democratic constitutional revival even during periods of authoritarian rule, state failure or foreign occupation. Even draft constitutions or short-lived constitutions may have this inspirational power. The Spanish Constitution of 1812, for example, was never fully implemented but widely regarded as an authentic expression of constitutional aspirations. It became influential in much of Latin America and continued to inspire Spanish liberal reformers. In some cases—Latvia in 1991 and Argentina in

1983—iconic constitutions were initially revived as a way of ‘resetting the clock’ and restoring democracy with a minimum of fuss, and then amended as necessary to reflect changed circumstances and demands.

Myanmar’s 1947 Constitution has served as an icon or a beacon of hope for those seeking to restore a democratic and federal system but its status is tainted not only by the fact that it ultimately failed—and in part failed for reasons that can be directly attributed to poor constitutional design—but also by the fact that its iconic status is itself so divisive. As long as the 1947 Constitution is seen primarily as a ‘separatist constitution’, which allows for the dissolution of the union, it will be celebrated by some but bitterly opposed by others. That is no basis on which to build a lasting constitutional order—which must, after all, be based on compromise. In the same way, the left wing ideological content of the 1947 Constitution would please some but alienate others, including national business communities and international investors. Returning to the 1947 Constitution, as some have suggested in the past, is therefore not an option—and, indeed, the constitutional debate has moved on from such suggestions. Myanmar cannot turn back the constitutional clock to an earlier era.

Nonetheless, revisiting aspects of old constitutions could provide answers to current problems. As discussed below, there might be specific provisions in the 1947 Constitution that could be copied or adapted to fill in the gaps created by the FCDCC-UNFC (2016) draft and the Federal Democracy Charter. Where this is possible, it would have two advantages: first, it would make constitution-making easier because it would not be necessary to design everything from scratch; and, second, it would mean that the provisions adopted would probably be tried and tested, and therefore workable—unless, of course, these were the problematic provisions responsible for constitutional failure. In particular, it is the prosaic elements of the 1947 Constitution—its rules on the dissolution of parliament, and government formation and removal, as well as its rules on parliamentary privileges and procedures—that might be most helpful in today’s situation.

The existence of a Constitutional Tribunal with the power to adjudicate on constitutional disputes would be a useful element of a new constitutional framework.

There may even be elements of stability and continuity to be drawn from the 1974 and the 2008 constitutions. It appears that the FDC and the democratic movement have at least inadvertently acknowledged this by taking the territorial organization as a starting point, and even leaving symbolic issues such as the name of the country, its symbols and the capital untouched—at least for the time being. The existence of a Constitutional Tribunal with the power to adjudicate on constitutional disputes (at least in its original form before its powers were curtailed in late 2012) would be a useful element of a new constitutional framework. There could also be much to be said for the need to ensure at least some legal continuity from previous constitutional dispensations, just as even the Burma Socialist Programme Party period (1962–1988) continued to apply some British colonial era codes. What precisely should be preserved and what replaced will need to be analysed in detail and determined in inclusive negotiations.

Chapter 3

PARTICIPANT ANALYSIS

This chapter examines the constitutional preferences, priorities and 'red lines' of the main actors in Myanmar's constitutional process. These positions may have changed recently, or may not have been formally adopted, but are derived from their positions in earlier negotiations and debates about constitutional design.

3.1 NATIONAL LEAGUE FOR DEMOCRACY

The National League for Democracy is the largest political party in Myanmar. It won 258 of the 330 (78 per cent) elected seats in the House of Representatives (Pyithu Hluttaw) and 138 of the 168 (82 per cent) elected seats in the House of Nationalities (Amyotha Hluttaw) in the November 2020 general election (Myanmar Information Management Unit 2020). The NLD contests elections throughout Myanmar and has a majority of the elected members in the state and regional legislatures in every state apart from Shan State and Rakhine State.

The NLD has never had a very clear constitutional policy. Prior to and immediately after the 2015 elections, there was some support among senior figures in the NLD for a return, at least as an interim, to the 1947 Constitution or to the FCDCC draft (U Ko Ni 2015). However, that position was not consolidated and never became official policy and was also untenable in the political circumstances. Although the 2008 Constitution was not popular, accepting it was the NLD's only viable option at the time. Working within the limits imposed by the

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Achieving a three-way agreement between the NLD, the military and the participating EAOs proved difficult.

2008 Constitution was the only route to power that the military would accept, and the NLD recognized this.

There was also some discussion in late 2015 about repealing or amending article 59 of the 2008 Constitution, which prohibits Aung San Suu Kyi from being elected to the presidency. This did not take place, in part because an easier work-around was found by appointing her to the newly created, and not constitutionally recognized, office of State Counsellor.

Once in office, the NLD's constitutional approach advanced on two parallel tracks. The first was to continue to negotiate with the EAOs through the 21st Century Panglong peace process, which had begun in 2016. The effectiveness of this process was undermined, however, by the fact that inclusion in it was limited to those EAOs that were signatories to the National Ceasefire Agreement (NCA). Other ethnic groups, including representatives of ethnic civil society organizations, were excluded (Dolan 2016). The NLD government, like the Thein Sein government before it, failed to convince the most powerful EAOs to sign the NCA and join the negotiations. In addition, civil society organizations were not formally part of the peace conferences, and nor were those political parties that had failed to win any parliamentary seats in the 2015 elections. Another limitation on the 21st Century Panglong process was that the military—which had to be included—retained its veto power. Achieving a three-way agreement between the NLD, the military and the participating EAOs proved difficult. Although 51 broad federal and governance principles had been agreed on by the end of the third Panglong peace conference in July 2018, these largely either reiterated commitments already made in the NCA or were too vague to provide a clear framework for constitution-building. Compromise could not be reached on a number of contentious issues, such as on sub-state constitutions, a non-secession clause and self-determination. Other important constitutional issues, such as shared-rule arrangements and institutional reforms at the centre, had not been adequately discussed when the peace process stalled in 2019.

The NLD's second track to reform was to propose amendments and seek to pass them in parliament. This took the form of two amendment bills presented to parliament in 2019 by the Joint

Parliamentary Committee on Constitutional Amendment (JPCCA), which was dominated by the NLD. The proposed amendments can be best described as ‘minimal’. The most important proposal was to gradually limit the number of military members in both houses of parliament, and in the state and regional legislatures, from 25 per cent to 15 per cent in the third term, 10 per cent in the fourth term and 5 per cent in the fifth term. The power to declare a state of emergency would pass to the Union Parliament (Pyidaungsu Hluttaw), and power in emergencies would be vested in the president, not the Commander-in-Chief.

The NLD’s 2019 package of amendments also proposed a change to the rule on constitutional amendments to certain key articles of the constitution, from 75 per cent of the members in both houses of the Union Parliament to 67 per cent. This would have made future changes easier by avoiding the military veto.

Other than including the word ‘federal’ and some minor changes, such as giving powers over the self-administered zones to the state and regional legislatures, there were no provisions for further decentralization in the NLD’s 2019 amendment bill. Numerous amendments on decentralization were suggested by the Shan National League for Democracy (SNLD) in the JPCCA, but these were all rejected by the NLD majority. Several hotly contested issues—such as the right of the states/regions to adopt their own constitutions, or on the election of the Chief Ministers by the state/regional legislatures—were therefore not addressed in the amendment bills. Nor were there any proposals to reform Myanmar’s inefficient and unaccountable system of government, in which the president is elected by, but not politically accountable to, the parliament, in favour of a more conventional and more accountable parliamentary system.

There are three possible reasons for the NLD’s apparent lack of constitutional ambition. The first rests on ‘rational choice’ theory, according to which constitutional actors seek to maximize their own power and advantage (see Elster 1995; Negretto 2013). As the largest party, the NLD could reasonably have expected to dominate politics. They therefore had an incentive to develop a constitution that would be democratic, in a centralized and majoritarian way, but no incentive to decentralize power or to increase accountability or checks and

The most important proposal was to gradually limit the number of military members in both houses of parliament.

The NLD is more dependent on the EAOs, the ethnicity-based parties and other actors in the NUCC for building a pro-democracy coalition.

balances. The second possibility is ideological. While the NLD is committed to democracy, in the sense of wanting elected civilian rule, it maintains a commitment to a Bamar-led unified Myanmar, which precludes separatism and has only a limited view of federalism.

The third possibility is that the NLD wanted to go further—that the party is more sincerely principled than just to seek its own power and electoral advantage, and more magnanimous than to favour only Burmese interests—but that its potential radicalism was in practice constrained by the military. If this third explanation is correct, the amendments proposed by the NLD were not reflective of the party's true objectives, but merely a tactical move designed to gradually remove military influence over politics so the way would be clear for further reform in future. It is not necessary to accept any one of these possible reasons as a complete explanation—they might overlap and intersect in various ways and may apply separately for different individuals and groups within the wider NLD.

Now that the NLD has been forced from power, it is no longer bound by any obligation to avoid displeasing the military. Instead, it has been placed in a situation where it is more dependent on the EAOs, the ethnicity-based parties and other actors in the NUCC for building a pro-democracy coalition, and in many cases for its members' physical safety. As a result, the NLD may be more open to a more far-reaching constitutional settlement, and there could be a clear shift in the party's constitutional policy. Indeed, by explicitly committing to a highly decentralized, federal parliamentary democracy, and repudiating the 2008 Constitution, the FDC already provides some evidence of this. What is not clear, however, is whether this is a principled change by the NLD or merely a tactical shift, or the extent to which this would be carried through into the detail of constitution-making. It is one thing to proclaim a commitment to federalism in principle and quite another to agree to major changes in the allocation of powers, responsibilities and resources between the levels of government.

There is also the factor of leadership. The NLD is an unusual political party that has been shaped by the experience of dissident politics under authoritarian rule, during which the leader of the party was under house arrest and therefore inaccessible for a long period of

time. Policymaking within the NLD has traditionally been seen as closed and secretive. It was difficult for outsiders to know what Daw Aung San Suu Kyi was thinking, the sort of constitutional advice that was reaching her ears and how far the rest of the party agreed with her. As an Anglophile who had studied in India and the United Kingdom, and married a British citizen, she was widely thought to have an attachment to British forms of parliamentary democracy. Certainly, whenever given an opportunity to propose a new constitution rather than just make constitutional amendments, the NLD has shown a preference for parliamentary democracy and a tendency to look to the Westminster model, such as in India, for constitutional inspiration. This Anglo-centric outlook should not be exaggerated, but it might partly explain the NLD's relative lack of constitutional imagination. British-derived constitutionalism reached its high point, in terms of both technical 'state of the art' and international influence, in the de-colonization era of the mid-20th century. Recent constitutional developments—such as socio-economic, environmental, and gender and sexual orientation rights, as well as specific mechanisms for minority inclusion and recognition, limiting the influence of money in politics, direct public participation or constitutional review through a separate Constitutional Court—are largely absent from this tradition. It is not only an old-fashioned approach to constitutionalism, but also a 'parsimonious' approach, in that it tends to be sceptical towards over-constitutionalization, to leave as much as possible to ordinary legislation or convention and to trust parliaments rather than judges.

Now the situation within the NLD has changed. Aung Sang Suu Kyi is under arrest and other members of the NLD senior leadership either have been detained or are in hiding. Leadership has in practice shifted to a younger generation of NLD politicians who may not have such embedded dispositions towards Westminster-style constitutionalism, and who might have been frustrated by the slow pace of change under NLD rule. If that is the case, the shift to a bolder constitutional policy, as outlined in the FDC, might be a genuine one. This does not mean, however, that the very real differences between the NLD's outlook and that of the EAOs and ethnic political parties had disappeared. As is shown below, various points of tension between them remain. Nonetheless, there are

Whenever given an opportunity to propose a new constitution rather than just make constitutional amendments, the NLD has shown a preference for parliamentary democracy.

grounds for some optimism that a new sense of commitment is emerging to accommodation and compromise.

The CRPH is an institutional rather than a party actor.

The NLD is signalling a renewed commitment not just to democracy, but also to federalism, even if the details of what this means at the level of constitutional design are still to be decided.

3.2 COMMITTEE REPRESENTING THE PYIDAUNGSU HLUTTAW

The CRPH was set up by resolution 2/2021 of the elected members of the Pyidaungsu Hluttaw following the 2021 coup. It is important to note that the CRPH is an institutional rather than a party actor. It has a large NLD majority but other parties, such as the Kayah State Democratic Party, the Ta'ang (Palaung) National Party and the Kachin State People's Party, are also represented. Its function is to represent the elected members of the Union Parliament and to carry on the functions of the parliament while it is unable to assemble. Originally formed by 16 members, membership has since been increased to 20. The CRPH proceeded to appoint ministers to a National Unity Government (NUG), in consultation with the other stakeholder groups within the NUCC, to exercise executive power in the name of the Union Parliament and to seek international recognition for the NUG as the legitimate government of Myanmar.

On 9 February 2021, the CRPH enacted the State Counsellor law (Pyidaungsu Hluttaw Law 1/2021), which appointed Aung San Suu Kyi State Counsellor for another five-year term, even though she had already been imprisoned by the military junta and this appointment was therefore purely symbolic. She was later included in the NUG, as was President Win Myint, whose term under the 2008 Constitution had already expired. This law set four objectives of a constitutional nature: (a) to promote a flourishing multiparty democratic system; (b) to implement the market economy properly; (c) to establish a federal union; and (d) to ensure peace and development. These objectives must be seen as subordinate to, and forerunners of, the somewhat broader and more expansive 'Union Vision and Values' and the 'Guiding Principles for Building a Federal Democracy Union' laid out in the FDC. Nonetheless, the same general trend is evident. The NLD is signalling a renewed commitment not just to democracy, but also to federalism, even if the details of what this means in practice at the level of constitutional design, in terms of powers, revenue sharing and government structure, are still to be decided.

3.3 ETHNIC ARMED ORGANIZATIONS AND ETHNIC POLITICAL PARTIES

The ethnic politics of Myanmar are complicated. Given the history of conflict and repression, which shut down the space for civilian electoral politics, many ethnic and minority groups⁸ are represented, or are claimed to be represented, not only by political parties, but also by ethnic armed organizations. The relationships between political parties and EAOs are often neither clear nor straightforward. Nonetheless, EAOs and ethnicity-based political parties have generally represented a 'third pillar' in Myanmar's constitutional struggle that is at a tangent, in terms of priorities and concerns, to both the NLD and the military. Their constitutional proposals can therefore be briefly summarized together.

The UNFC, made up of a number of EAOs,⁹ has been a key actor, claiming to represent many, but by no means all, of the ethnic nationalities in Myanmar. Its role has been weakened, however, by the withdrawal of some of its members, such as the Karen National Union (KNU) and the Kachin Independence Organization (KIO). Since 2017, its role has to some extent been replaced by the Federal Political Negotiation and Consultative Committee (FPNCC), which some of the stronger EAOs joined. The constitutional positions of those EAOs which have not signed up to the peace process remain largely unknown and are excluded from this analysis, although obviously any final settlement on the constitution would have to include their perspectives.

As noted above, the UNFC developed its own draft constitution (the 2016 draft). These proposals contain a number of provisions that go significantly beyond anything the NLD has previously agreed to, such as: (a) almost complete freedom for the states to adopt their own constitutions; (b) the idea that sovereignty derives from the member states, not from the people of the union as a whole; (c) state-level

The 2016 draft constitution contains a number of provisions that go significantly beyond anything the NLD has previously agreed to.

8 Terminology is sensitive. The term ethnic in this context generally refers to the non-majority Bamar ethnic groups. Bamar is of course an ethnicity in itself, with all the complexities that such a classification implies. In order to avoid lengthy and detailed anthropological analyses, the rather simplified terminology of political analysis is used instead, while recognizing the subtlety required to describe Myanmar's diverse society accurately.

9 Twelve EAOs participated but some resigned or suspended their membership or played only a limited role.

citizenship, such that the ‘citizens’ of one state would not be able to vote in state or local elections in another state; (d) the right of states to establish their own armed forces; and (e) an arrangement of state boundaries based on nationality, possibly with a ‘Bama National State’ in place of the existing seven Burmese-majority regions. All these are highly contentious issues that are deeply desired by the EAOs but very difficult for the NLD to accept and impossible for the military to countenance.

The organizations representing ethnic nationalities wanted to limit the powers of states while extending the powers of the self-administered zones in the proposals to the 2019 amendment process.

Other EAOs and political parties representing ethnic states made separate proposals to the 21st Century Panglong Conference. Some of them—most notably the SNLD—made submissions to the 2019 constitutional amendment process. For the most part, and in general terms, these proposals are not incompatible with those of the 2016 draft, although they may differ in matters of detail. For example, the Chin National Front proposed establishing a union based on genuine federalism that fully guarantees democratic rights, national equality and the right to self-determination, while the KNU proposed full protection of ethnic minority rights.

It is worth noting, however, that in their proposals to the 2019 amendment process the organizations representing ethnic nationalities currently recognized only in the self-administered zones wanted to limit the powers of states while extending the powers of the self-administered zones.

3.4 OTHER ACTORS

In addition to powerful actors such as the NLD and the EAOs, other actors might become directly involved in constitution-building through the Constitutional Convention proposed in the FDC, or else exert indirect political influence on the constitution-building process.

Perhaps the most visible or palpable constitutional pressure comes from the Civil Disobedience Movement, and the various civil society groups, alliances and strike committees represented in the NUCC. These include the ethnic strike committees, the women’s movement and the various spheres of Myanmar civil society that have been actively or passively opposing the return to military rule. It is worth

noting that the period of relative openness and liberalization experienced before the 2021 military intervention has left Myanmar civil society in a much stronger position today than it was when military rule was imposed in the past. The CDM is firmly on the pro-democracy side but as a disparate group, its specific constitutional aims and views on issues of federalism and national rights may be inconsistent. One issue that seems to unite civil servants, if only on a self-interested basis, is to ensure that they are not penalized, in terms of employment or promotion, for supporting the CDM. If there is one feature that transcends the positions previously expressed by these various groups, it is a firm commitment to human rights and non-discrimination, which might to some extent run counter to the ethnically defined concepts advanced by the ethnicity-based organizations. Youth groups in particular seem ready to move on from ethnic nationalism and identity politics, and to recognize other dimensions of diversity. Their strong positions in the NUCC debates so far indicate that they would also be a significant actor in future debates on constitutional design.

The monks of Theravada Buddhism have in the past been politically active in opposing military rule—especially during the so-called 8888 uprising—while also being generally conservative in terms of preserving the Buddhist nature of the Myanmar state. However, the monks have not emerged as a powerful or unified political actor in the current crisis. There may be a trend towards a clearer separation of state and religion, as also demanded by the above-mentioned civil society groups.

The business community is divided. Much of the private sector, if not necessarily pro-democracy on principled grounds, is in favour of maintaining the relative openness and economic liberalization from which they have benefited in recent years, and is presumably seeking guarantees on the preservation of property rights. However, it should be remembered that much of the business community in Myanmar, especially in manufacturing and utilities, has close ties with military networks, and that much of the military's motive for staying in power is to maintain lucrative control over wide areas of the economy. It can also be assumed that the business community would favour a common market and a unified economy in a future federal Myanmar, with equivalent standards and common institutions for regulating

Much of the private sector, if not necessarily pro-democracy on principled grounds, is in favour of maintaining the relative openness and economic liberalization.

the economy. This has implications for the management of natural resources, taxation issues, investment and land rights, among other things.

The constitutional, state-building 'mission' of the military is to abolish any sense that ethnic minorities have any inherent sovereignty or right to statehood of their own.

3.5 THE ARMED FORCES OF MYANMAR

The military leadership has implausibly claimed to base its actions on its interpretation of the 2008 Constitution. According to its statements, the military takeover of power in 2021 was not a coup, but a lawful intervention by the Commander-in-Chief in the exercise of the powers granted to him by the 2008 Constitution in response to alleged election irregularities. This position is not sustainable and cannot be considered to have been made in good faith, given the excessive nature of the intervention and the lack of evidence for election irregularities. Nonetheless, it shows that the military still wants to hold on, even if superficially, to the 2008 Constitution. It sees the 2008 Constitution as a means to make a gradual withdrawal from power while protecting its institutional interests, and the personal and economic interests of its leadership. All of this is undoubtedly self-serving. However, if the military institution has had a clear constitutional objective historically, it is to keep Myanmar together. It has long seen dissolution of the union as the greatest threat, and used the rhetoric of national unity and appeals against the risk of disorder in the event of secession to justify its hold on power. After all, the first military intervention in Myanmar was provoked by a fear that states might exercise the right of secession they enjoyed under the 1947 Constitution. The constitutional, state-building 'mission' of the military is therefore to abolish any sense that ethnic minorities have any inherent sovereignty or right to statehood of their own.

The military's contributions to the 21st Century Panglong peace process demonstrated persistence on the point of national unity. Its red lines were set out clearly: that no part of the territory of Myanmar shall ever secede from the union, and that principles such as the 'non-disintegration of the Union', 'non-disintegration of national solidarity' and the 'perpetuation of sovereignty' continue to be constitutionally recognized. It also insists on the unity of the Defence Services under the command of the Commander-in-Chief—essentially prohibiting the establishment of separate state-level armed forces. While the military

has not shied away from the word ‘federal’, its meaning is quite different to that of the EAOs. According to the military, the ethnic states and nationalities could enjoy some limited autonomy, but only to the extent granted by a sovereign and unified Myanmar, into which they would be incorporated and from which they could not secede. This has implications for constitutional design. It is notable, for example, that whereas the EAO submissions to the peace conference proposed that residual legislative powers (powers not specified on any of the legislative lists) should be exercised at the state level, the military would retain these residual powers at the union level. Nonetheless, the military has on occasion been more open to decentralization than the NLD. For example, the military and its USDP allies proposed an amendment similar to that proposed by the ethnic parties in the JPCCA to allow state and regional legislatures to elect their own Chief Ministers. The intentions behind this are not fully evident, but it may have been that greater decentralization would allow a countervailing force against domination of the union government by the NLD and allow for the partial preservation of localized influences.

In reality, however, the actions and policies of the military over decades have failed to preserve national unity. They have fragmented the country into countless armed-controlled territories and have failed to establish a single constitutional order around the country. Instead, they have helped the military leadership and their clients to enrich themselves. The utter bankruptcy of the military’s stated intentions is obvious to all, apart perhaps from inside the echo chambers of military propaganda. Even the latter is being challenged by easier access to open information. While the military-controlled State Administration Council and its puppet Union Election Commission might be scheming to orchestrate some form of election to formally reinstate some form of civilian-looking government, none of these efforts will rebuild even the tenuous levels of legitimacy that the 2008 Constitution enjoyed, as that was only contingent on NLD buy-in and the ability of voters to express their electoral choices freely in successive elections.

The most pressing question now is how the military, under a different leadership, might respond to a new constitution being developed by the Constitutional Convention that is to be summoned under the

The actions and policies of the military have failed to preserve national unity and to establish a single constitutional order around the country.

FDC. Would a different military leadership be willing to negotiate? Or would it insist that any return to elected civilian rule must take place under the 2008 Constitution? Given the military's recent actions, in invalidating the 2020 elections, attempting to dissolve the NLD and re-imposing direct military rule through the State Administration Council, it is hard to imagine that the current leadership would be willing to negotiate, or even accept a new constitution, unless forced to do so. Any way forward therefore requires a change in the military leadership and an acceptance of the fundamental demands of the people, as expressed by their legitimate representatives. As long as the military holds the cards in terms of physical force, it may think that it can control both the process and its outcomes, which means that any return to civilian rule would have to take place on its terms. With armed resistance mounting and the military rapidly losing both legitimacy and effective control over territory, however, this is looking increasingly doubtful. One difficulty with the military line of argument is that while the 2008 Constitution (article 421(b)) allows extension of a state of emergency (if instituted constitutionally) for two periods of six months each, after consulting the National Defence and Security Council, it requires that the extension must be reported to the Pyidaungsu Hluttaw. If the Pyidaungsu Hluttaw meets, however, that will expose the fragility, both legally and politically, of the emergency regime. The longer the military's hold on power lasts, the less convincing its already flimsy claims become that it regards itself as bound by the 2008 Constitution. Of course, abandoning the 2008 Constitution would not necessarily mean being open to negotiation on the terms advanced by the NLD or other pro-democracy actors. It might simply mean a return to rule without a constitutional basis or an attempt to impose its own new authoritarian constitution. In either case, abolishing the 2008 Constitution is not within the military's formal or legitimate powers, and whatever power it held under the 2008 Constitution has been forfeited by its own actions and subsequent attacks on the population. The military can therefore no longer be considered a legitimate stakeholder in the constitutional process.

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Chapter 4

PREFERENCE ANALYSIS

As noted in Chapter 2, the 2016 draft constitution prepared by the United Nationalities Federal Council embodies only a partial consensus, even among the pro-democracy side. Nonetheless, this draft was based on the earlier FCDCC draft which had NLD support, and the 2016 draft also forms the basis of the Federal Democracy Charter, to which the NLD signed up. Therefore, while far from universally endorsed, it does represent the most broadly accepted constitutional draft thus far. The purpose of this chapter is not to endorse or criticize the 2016 draft, but simply to analyse it as a starting point for the constitutional discussion. The aim is to use the 2016 draft as a mirror in which the constitutional preferences of the various political actors can be reflected in order to identify areas of convergence and divergence.

Key to this process will be to contrast the 2016 draft with the FDC, and with the positions of the NLD and the military, as well as other actors. In doing so, the Participant Analysis set out in Chapter 3 is drawn on. However, based on an assessment of documents, it is important to reiterate that the positions outlined there include some texts that date from before the 2021 military takeover. The situation in Myanmar is evolving and these positions might shift as the constitutional process progresses.

The 2016 draft includes a list of Basic Principles, which are broadly consistent with the 'Union Vision and Union Values' set out in the FDC.

4.1 BASIC PRINCIPLES

The 2016 draft includes a list of Basic Principles, which sits between the preamble and the first chapter of the draft constitution proper (see Table 1).

These Basic Principles are broadly consistent with the 'Union Vision and Union Values' set out in the FDC. However, there are several potential points of tension. First, the 2016 draft makes a double commitment to 'full self-determination' first for ethnic minorities in 'politics, economics, social affairs, culture and other sectors', and then for the constituent states of the union. Self-determination is a highly open-ended principle that has never been satisfactorily defined or operationalized in a Myanmar context; that is, in a way that is acceptable to both the minority ethnicities and the central

Table 1. Basic Principles in the 2016 draft constitution

| | |
|--|---|
| Sovereign power | All sovereign power of the Union shall derive from the people. |
| Equality | All ethnic groups shall have equal status and rights politically and racially. |
| Self-determination | All ethnic groups shall have full self-determination in politics, economics, social affairs, culture and other sectors. |
| Federal principles | The Federal Union shall be formed with constituent states having full self-determination. |
| Minority rights | The Constitution shall provide for the explicit protection for the rights of ethnic minorities living in constituent states of the Union. |
| Democracy, human rights and gender equality | Human rights and democracy shall be protected without discrimination on the basis of religion, ideology, colour or sex. |
| Secular state | The Union shall be secular. |
| Multiparty democracy system | A multiparty democracy system shall be practised in the Federal Union. |

Source: Unofficial English translation of the FDCDC-UNFC draft produced by the Research and Legal Affairs Department of the UNFC, 2016.

government. If interpreted as external self-determination or a right of secession, that would be opposed not only by the military, which has, of course, opposed the entire federal constitutional democracy project in the past, but also by the NLD, and perhaps by those parties representing 'minorities within minorities' for which the secession of states would pose a threat.

It is notable that the 2016 draft does not contain explicit provisions on secession—neither facilitating it, as the 1947 Constitution did, nor expressly prohibiting it, as the 2008 Constitution did. However, certain provisions in the draft could be interpreted as prohibiting secession, at least unless brought about by means of a constitutional amendment. Article 8, for example, declares the Union Constitution to be the Supreme Law, while article 46A limits the extent of self-determination to that which is permitted 'in accordance with this Constitution'. A more explicit prohibition of secession might be insisted on not only by the military, if the constitution is ever to be acceptable to them, but also by NLD or other unionists. This would not be welcomed by some EAOs or ethnic parties, and may be a sticking point in constitutional negotiations. The carefully poised silence on the issue in the 2016 draft could, in practice, turn out to be the closest possible position to a mutually acceptable compromise.¹⁰ It is also possible to interpret the silence as a bargaining chip. Perhaps a non-secession clause could be introduced later, during the negotiating process, in exchange for acceptance of other provisions enabling more radical decentralization to the constituent units.

Similarly, the commitment in the 2016 draft to the secularity of the union might provoke a backlash from the more socially conservative sections of the pro-democracy movement, which would like to see an acknowledgement at the constitutional level of the majority-Buddhist heritage of Myanmar.¹¹ Religion–state relations are almost always a highly contested constitutional point and could be exacerbated in a Myanmar context in which the Bamar majority is largely Theravada Buddhist. While some ethnic minorities are also predominantly

The carefully poised silence on the issue in the 2016 draft could, in practice, turn out to be the closest possible position to a mutually acceptable compromise.

¹⁰ On the role of constitutional silence in divided societies, see Lerner (2011).

¹¹ Secularism and religious recognition are not necessarily mutually exclusive. Both these things could take many forms and there is a broad spectrum of options from which to choose, including an Indian form of secularism as the non-discriminatory multiple recognition of diverse religions. For more on this, see International IDEA's Constitution-Building Primer, *Religion–State Relations* (Ahmed 2014).

Buddhist, such as the Shan, others are predominantly Muslim (the Rohingya) or Christian. For example, there is a much higher proportion of Christians among the Kachin and Chin people than in the Myanmar population as a whole.

The 2016 draft purports to establish that it is a union of ethnicities, on the one hand, and a union of states, on the other.

4.2 FORM OF THE FEDERAL UNION/MEMBER STATES

The 2016 draft envisages a federal, democratic union. In the English translation produced by the Research and Legal Affairs Department of the UNFC, the name of the country is given as Burma rather than the current official title of Myanmar (2016 draft, article 1). However, the UNFC proposed at the 21st Century Panglong conference that a new country name that represents all ethnicities should be considered because 'Myanmar or Burma refer only [to] one ethnicity'. Burma is then described as 'belonging to all ethnic peoples', which with their 'different histories, cultures and customs' are 'united in their common mission and goals and committed to join hands in the Union with equal status' (2016 draft, article 2). However, article 6 of the 2016 draft states that 'the Union of Burma is formed with Member States that have self-determination'. As noted above, this self-determination is limited by the supremacy of the union constitution (articles 8 and 46A). The crucial point here is that the 2016 draft purports to establish that it is a union of ethnicities, on the one hand, and a union of states, on the other. Since ethnic population distributions do not correspond with state boundaries, this creates an internal contradiction that, unless satisfactorily resolved by negotiation during the constitutional process envisaged by the FDC, could prove highly problematic in the future.

The 2016 draft and the FDC both envisage a federal union of member states that are fundamentally of equal status. This would abolish the current symbolic division between regions in the Bamar majority areas and states in the areas dominated by other ethnicities. Although regions and states have the same powers and autonomy, the stylistic distinction serves to underline the difference between them. The 2016 draft would establish a 'Bama National State' for the Bamar people, collapsing much of the Bamar-majority area into one state. It would also establish a new Wa state as a homeland for the Wa people. This is likely to be controversial as the existing 14-unit

structure reinforces the powers of the Bamar majority, insofar as (based on equal representation in the upper house) it gives them half the seats and half the Chief Minister portfolios. A single Bamar state would reduce that influence, while creating a huge imbalance in terms of population and economic output. Federations with such extreme disparities are rare and could be unworkable in practice.

The 2016 draft provides that 'All sovereign power of the Union shall derive from the people' (Basic Principles) and that 'The sovereign power of the Federal Union derives from the citizens and is in the hands of the citizens' (article 4). The FDC, in contrast, provides that: 'The member states of the Union and the people in these states are the original owners of sovereignty'. Clearly, there is an incompatibility in the formulations of sovereignty and the origin of power between the two documents. The former sees the origin of sovereignty in 'the people' as a collective singularity while the latter sees it in the member states and the people in these states. This discrepancy will have to be resolved one way or the other, or in a carefully worded compromise arrived at by political agreement.

However, while these provisions are 'high stakes' on a symbolic level, the 2016 draft would give substantial recognition to the rights of states in the exercise of sovereign (or constituent) power, since the constitutional amendment formula—which gives the states the final say in any changes to the constitution—in practice recognizes that sovereignty, which may be defined as the authority to make and change fundamental law at a constitutional level, comes from the peoples of the member states.

There is an incompatibility in the formulations of sovereignty and the origin of power between the 2016 draft and the FDC.

4.3 RIGHTS AND GUARANTEES

The 2016 draft constitution contains an extensive bill of rights. This provides for the rights to life, equality before the law, freedom of thought and belief, legal recognition and freedom from discrimination (article 11), as well as freedom from slavery, forced labour and torture (article 11B), freedom of expression, worship and religion, and assembly (articles 13 and 14), the right to privacy (article 15), gender equality (article 16), a right to citizenship (article 17), freedom of movement (article 18), the right to marry (article 19), the right to

political participation (article 20), freedom of association (article 21), freedom from arbitrary arrest and detention (article 22), and the right to a fair trial and due process of law (articles 24 and 25).

These rights are accompanied by a range of economic and social rights, such as property rights (article 26), the right to work and pursue a living (articles 26B and 27), intellectual property rights (article 28), the right to education (article 30), including the right to establish schools and universities outside the state sector (article 32), the right to public healthcare (article 33) and the right to ‘an environment conducive to health and in harmony with nature’ (article 40). Further socio-economic rights are extended to economic sectors or classes. Article 37 protects workers’ rights, including the right to ‘live a life in consonance with human dignity’ with ‘decent working conditions’, ‘social security’, ‘appropriate working hours’, ‘holidays and regular leave’ and freedom to form trade unions and ‘conduct organising activities’. Article 38 protects the rights of farmers, including the right to ‘freely grow, sell, and produce crops’ and to pay taxes in cash—as opposed to as a share of the crop.

On cultural rights, the 2016 draft balances the claims of communal culture and individual cultural development. On the one hand, it envisages communities having the right to maintain their ‘tradition, culture, skills, and knowledge belonging specifically to it through customary and traditional practices’ (article 29), while on the other hand every citizen is free as an individual to ‘develop and promote the culture, customs and tradition of his/her own nationality’ (article 34). There is also a right of every citizen ‘to freely speak and learn the language of his/her own nationality’ and ‘to develop and promote his/her language and literature’ (article 35) in addition to a provision allowing the ‘national languages of the respective states’ to be designated the official language of the state, alongside Burmese and English as the official languages of the union (article 170). A provision on affirmative action (article 39) states that the general principle of equality before the law does not prohibit ‘laws to protect and promote the under-developed nationalities, the disadvantaged communities with low capacity and the traditionally backward and neglected citizen groups/communities’.

The 2016 draft would establish two mechanisms for the enforcement of rights. First, there is a judicial mechanism by means of appeal to the Supreme Court, although not, it should be noted, the Constitutional Court, the jurisdiction (article 121) of which in relation to rights protection is unclear. Second, an independent Human Rights Commission would not resolve legal disputes over rights but be responsible for monitoring and overseeing compliance with human rights, educating the public on human rights and making recommendations to other public bodies (article 173). The draft contains detailed provisions on the composition, structure and organization of the Human Rights Commission (article 173), which would have 11 members appointed by the president following nomination by the Chamber of Nationalities with the approval of the Chamber of People's Representatives.

In sum, this is an extensive, modern bill of rights that is broadly in line with international democratic norms. It certainly goes far beyond the restricted set of highly conditional rights outlined in the 2008 Constitution. The right to freedom of expression, for example, can be limited by law in the 2016 draft only 'insofar as the exercise of these rights contravenes democratic principles and practices, endangers public health, or corrupts public morality' (article 13), whereas the 2008 Constitution allowed limits to be imposed 'for Union security, prevalence of law and order, community peace and tranquillity or public order and morality' (article 354). In other words, there is a shift from limitations designed to restrict democracy in the name of security and law and order to limitations designed to protect democracy. How exactly this would be applied in terms of judicial decisions is for the moment a purely speculative question, but it certainly demonstrates a difference in approach.

It is also worth noting that the 2016 draft declares certain rights to be non-derogable, meaning that they cannot be limited even in emergencies, whereas the FDC is silent on this point and the 2008 Constitution does not provide for any non-derogable rights. In other words, core humanitarian rights, such as freedom from slavery and torture, which are widely recognized as non-derogable under international human rights instruments are better protected in the 2016 draft than in previous texts.

The 2016 draft constitution declares certain rights to be non-derogable, meaning that they cannot be limited even in emergencies, whereas the FDC is silent on this point.

There are some notable potential sticking points related to the nature of the union as set out in the 2016 draft, as a federation both of states and of nationalities, including that freedom of movement between states would be limited.

The freedom from discrimination provision in the 2016 draft includes sexual orientation as a protected characteristic.

As might be expected, the rights in the 2016 draft constitution align with many of those proposed by representatives of ethnicity-based entities at the 2016–2019 peace conferences. They go far beyond what the NLD has previously supported, but they are consistent with the undertakings the NLD signed up to in articles 22 to 27 of the FDC. If they remain consistent with their avowed democratic principles, there is little that the NLD or other pro-democracy actors should oppose.

However, there are some notable potential sticking points, primarily related to the fundamental nature of the union, as set out in the 2016 draft, as a federation both of states and of nationalities. Crucially, freedom of movement between states would be limited (article 31). A state would be able to limit immigration from other parts of the union, and to limit application of the rights of citizens of the federal union in one state to another state. This goes against the basic principles of federalism as they have been understood and applied ever since the Articles of Confederation of the United States of America in 1781. Moreover, each state would have the authority to enact laws relating to its own state citizenship (article 141). Citizens of one state would not, according to the 2016 draft, be able to vote in state or local elections in another state, unless they first became a citizen of that other state (article 135). Given how concepts of citizenship have been linked to historic exclusion and cultural chauvinism in Myanmar, and the risk that exclusionary rules on state citizenship would contravene international conventions in terms of right to statehood, voting rights and freedom of movement, this is all likely to be highly contentious. Those parts of the pro-democracy movement that see Myanmar as a united whole, that value uniformity as a precondition for unity, and focus on the human rights of citizens as individuals rather than as members of ethnic communities are likely to oppose such barriers to internal movement.

A further potential sticking point is that the freedom from discrimination provision in the 2016 draft (article 11) includes sexual orientation as a protected characteristic, and this protection is also extended to members of the armed forces (article 149). Given the current state of LGBTQI+ rights in Myanmar, this is a bold step and is likely to prove controversial.

4.4 PARLIAMENTARY SYSTEM OF GOVERNMENT AT THE UNION LEVEL

The 2016 draft provides for a parliamentary system of government at the union level. There would be a federal president as Head of State, whose powers would mostly be of a formal, symbolic or ceremonial nature (article 102). The federal president would be indirectly elected by the Federal Assembly (Pyidaungsu Hluttaw), that is, both houses of parliament in a joint sitting, for a term of five years (articles 100 and 101). Executive power and policymaking authority would be exercised by the government, which would comprise ministers led by a prime minister who would be nominated by the Chamber of People's Representatives (article 111) and be dependent on the continuing confidence (political support) of that chamber (article 117).¹² All of this is consistent with the norms of a parliamentary democracy and with the content of the FDC, which commits the state to a parliamentary system led by a prime minister (FDC, Part I, Chapter IV, Part III, article 8).

The FDC is committed to the principle of the separation of powers, noting that the three pillars of sovereignty—legislative power, executive power and judicial power—should be clearly separated, exercised independently and exert reciprocal checks and balances among themselves. This is not incompatible with the parliamentary system outlined in the 2016 draft, even though there is a relationship of mutual confidence and dependence between the government and the majority in the lower chamber. Perhaps the most important 'check and balance' in a parliamentary system is not between the executive and the legislature (since these are combined under the office of the prime minister who leads the majority party) but between governing party or parties and the opposition. However, the 2016 draft and the FDC both differ from many parliamentary constitutions in not providing for recognition of a 'Leader of the Opposition'—an aspect of the constitution to which further attention should be paid in future constitutional negotiations.

12 The available English translation of the 2016 draft is inconsistent. Article 111 refers to the prime minister being nominated by the lower house but article 102 refers to the prime minister being nominated by the Pyidaungsu Hluttaw. The latter is assumed to be a typographical/translation error as it would potentially make government formation very difficult, since a working majority that rests on the members of both houses would have to be constructed, and it would be inconsistent with article 117, which limits votes of no confidence to the Chamber of People's Representatives.

The 2016 draft provides for a parliamentary system of government at the union level.

The 2016 draft and the FDC both differ from many parliamentary constitutions in not providing for recognition of a 'Leader of the Opposition'.

Several points could be controversial during the constitution-building process, including the method of election and the electoral system.

In terms of the legislature, the 2016 draft proposes a two-chamber parliament made up of a Chamber of Nationalities (Amyotha Hluttaw) directly elected by the states, with each state having an equal number of members (article 66) and a Chamber of People's Representatives (Pyithu Hluttaw), also directly elected but 'on the principle of election by proportion of population' (also article 74). The two chambers would have nearly equal powers—apart from the fact that the budget could only be introduced in the Chamber of People's Representatives (article 84(B)), while bills related to natural resources could only be introduced in the Chamber of Nationalities (article 84(C)). All this is broadly reflected in and compatible with the FDC, which provides that the 'Federal Parliament is established with Federal Upper House and Federal Lower House which have equal powers', in which the upper house consists of an 'equal number of representatives selected and sent by various member states of the Federal Union', while the 'Lower House is established with representatives elected by the constituents in the elections which are based either on the number of population or townships' (FDC, Part I, Chapter 4, Part III, article 7).

Several points about these provisions, however, are remarkable and could be controversial during the constitution-building process. First, while the 2016 draft provides that members of the Chamber of Nationalities must be directly elected by the states, the method of election and the electoral system are not specified. Indeed, these matters are expressly reserved to the states (article 64). This may lead to considerable variation in the mechanisms for elections and electoral laws between states, which could place additional burdens on officials and political parties to comply with the various rules in different states. Careful thought should be given to how this will affect electoral integrity, electoral administration and electoral campaigning. Are such variations at the state level required, or is there a case for greater uniformity to be specified in the federal constitution?

Second, the electoral system for the Chamber of People's Representatives is not specified in the 2016 draft. It is weakly implied, perhaps, that the current first-past-the-post (FPTP, or single member plurality) electoral system would continue, but this is unclear and other electoral systems could fit within the constitutional space allowed by the draft. There are both advantages and disadvantages

to FPTP. In a Myanmar context it seems likely to favour the NLD for the foreseeable future, while promoting regionally concentrated opposition parties based on ethnic identity, rather than union-wide programmatic parties. This could hinder the deeper consolidation of Myanmar's democracy into a stable competitive system where election results are a judgment on government policy and performance, rather than an expression of ethnic identity. In any case, it would probably be wise to begin a discussion on the various options for changing the electoral system and analysing the possible implications for representation. Greater open-endedness, or keeping the current system for the present but allowing for future change at an opportune moment, might be most beneficial.

Third, there is the issue of constituency boundaries for the Chamber of People's Representatives. Under the 2016 draft, these would simply 'be determined by law'—on the principle of proportionality but with little additional guidance and no redistricting provisions to prevent gerrymandering. This open door to gerrymandering could have grave consequences for the health and resilience of Myanmar's democracy. There is plenty of good comparative practice on the rules on constituency boundaries, most notably having these drawn up by an independent commission rather than by the legislature, and specifying the extent to which deviation from strict proportionality may be allowable to adjust for historical communities, local government boundaries or geographical features. Serious consideration should be given to including such provisions in order to ensure fair elections in the future, particularly in the light of the extreme malapportionment that has been a blemish on the democratic elections of recent years.

Finally, there is the problem of the near equality of powers between the two chambers. The Chamber of Nationalities (Amyotha Hluttaw) under the 2016 draft would have a much greater voice in the legislative process than the same-named body under the 2008 Constitution. In the 2008 Constitution, disputes between the two houses could be resolved in favour of the numerically superior Pyithu Hluttaw (lower house), by means of a joint sitting of both houses (article 95). In the 2016 draft, the option of resolving disputes by a joint session would not exist, and the Chamber of Nationalities would have an effective veto over most legislation. This near

There is plenty of comparative practice on the rules on constituency boundaries, most notably having these drawn up by an independent commission rather than by the legislature.

equality between the two houses has not been well thought through. Although, in the context of a desire to strengthen federalism, it is understandable to want to augment the role of the Chamber of Nationalities as ‘the voice of the states’, a strong upper house could cause problems for the operation of parliamentary democracy. According to the 2016 draft, the prime minister and the government are politically responsible—as fits the logic of a parliamentary system—to the Chamber of People’s Representatives. However, they will not be able to govern effectively unless they can, as a minimum, pass the budget. Failure to ‘secure supply’ (pass the annual budget bill) could lead to a crisis like that which afflicted Australia in 1975, where the government still enjoyed the confidence of the lower house but was forced out of office because it could not get its budget through the upper house.

Other parliamentary systems avoid this problem by providing deadlock-breaking mechanisms—such as limiting the period during which the upper house can delay legislation or resolving disputes through a joint session of both houses. The remedies proposed in the 2016 draft appear to be too weak to perform this function effectively. There is a 21-day deadline for the consideration of budget bills by the Chamber of Nationalities (article 98), but what happens if the bill is not passed in that time is unclear. This could be fixed by simply providing that if the budget bill is not passed by the Chamber of Nationalities within 21 days, it would in any case become law, if the Chamber of People’s Representatives so resolves, in the form last passed by the Chamber of People’s Deputies. There are many examples of such, or similar, provisions in other parliamentary democracies.

For ordinary bills (not money bills), the proposed solution in the 2016 draft is a joint committee to resolve differences between the two houses. If the joint committee agrees to changes in a bill, it is returned to the chamber in which it was introduced. If the bill—in the form agreed by the joint committee—is then passed by both houses, it becomes law. One problem, however, is that there is no constitutional time limit for the work of the joint committee. It could in principle delay a bill indefinitely, preventing it from ever getting to a vote; or it could immediately say that no agreement has been reached, thereby killing the bill. Either way, this puts vast veto power

into the hands of that committee, and its chairperson would become a crucial legislative player in a way that is perhaps out of keeping with the logic of a parliamentary system. This could be resolved by a requirement that the chairperson of the joint committee, in relation to any government bill, should be the Leader of Government Business in the house, or the minister acting as the bill's sponsor.

Even with these small changes, the 2016 draft would still give the Chamber of Nationalities a great deal of power—probably more power than the second chamber of any other parliamentary democracy apart from Australia. Constitution-builders need to consider carefully how that will work out in terms of practical politics. Based on past voting behaviour, it should not be assumed that states will necessarily be dominated by ethnic parties. Nonetheless, the different apportionment and electoral rules might mean that a government with a secure majority in the Chamber of People's Representatives would have to do deals, on either a standing or an ad hoc basis, with state representatives from other parties in the Chamber of Nationalities in order to get the legislative business of the government through parliament. Instead of promoting the interests of ethnic nationalities, the effect might be to enable the government to play off some parties (ethnic or otherwise) and some states or regions against each other, trading funding for votes in a way that is essentially corrupt (so-called pork barrel politics). It would also make consistent policy development and effective policy implementation more difficult across Myanmar as a whole. More 'veto-players' means more friction, more complexity and more opportunities for things to be derailed and delayed. Would this really be in the interests of any ethnic group as the country seeks to recover from crisis?

At the same time, however, it is important, both politically and symbolically, for the Chamber of Nationalities to have a strong voice at the centre. One way to reduce unnecessary friction while preserving a strong role for the Chamber of Nationalities would be to allow the Chamber of Nationalities an absolute veto over concurrent legislation, but not over exclusive legislation. In other words, in the case of a legislative power shared with the states, the states' representatives, through the Chamber of Nationalities, would have a veto over the exercise of that power. If it is a power that is exclusive

The different apportionment and electoral rules might mean that a government with a secure majority in the Chamber of People's Representatives would have to do deals with state representatives from other parties in the Chamber of Nationalities in order to get the legislative business of the government through parliament.

to the Federal Union, however, the Chamber of Nationalities might have a more limited power, such as to impose a 6-month or 12-month delay, which would be long enough to cause the government frustration and to be an incentive for the government to seek to negotiate.

4.5 JUDICIARY AND INDEPENDENT COMMISSIONS

The 2016 draft makes a commitment to the principle of judicial independence (article 120), but this is only weakly operationalized through rules on judicial appointment and tenure. Judges in the Federal Supreme Court are to be appointed by the president having been nominated by the prime minister, and with the approval of the Federal Assembly (article 123). Unusually by today's standards, there is no provision for a Judicial Appointments Commission or similar institution to ensure the non-partisan selection of judges on merit. Nor is there any requirement to consult with other judges before making an appointment.¹³

The 2016 draft establishes minimum qualifications for Federal Supreme Court judges (article 124), who must be at least 45 years old, have at least 10 years of experience in the legal profession and be 'honest' and of 'good moral character'. The 2008 Constitution requires Supreme Court judges to be 'loyal to the Union and its citizens' and not to be a member of a political party (Constitution of Myanmar, 2008, article 301), but these requirements do not appear in the 2016 draft. Removing the ban on judges being members of a political party could be problematic, especially given the potentially highly politicized nature of the appointment process. The qualifications of other judges are not specified in the 2016 draft, since it envisages that the judiciary subordinate to the Federal Supreme Court and the Constitutional Court would be regulated either by the state constitutions or, in the case of the federal courts, by ordinary statute law.

The removal process for all federal judges is specified in article 125 of the 2016 draft. Judges can resign at will but would otherwise serve

¹³ In India, for example, judicial appointments are made after consultation with a 'collegium' of senior judges.

until retirement at the age of 75, unless they are removed on the grounds of being 'permanently incapable to perform his/her duties' or 'found guilty of committing an act of gross misconduct'. A decision on removal would require a 75 per cent majority in the Federal Assembly (both houses of parliament), based on a recommendation by an investigatory committee of both houses set up following a proposal from the Federal Attorney General. From the point of view of preserving judicial independence, this is a significant improvement on the process set out in the 2008 Constitution, in which the president had an active role in the removal of judges (article 302).

The 2016 draft proposes a dual or parallel court system, in which federal courts would operate alongside state courts (articles 121–28). Criminal and civil cases arising from state law would be handled in the state courts, while the Federal Supreme Court would have jurisdiction only over certain enumerated matters of a federal nature, such as disputes between states or between citizens of different states (article 127). This highly decentralized judiciary is in contrast to all previous constitutions, which provided for a single, unified judicial hierarchy. The 2016 draft maintains the distinction found in the 2008 Constitution, but not in the 1947 Constitution, between the Federal Supreme Court and a separate Constitutional Court that would have jurisdiction over matters of constitutional interpretation (article 121).

Another form of separation of powers is envisaged in the 2016 draft through the existence of independent commissions, such as a Human Rights Commission, a Commission for Gender Equality, a Commission for Investigation and Eradication of Corruption, a Civil Service Commission, an Elections Commission, an Environmental Protection Commission, a Commission for the Protection of Child Rights, a Commission for the Protection of Minorities, and a Truth and Reconciliation Commission (articles 172 and 174). This list is not reflected exactly in the FDC, which foresees an Anti-corruption Commission, an Elections Commission, an Anti-discrimination and Human Rights Commission, a Right to Information Commission and an Anti-gender-based Violence Commission. While the Civil Service Commission, a Commission for the Protection of Minorities and a Truth and Reconciliation Commission are not mentioned in the FDC, that does not necessarily rule out their establishment by ordinary

The 2016 draft proposes a dual or parallel court system, in which federal courts would operate alongside state courts.

statute or their inclusion in a subsequent constitution based on the FDC.

4.6 DISTRIBUTION OF POWERS BETWEEN UNION AND STATES

On the division of powers between the federal and state levels, the 2016 draft uses two lists: an Exclusive List, on which only the Federal Assembly can legislate (article 103); and a Concurrent List, on which both the Federal Assembly and the state legislatures can legislate (article 93).¹⁴ In cases of inconsistency, in relation to concurrent matters, Federal legislation prevails (article 98). Anything not on either list would be a state-only power. In this respect, the 2016 draft resembles Nigeria's Constitution of 1963, which also had specific Federal and Concurrent lists, where anything not on those lists was retained as a residual power of the states.

The crucial point, however, on which the 2016 draft and the FDC are in harmony, is that residual powers should remain with the states rather than the union.

This arrangement differs somewhat from the FDC, which provides that: 'Power of the Union, power of the states and concurrent powers shall be determined and enacted'; and that 'Only the powers necessary to exercise for the common interests of the member states of the Union shall be conferred to the Union'. In other words, the FDC envisages a three-list system like India's, which has a union list, a concurrent list and state lists. This difference of approach would have to be resolved politically through negotiation.

The crucial point, however, on which the 2016 draft and the FDC are in harmony, is that residual powers should remain with the states rather than the union. This is favoured by the ethnicity-based political parties, since it leaves scope for a gradual expansion of their powers into that unoccupied constitutional space. The NLD has not historically supported placing residual powers with the states, and neither the party's proposals at the 21st Century Panglong conferences, nor the proposed 2019 amendments, refer to any changes from the 2008 Constitution in this regard. Nonetheless, insofar as the NLD has signed up to the FDC, which clearly specifies

¹⁴ The numbering on the English translation provided is erratic. Occasionally, two provisions have the same article number.

that ‘Residual powers [...] shall remain with the member states of the Union’, it must be regarded as now accepting that principle.

Whether in two lists or three, however, difficulties remain in defining exactly which powers and areas of legislative competence should be included on each list and how these powers are to be backed by appropriate fiscal resources. While making general commitments to a highly decentralized form of federalism, the FDC is vague on such details and much would still need to be negotiated during the constitution-building process. Aspects such as practical implementation and financial feasibility will certainly also have to be reflected on early in the design stage. Most of the ethnicity-based parties and EAOs will demand sweeping powers at the state level, and this is likely to be resisted by the more centralizing or Bamar-majority elements of the pro-democracy coalition.

4.7 INSTITUTIONS OF GOVERNMENT AT THE STATE LEVEL

In the 1947 and 2008 constitutions, the institutions of government at the state level were defined by the union-level constitution and there was no autonomous scope for the states (or states and regions) to adopt their own arrangements of self-government. In contrast, the FDC and the 2016 draft allow states to adopt their own state constitutions. This has been a long-standing core demand of those EAOs that are signatories to the NCA, and was a contentious issue in the 21st Century Panglong peace conferences.

The FDC recognizes the right of states to adopt their own constitutions but places some limits on that power, particularly in terms of the protections offered to ‘minorities within minorities’ and recognition of local government (FDC, Part I, Chapter IV; Part III, articles 12–14). These protections are also outlined in the FDC’s commitment to human rights throughout the union, including recognized rights for ethnic and religious minorities within the states (FDC, Part I, Chapter IV; Part III, articles 22–27). For instance, the FDC requires that ‘there shall be priority or specific space provided for ethnic minorities in State governments, State parliaments and local governance so they can participate in politics and decision-making’

While the FDC makes general commitments to a highly decentralized form of federalism, details still need to be negotiated during the constitution-building process.

(FDC, Part 1, Chapter IV, Part III, article 26). However, these provisions are only general principles—they are not well defined and would need to be translated into enforceable constitutional terms.

The 2016 draft says nothing about local government, which would fall solely and exclusively within the domain of the states.

The 2016 draft does only an incomplete job of operationalizing those principles. The 2016 draft would allow states to adopt their own constitutions with very few constraints on their content and the principles on which the member states would base their own constitutions are to be determined by the states themselves. The only stipulation is that they must be in accordance with the constitution of the federal union, which mandates a separation of powers (article 48). Although the FCDCC sets out four principles on the design of state constitutions, the 2016 draft does not explicitly state that these are binding on the states.¹⁵

It is worth examining how other federal systems recognize and guarantee local democracy, and the rights of minorities within minorities.

Similarly, the 2016 draft says nothing about local government, which would fall solely and exclusively within the domain of the states, and be regulated by state laws and subject to state constitutions. This approach allows the maximum amount of state autonomy but leaves the rights of ‘minorities within minorities’ vulnerable. It also allows the states to centralize power and resources within their own state capitals at the expense of their outlying areas. It is notable that in the peace process and the 2019 proposed amendments, some ethnicity-based parties, such as those representing the Pa’O people, resisted the extension of state powers for fear this might encroach on the limited autonomy they enjoy in their self-administered zones or divisions.

For these reasons, it is worth examining how other diverse federal systems recognize and guarantee local democracy, and the rights of minorities within minorities, in their federal constitutions. In particular, Chapter 7 of the South African Constitution, on the recognition and protection of local democracy in a federal system, and article 371 of the Indian Constitution, on the establishment of particular

¹⁵ These principles, as set out in a footnote to the English translation of the FCDCC-UNFC draft, produced by the Research and Legal Affairs Department of the UNFC, 2016, are as follows: State Constitutions should (a) build on the basis of the Constitution of the Federal Union; (b) provide for multiparty democracy; (c) defend the democratic rights of the people; and (d) provide for the rights of nationalities in the state.

guarantees for particular communities, could provide useful material for comparative study, to see what could be adapted for inclusion in a future federal constitution for Myanmar.

4.8 SECURITY SECTOR REFORM AND CIVIL-MILITARY RELATIONS

In a notable departure from the 2008 Constitution, the 2016 draft would remove members of the military from the legislature at all levels. It would establish a genuinely and conventionally democratic system of government, in which the military are subordinate servants of a civil state, not a political and economic power. According to the 2016 draft, the armed forces would be under civilian control (article 154). The president would act as Commander-in-Chief and operational control would be vested in the government acting through a civilian minister of defence (article 152). This differs from the 2008 Constitution, in which the military Commander-in-Chief had substantial political and institutional autonomy over the armed forces.

Under the 2016 draft, the Federal Assembly would have general authority to legislate on the organization of the armed forces. War would be declared by the president on the advice of the government, with the approval of the Federal Assembly (article 102). Additional provisions in the 2016 draft include efforts to 'civilize' the armed forces through compulsory training in democratic principles and human rights (article 156). These provisions are likely to be supported across the pro-democracy movement, although achieving them, which would involve displacing the power of the existing military leadership, would obviously be very difficult.

Perhaps the most controversial proposal in the 2016 draft is the ability to raise and maintain state-level armed forces (article 51). Although this power would be subject to federal law, the powers of the states in the Chamber of Nationalities could mean that this might not be an effective check. State armies are limited in the 2016 draft by size, in terms of personnel, to 0.5 per cent of the population of the state. Nonetheless, this could result in a 25,000-strong army in Shan

According to the 2016 draft, the armed forces would be under civilian control.

State, for example, which would be a similar sized army to that of Kenya or Belgium.

All these proposals are broadly in line with the FDC, which foresees the right of the constituent units to establish state police and state security forces (Part I, Chapter IV, Part III, 30), although it is not clear whether this means state armies with warfighting capabilities or a lesser 'gendarmerie' force. The FDC also makes provision for the establishment of a National Security Council with a civilian majority, which is not explicitly provided for in the 2016 draft. The FDC makes a further commitment to inclusion in the security sector (Part I, Chapter 4, Part III, article 33), but what this means in practice is not clear from the text. It might imply the integration of the EAOs into the Myanmar armed forces, or simply be an attempt to broaden the base of recruitment to include more non-Bamar officers.

Chapter 5

CONCLUSIONS

To conclude, Myanmar's political and constitutional landscape has been changed out of all recognition by the events of February 2021. The 2008 Constitution, which—despite its many faults—had previously provided a framework that limited actors' room for manoeuvre, has lost its political—and arguably its legal—validity. According to the pro-democracy movement, it has been repealed, the FDC is acting as a pseudo-interim constitution and a new constitution for a federal democratic Myanmar is now to be written—not on a blank sheet of paper, but as a process of filling in the gaps in a series of documents (chiefly, but not exclusively, the FDC) that sets the constitutional agenda. Achieving this agenda will require the defeat or disintegration of military rule, or a negotiated settlement—but at least the pro-democracy side could reach agreement, in constitutional terms, on what it is striving for.

This means a strategic realignment by the NLD. In 2008–2021 its interests lay in accommodating the military, working within the boundaries set by it and trying to achieve limited, incremental reform. Following the military intervention, however, its interests now lie in doing a deal with the EAOs and ethnic parties to unify the pro-democracy movement. This means that the NLD will have to shift its constitutional position in favour of more far-reaching constitutional renovation and a deeper commitment to a federal, multinational union than before. The FDC provides evidence of this shift, but many details still need to be worked out. In working out those details, reference can be made to previous drafts. These are not perfect, uncontroversial or universally agreed—but they do provide a starting

Myanmar's political and constitutional landscape has been changed out of all recognition by the events of February 2021.

point that builds on previous agreements and avoids wasting all the effort already put into constitutional drafting.

The 2016 draft, on which the FDC is based, is therefore worthy of careful study. This Report has delineated the main features of the 2016 draft and identified the points of convergence and divergence between that draft, the provisions of the FDC, and the interests and positions of the NLD, the EAOs and other political parties and political actors. The points of convergence are many: a commitment to democracy, parliamentarianism, human rights, federalism, constitutionalism and civilian control of the armed forces provide a solid basis for consensual constitution-building. However, agreement remains at an abstract level. It will require careful negotiation on matters of detail to arrive at a workable constitutional text.

Among the areas still open to debate are: (a) secularism; (b) the principle of 'state sovereignty' as opposed to the sovereignty of the people of the union as a whole; (c) the precise distribution of powers, competences and resources between the union and the states; (d) the content and limits of state constitutions; (e) state citizenship; (f) voting rights in the states; (h) freedom of movement between the states; (i) state armed forces; (j) state boundaries; (k) local government, the protection of 'minorities within minorities' and self-administered zones; and (l) LGBTQI+ rights.

Finally, there are aspects of constitutional design, which are insufficiently worked out in either the 2016 draft or the FDC, that need further consideration at the technical level even if they are neither divisive nor controversial. Chief among these are: (a) the powers and composition of the upper house; (b) resolution of disputes between the two houses; (c) recognition of a Leader of the Opposition; (d) the composition and powers of independent commissions; and (e) the role of the Constitutional Court, its relations with the Supreme Court, and the overall structure and independence of the judiciary.

These areas of disagreement, or areas for development, should therefore be the focus of constitutional decision makers, and the priority for international support in terms of technical assistance and capacity-building.

This Report has delineated the main features of the 2016 draft and identified the points of convergence and divergence between that draft, the provisions of the FDC, and the interests and positions of the NLD, the EAOs and other political parties and political actors.

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A NEW CONSTITUTION FOR MYANMAR—Towards Consensus on an Inclusive Federal Democracy provides a study of the constitutional history and trajectory of Myanmar, together with an analysis of the positions of certain key stakeholders in Myanmar with regard to constitutional issues.

Areas of constitutional convergence (where the key democratic stakeholders are broadly agreed) and divergence (where they differ) are identified, as are those areas of constitution-building on which the key stakeholders are relatively silent, and that require further attention. This publication provides democratically legitimate political actors in Myanmar, as well as the international community in support of Myanmar's federal democracy, with a finer understanding of the available range of viable constitutional choices.

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