

# **The 2008 Myanmar Constitution: Analysis and Assessment**

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## **I Purposes of constitutions and constitution making processes**

In July 2008, as the people of Myanmar were suffering from the terrible ravages of the worst cyclone in decades, thousands of people were dead and many more missing, communications in various parts of the country were disrupted, and the nation was preoccupied by the rescue and care of those who survived the cyclone, the military regime held a referendum on the new constitution that it had prepared. It knew that this was not the time to hold the referendum and that many people would not be able to cast their vote. It ignored local and international pleas to postpone the election under it was possible to hold a proper and fair referendum. Predictably the results announced by the regime showed an overwhelming majority for the constitution, in the upper 90 percent. There were numerous reports that the ballot papers were marked by state officials, regardless of the preferences of the voters. The voters themselves knew that they would be penalized if they voted against the draft constitution. In any event, most of them had had no opportunity to read the draft, much less to study or discuss it. The cynicism with which the regime held the referendum and manipulated the results was on a par with the cynicism and coercion by which the draft was prepared.

In this paper I describe the reason why the regime undertook the task of drafting a new constitution and the process of preparing it. I examine the principles which the regime claims underlie the constitution (mainly as set out in the introductory parts of the constitution) and show the falsity of the claims. I demonstrate what I consider are the reasons for the constitution—the principal one being the perpetuation of the dominance of the military. I begin the paper by exploring the purposes of constitutions and the possible roles of constitution making processes, in order to establish a framework to analyse the new Myanmar constitution.

A constitution has to be assessed in the context and the purposes for which it was drawn up. The same can be said about the process of making a constitution. Many recent constitutions have been made and adopted in the context of civil, often armed, conflicts. The process which leads to a new constitutional settlement is often initiated before the conflict, or at least after the fighting, has ended. Since many civil disputes are about the structure of the state, the distribution of power, and access to national resources, matters normally dealt with in the constitution and related laws, the dispute can in a sense be said to be about the constitution. Consequently a new constitution is often seen as the successful conclusion of the conflict.

The process of making the constitution is as important as the outcome; in fact the process determines the outcome. But it also serves other purposes, including reconciliation and trust building. There are additionally strategic considerations, particularly about the scope and pace of constitutional reform. Critically, constitutions conceived and adopted in conflict/post conflict situations are the result of negotiations, or should be if they are to succeed.

The constitution which the Government of Myanmar (State Peace and Development Council) submitted to the people must therefore be judged in its context and the purposes attributed to it by the government. Context (on which there can be, and are, different perspectives) is more complicated than the purposes (which are set out clearly in the constitution and are summarized later in this paper). Various issues arise as regards to the context. We know that Myanmar has been ruled by the military junta

for several decades and now professes to be moving to a multi-party democracy within the overall authority of the armed forces (Tatmadaw). If democracy is an objective, then is the constitution the beginning of the process which would lead to further consolidation of democracy through constitutional amendments (a transitional document) or is it the final form and foundation of democracy? A transitional document has objectives, methods and trajectory different from a final system and should be judged as such<sup>2</sup>.

If it is transitional, then one would examine the constitution as part of a wider strategy: will it bring about sufficient change, leading ultimately to full democracy; will it enable democratic forces, internally and externally, to engage the military constructively; will it open up negotiations and dialogue and empower civil society, through participation and greater knowledge of constitutional and political options for the future? Or, on the contrary, will it confer spurious legitimacy on the present rulers who may not be willing to accept a fundamental shift to democracy and participation or respect for minority cultures and aspirations—in other words, under the guise of new constitutional forms, authoritarianism will continue to flourish.

The Myanmar government no doubt regards the constitution definitive; judged as that, it may well, as this paper concludes, fall short of the purposes attributed to it. But others may make up their mind on whether to support the constitution and associated developments on the basis that it is a transitional document representing some movement from the undemocratic and authoritarian regime of the military junta.

The judgment on the process by which the constitution was prepared would also depend on whether it is perceived as transitional or definitive. Transitional documents are often the result of a less than democratic and participatory process—the circumstances may not be propitious for this, and the agreement of the warring factions urgent, but the document may hold the promise of further democratization and in course a participatory process of making the next constitution.

Another element of the context is the socio-political situation. Many recent constitutions have either focused on achieving the traditional type of democracy (as in Latin America and Eastern Europe). Others have as their primary focus the resolution of internal, often ethnic, conflict (adjusting traditional democratic concepts and practices to the exigencies of inter-community relations).

The principal problems facing Myanmar, as far as process is concerned, are the active participation of the people in deciding on the constitution and reconciliation between the majority Burman community and ethnic minorities, and between proponents of democracy and proponents of authoritarian militarism. And as far as substance is concerned, the problems are democratization and the recognition of Myanmar's ethnic and linguistic plurality.

Within this broad introduction, the paper examines first the process by which the draft constitution was prepared and adopted, and compares it with what is now regarded as

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<sup>2</sup> For example, Pedersen says that 'the most important mechanisms for domestic negotiations and co-operation may be the referendum, the elections, and a future mixed parliament and broader political institutions' (2008, typescript).

a process appropriate to recognition of people's sovereignty and their right to determine the system of governance. The paper will then examine the substantive content of the constitution and assess it both by reference to the declared objectives of the SPDC and the challenges facing the country.

## II Context of Constitutional Reform

The context of constitutional reform in Myanmar is characterized by several factors. The country has been ruled by an authoritarian and oppressive regime for several decades now. The current regime has resisted democratic reforms and spurned the people's choice of its leaders as manifested in the results of the 1990 elections, and the most popular leader in Myanmar has languished for years under house arrest. There has been a total absence of the rule of law. Many people have struggled for democracy. When given a chance people have overwhelmingly expressed their preference for a democratic and accountable government.

The suppression of the rights of individuals and communities has been reinforced by the denial of democracy. There have been massive violations of the most basic rights and freedoms of the people. There is no freedom of speech. There is zero tolerance for dissent of any kind. Numerous Burmese have been forced into exile. The regime has exploited the labour of the people; children and others are forced into labour. The scale of poverty, despite the country's riches, is appalling, denying many people basic necessities of life. Myanmar's resources have been appropriated and misused by a small class connected to the military.

The people of Myanmar suffer from the failure of national identity, in considerable part due to the lack of democratic discourses and practice. There is much hostility and mutual suspicion among Myanmar's elites. Due to the colonial organization of Burma, at it was then called, and the politics of the post-colonial period, there are deep divisions among the people. A majority of the people (perhaps two-thirds) are Burman<sup>3</sup>, who look upon the country as a 'nation', despite diversities of language, culture and religion. For most of them the priority in reform is democratization. Of the remainder, the most numerous are indigenous ethnic communities, divided principally in seven groups. They do not share the same history or aspirations, each conscious of its distinct identity and wish to be represented by leaders of their own community. Some of the ethnic leaders are devout Christians, which marks them off from the majority. Many share a common desire for independence or a substantial measure of autonomy, and the right to the benefits of natural resources that lie within their traditional homelands.

An author has commented on the broad consensus among them concerning the legitimacy of political recognition for seven major non-Burman ethnic groups politically expressed in the form of Arakan, Chin, Kachin, Shan, Karenni, Karen and Mon states. These states occupy the mainly mountainous periphery surrounding the mainly lowland Burman-dominated centre ('Burma proper' under the British). They account for most of the non-Burman population, although Rangoon is rather mixed as is the delta region and Tenasserim Division<sup>4</sup>.

When Burma's independence was being negotiated after the end of the Second World War, the ethnic minorities wanted their own independence—their areas had been governed by the British as less than full part of Burma. Reluctantly, they agreed to the merger with the rest of the country but on the condition that they would enjoy significant autonomy in the form of a federation. But the 1947 Constitution provided

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<sup>3</sup> 68% according to Central Intelligence Agency [CIA], 2002.

<sup>4</sup> Alan Smith, 'Burma/Myanmar: The struggle for democracy and ethnic rights' (unpublished)

only for a weak form of federation, which was further weakened by constitutional amendments.

Their feeling of alienation led to insurgencies and assertions of their sovereignty or autonomy. Conflict between the dominant ethnic Burman population and the ethnic minorities or ethnic nationalities has been central to the country's troubled history since independence, on the one hand an assimilating centralism and on the other the demand for recognition of the right of ethnic self-determination.

The Burman political elite is divided on the question of the legitimacy of non-Burman ethnic grievances and aspirations. The Burman-dominated military insists that it must impose its nationalist will through the Burmanisation of ethnic minorities in order to counter ethnic efforts to separate from Burma. Burman political leaders in opposition to the military tend to be more willing to recognise non-Burman grievances and to acknowledge that ways must be found to satisfy non-Burman aspirations.<sup>5</sup>

These ethnic communities or minorities have suffered greatly from the political developments and systems of Myanmar. The natural resources which they consider belong to them have been looted and exploited by others. The areas of their habitation are otherwise neglected and underdeveloped. They feel that they are grossly under-represented in the institutions of the government, and their voice seldom heard. Little has been done to protect and promote their cultures, as they come under increasing threat from the exploitation of their land and its resources.

The most pressing and substantive problems that face Myanmar are therefore national reconciliation, nation building and identity, protection of human rights, democracy and participation. The constitution must provide a framework within which ethnic conflict can be ended and its diverse communities can live in harmony and their cultures respected. There must be demilitarization of the state which is at the centre of many of the country's problems.

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<sup>5</sup> Alan Smith, *Ethnic Problems And Constitutional Solutions*, July 2003

### **III Process**

The obvious and important function of the process is to make a constitution. In recent years a number of studies of different processes have tried to isolate the components of a process and the ways they can be designed to most effectively achieve a good and workable constitution. This has to do with the institutions which are adopted for the drafting and enactment of the constitution, the system of voting for making decisions, incentives for consensus building, the extent of openness and transparency, the use of experts and comparative experiences, and most critically, the scope and modalities for participation of the political parties, civil society organizations, the international community, and people in general.

But the process can also achieve other important objectives. For most of these, it is now widely believed that a participatory process is essential. A participatory process is one in which large sections of the people are able to engage in deliberations and influence the outcome. It requires that the institution or institutions which prepare and adopt the constitution are broadly representative of the people and its diversity. People have opportunities to learn about the process and the critical issues which the constitution must deal with. They are given time to submit their views to the decision making body and to comment on the draft constitution before it is adopted.

The Universal Declaration of Human Rights states that the will of the people is the basis of government. The UN has proclaimed the right to self-determination as the foundation of all other rights. It is now widely accepted that this principle gives the people of a country the right to determine their constitution, which implies that they must be given opportunities to participate in the process of making the constitution. Article 25 of the International Covenant on Civil and Political Rights (ICCPR) reinforces the principle of self-determination by guaranteeing to every citizen the right 'to take part in the conduct of public affairs, directly or through freely chosen representatives'. The Human Rights Committee has explained that Article 25 'lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant', and that entails the full participation of all communities in the constitution making process.

Apart from acknowledging the sovereignty of the people, a participatory process has a number of advantages. In many countries, behind civil conflicts over the structure of the state lies a deeper disagreement about nationalism and identity. There is no agreement on the cultural foundations of the country and there is no common feeling of loyalty to state symbols and institutions. The process of re-constituting the state often does not succeed because of the lack of agreement between diverse peoples on what the 'nation' means to each. Nation building must precede the restructuring of the state. Participatory processes of constitution making provide forums and opportunities to discuss and agree on the nature of the state, and to balance general interests and identities with particular interests and identities. In this way an acceptable basis of nationalism and the vision for the country's future can arise.

Participation also helps to reconcile groups and communities who have previously been on the opposite sides of the conflict, by articulating, and then resolving, differences that have divided them. It is a way of building trust between them.

A participatory process is also a process of education into the values and mechanisms of democracy and peaceful co-existence, facilitating people's engagement in the political and constitutional process and helping in the implementation of the constitution. Deep seated conflicts are seldom resolved by agreements among elites which do not carry the people with them. It is the people who suffer most from violence, displacement, loss of home and property, and opportunities for employment, education, and family life—and their consent to the new arrangements is an essential condition for the success of the settlement.

### ***Process for the preparation of the Draft Constitution***

The origins of the process lie in the refusal of the military junta, the State Law and Order Council (SLORC), to honour the general elections to the National Assembly in 1990. The junta had assumed power through a coup in 1988 promising hold democratic, multi-party elections. The elections were duly held two years later, in which the National League for Democracy (NLD), led by Aung San Suu Kyi, won about 80% of the seats and other democratic forces just over another 10%. This was not the result that the junta either desired or anticipated. It refused to convene the National Assembly, but when it came under increasing local and external pressure, it stated that neither the 1947 nor the 1974 was “suitable for the emergence of a strong government”. A government could only be formed after a new constitution was adopted by the Assembly based on principles proposed by a National Convention. This was in contradiction to the earlier position of the junta that the members of the Assembly would be free to decide whether to operate under either of the previous constitution or adopt a new constitution. The NLD preferred to operate under the 1947 constitution, which was the independent constitution for which there was wide support from most people and communities, and on the basis of which together with 80% of elected members, it had adopted a new constitution. The junta refused to negotiate with the NLD on the formation of a new constitution.

There were two stages in the adoption of the new constitution. The process began in January 1993, two and a half years after the elections. Under it the basic principles of a new constitution would be drafted by a National Convention; the State Law and Order Restoration Council (SLORC) would take a keen interest in the process to “protect all the segments of society, especially the nationalities and ethnic minorities”. The National Convention, with members from various political groups and the military, was established at the initiative of the government on 10 July 1992. 702 members had been hand-picked by the SLORC; the National Convention included only 99 of the persons who were successful in the 1990 elections (of which the NLD was given only 88), out of 485 who won seats. The process itself was highly undemocratic and manipulated. There were little transparency with strict restrictions on the freedom of expression backed by severe penalties for breach. Some essential principles (like the continuing dominant political role of the armed forces) were prescribed in advance. In November 1995 the NLD pressed for the liberalization of the procedure and the rules and on the refusal of the SLORC the following month, it decided on a boycott (subsequently its members were declared to have forfeited their seats for non-attendance). When the NLD started its own deliberations on a new constitution, fresh legislation was introduced to impose draconian sanctions for attempts at constitution making outside the framework of the National Convention, and fresh restrictions imposed on its procedure to increase secrecy and manipulation by the junta.

The National Convention seldom met after this and lost any momentum it might have had. The second stage started in 2003 when the then Prime Minister Gen. Khin Nyunt announced a new time table for ‘implementing in a step-by-step and systematic manner the following political program for building the nation’. Under his scheme, the National Convention would be reconvened to complete the ‘basic principles and detailed basic principles’, on the basis of which a new constitution would be drafted. The constitution would be submitted to a referendum (rather than to the National Assembly elected in 1990, as originally announced). ‘Free and fair’ elections would then be held in accordance with the new constitution for Pyithu Hluttaws (legislative bodies). With the convening of these bodies the task of building a ‘modern, developed and democratic nation’ would commence.<sup>6</sup>

The NC did not meet again until 17<sup>th</sup> May, 2003<sup>7</sup> (when allegedly the NLD was invited, but refused to attend due to disagreement about the size of its delegation). However, according to government sources, 1086 delegates, over 600 of them from the ‘national races’, attended and concluded their work on 3<sup>rd</sup> September 2007. Subsequently a 54 person commission including ‘legal experts from states and divisions, professors of various fields, and those who are well versed in the political, economic and administrative affairs’ was set up to draft the constitution. On 3<sup>rd</sup> December 2007 the draft was launched and adopted on 19<sup>th</sup> February 2008. Earlier, on 9<sup>th</sup> February it was announced that the referendum would be held in May 2008; and that elections to the legislature would be held in 2010.

On the face of it, the process does not meet the standards of public participation established by international law nor those necessary for legitimacy and reconciliation. First the military regime repudiated the results of the 1990 general election which were won by the NLD under the leadership of Aung San Suu Kyi. When the government established the National Convention (NC), it handpicked, as has been mentioned., most of the 707 delegates. With the withdrawal of the NLD in late 1995, and subsequently of some other groups, few delegates were left with any legitimacy or popular mandate.

The most important of the principles had been laid down by the government even before the NC met, including “a leading role in politics for the military”. Most of the principles adopted by the NC were proposed by the regime, suggesting a high degree of orchestration, and resistance to proposals by other delegates. These principles included that appointees of the military who would constitute 25% of members of representative bodies and a significant portion of the executive. Speeches by delegates were censored; additionally, delegates were forbidden, under threat of punishment, from discussing publicly the proceedings of the NC. It enacted a law (No. 5 of 96) to provide for imprisonment for up to 20 years for any one who undertook constitution drafting activity outside the framework of the NC or expressed any criticisms of the NC or its principles.

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<sup>6</sup> (New Light of Myanmar, 31 August, 2003)

<sup>7</sup> Found in <http://www.burmalibrary.org/show.php?cat=404&lo=d&sl=0>

The National Convention (Preparing, Procedure, Proceeding, Legislations, Statement etc..277) (paragraph) 1.

Attempts to re-start the process, with NLD participation, by the liberalization of the rules and the release of Aung San Suu Kyi from house arrest, were frustrated by the government. Some groups from the ethnic minorities also withdrew and those who joined found that little regard was paid to their demands for a federal system which were not even presented to the NC, being filtered out by a military dominated committee set up for this purpose. The basic 'principles' of the NC were so detailed that there was little scope for the drafting committee, which was composed of nominees of the military instead of elected representatives as was originally promised.

The military government, on its part, claims that the process was participatory. It says, 'Representatives of various national races and the people participated in the process of holding the National Convention and drawing the State Constitution, and the entire people will participate in the holding of referendum, approving the draft and implementing the democratic transition processes. So, public participation will make history of the nation'.<sup>8</sup> The Referendum Commission told the UN Envoy Ibrahim Gambari that delegates to the NC were not appointed by the government but chosen by the parties and delegate groups.

On 28<sup>th</sup> February, 2008<sup>9</sup> legislation for the referendum was published. The referendum was conducted by a 45 person commission ('The Commission for Holding Referendum') appointed by the State Peace and Development Council. It was to decide on the timing of the referendum of which it must give at least 21 days notice. The commission was to work through a number of state and district sub-commissions, who would be responsible for preparing the initial list of voters (but no criteria for eligibility to vote were laid down). Those abroad with the permission of the government and specified categories of persons (mostly students and members of the Tatmadaw) who were away from their place of origin would be able to vote. There were also provisions for advance voting by those who will be away from the area of their registration. 'Members of religious orders' are disqualified from voting (as are prisoners and 'undischarged bankrupts').

The law does not specify a minimum percentage of the total electorate who must vote before the vote is valid or what the percentage of affirmative votes is required for the adoption of the constitution. The rule on adoption was prescribed in the Draft Constitution (Article 1 of Chapter XIV) that provided for the adoption by the assenting votes of more than half of all the people who have the right to vote. There was no requirement for specified majorities in a minimum number of states and divisions for adoption. It would therefore seem that a simple majority of those voting would suffice (the Commission is required to add up the yes, no and spoiled votes from all parts of the country before declaring the results. It is odd that the procedure for the adoption of the constitution should be stated in the draft constitution which has no legal force rather than in a prior law such as the referendum act.

The government roadmap did not state what would happen in the event the draft was rejected. As mentioned at the beginning of the paper, such a contingency was not on the horizon; not only the military, but no one else expected a free and fair referendum. There were no opportunities for debate. Those opposed to it were persecuted and many key actors and organizations are in exile, unable to return for fear of arrest. The

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<sup>8</sup> *The New Light of Myanmar*, 28 February 2008.

<sup>9</sup> <http://news.bbc.co.uk/2/hi/asia-pacific/7338815.stm>, New Burma constitution published, 9<sup>th</sup> April 2008.

commission rejected the suggestion of Mr. Gambari, UN representative for Myanmar, that international observers be invited, saying that the 'constitution is within the State sovereignty' and 'there were no instances of foreign observers monitoring the events like a referendum'.

The process was designed and managed by the military junta, by a group which usurped power from a democratic government in 1962 and denied the right of the winner of the 1990 election to form a government. No independent institution had responsibility for particular parts of it or for managing the process. The process was secret. Only drafts prepared by the military were presented to the NC. The government had no mandate to prepare the draft. It has done nothing to create awareness among the people of constitutional issues and options or given them a sense of involvement. Some key political leaders are in prison. The ban on alternative constitutional ideas and options has further impoverished the debate, so much of the thinking has gone on among groups in exile. The process has not advanced the agenda of nation building or national unity; it has failed to satisfy either those concerned with democratization or protection of minority rights and cultures. Nor has it persuaded the outside world of the seriousness of the regime to reform the political system. Instead of creating trust among antagonistic groups, it has increased suspicions. And now the constitution produced by what is almost universally perceived to be a faulty process has intensified the divisions between the government and political parties and minorities.

## IV The Constitution<sup>10</sup>

### *Objectives and Basic Principles of the Constitution*

The constitution sets out, in Chapter I (Fundamental State Principles), six principal objectives of the state: (a) non-disintegration of the Union; (b) non-disintegration of national unity; (c) perpetuation of sovereignty; (d) “discipline-flourishing genuine multi-party democracy”; (e) “noblest and worthiest of worldly values, namely justice, liberty, and equality”; and (f) the participation of Tatmadaw “in the national political leadership role of the State” (ch.1, art.2).

The constitution prescribes the separation of powers (of the legislature, the executive and the judiciary) ‘as much as possible’, and the ‘reciprocal control, check and balance among themselves’ (ch.1, art. 5). In addition to this horizontal distribution, powers are also distributed spatially among the Union, regions or states, and self-administered areas. There will also be the ‘independent administration of justice in accordance with the law’ (ch.1, art. 8(e)).

The multi-ethnic character of Myanmar is recognized (‘The State is a nation wherein various national races make their homes together’, ch.1, art. 1(c)). The principal form this takes is the territorial division of the country into the parts mentioned above with the regions replacing the existing ‘divisions’ (inhabited mainly by the majority Burmans) and the states (inhabited by indigenous peoples or ethnic minorities), and self-administered areas (inhabited by ‘national races’ living in communities ‘on the same common stretches of land in appropriate sizes of population’ (ch.1, art. 4(e)). The capital city and its environs will be a Union territory where the Union authorities will have full jurisdiction; other parts of the country may also be declared union territory.

The diversity of the population is also acknowledged in the representation of ‘national races’ in the legislature and the executive at these different levels. The state will have the obligation to promote: languages, literature, art and culture of the national races; solidarity, mutual amity, and respect and mutual help among them; and the development of less developed national races (ch.1, art. 11).

When we turn to the substantive provisions, we find that few of these objectives are actually realized or can be realized (other than the dominance of the Tatmadaw). There is no effective separation of powers, most state powers being either vested in the President or subject to his influence or direction. A large amount of power is also concentrated in the Commander-in-Chief of the armed forces. Between the President and the Commander-in-Chief, there is little scope for democracy or the accountability of executive authorities (with the composition of the legislatures falling well short of genuine representation of the people). The judiciary does not enjoy the independence

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<sup>10</sup> The account in this paper of the constitution is based on an unofficial English translation of the Constitution. In some instances the English version does not always correspond accurately with the Burmese (for example, in the Burmese version the provisions on the Constitutional Tribunal is in the Judiciary section, not the General Provisions at the end).

that is necessary for impartial justice. Few provisions recognize the culture or languages of minorities, or give them power over these matters (there is only one official language, Myanmar). Governments at sub-national levels have few effective powers and almost no self-government; they are subordinated to the Union and in particular the president. The discrepancy between the rhetoric and the logic of constitutional provisions is evident in many other places in the constitution.

The overriding purpose of the constitution is, under the hegemony of the armed forces, the prevention of the ‘disintegration’ of the Union, national solidarity and state sovereignty. Secession of any part of the country is prohibited (2/7). Every constitutional principle is bent to this imperative, by use of coercion if necessary. As determined by the President or the Commander-in-Chief, it provides the justification for the suppression of rights and democracy—and the aspirations and culture of minorities. This pre-occupation with security which serves the interests of the ruling elite amply betrays its anxiety about, indeed, distrust of rights and democracy, and reduces incentives for consensual politics and the accommodation of the legitimate concerns of ethnic or political minorities.

### *Overview of the structure of the Constitution*

Myanmar would have the appearance of a federal state and is described as having a union system (Pyidaungsu) (2/1)<sup>11</sup>. Apart from the Union territory, it has seven regions (which would consist largely of Burman people) and seven states (consisting of ethnic minority communities) and self-administered areas within regions or states. Boundaries of these entities cannot be changed without the consent of the people in the area affected by the change (2/9) (The boundary can be altered by the President and three fourths of the Pyidaungsu Hluttaw if the region/state Hluttaw representatives pass a decision against re-delineation of the boundary – 2/9/e-f, but it is correct that a majority of the township must have voted in favour). There are separate legislative, executive and judicial institutions at these levels. No part of the territory of the Union, namely regions, states, Union territories and self-administered areas “shall ever secede from the Union”.

The Union legislature is bi-cameral, with one chamber to represent states, regions and self-administered areas. A considerable part of the Constitution is devoted to the division of legislative powers as among these levels; and rules to deal with conflicts between laws at different levels are established. There are provisions for the revenue and budgets at each level. Disputes touching on the constitution between governments are to be resolved by the Constitutional Tribunal; disputes of other kind between them are to be dealt with by the Supreme Court. However, the Union system is far removed from a federal system; all levels below the Union are subject in one way or another to the rule of the Union executive and legislature. There are emergency provisions for the suspension of the powers of sub-national units, handing them over to the president or the commander-in-chief.

The second major feature of the constitution is the presidential nature of the executive. Although the president is elected by the Union legislature (rather than by

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<sup>11</sup> The expression “Union” probably comes from the Indian Constitution, which although in most respects is federal, does not, the Indian constitution does not use the word federation. On the other hand, as I argue, the Myanmar constitution can by no stretch of imagination be called federal.

the people or their specially elected delegates), the system resembles, superficially, that in the US. The President cannot be removed by the legislature through a vote of no confidence, but can be removed by impeachment proceedings which cover more than moral or legal culpability. The executive is separate from the legislature (no minister can be a member of the legislature). But the list of presidential powers is more extensive than in the US, in relation to the law making process, and to control over the judiciary. The Myanmar president would enjoy enormous powers even in non-Union territories. The system of voting for the election of the President or legislative bodies is not specified, leaving it to the discretion of the ruling elite to secure whatever system suits its purposes.

The third major feature is the unusual (and extensive) role of the armed forces (Tatmadaw) in the political process. Despite the wide powers of the president, he or she can effectively be displaced by the commander-in-chief in serious emergencies. The National Defence and Security Council, dominated by the Tatmadaw, exercises important policy and executive functions. The constitution provides a framework for what amounts to a separate regime for the armed forces, giving its members special privileges and representation in state institutions (particularly the legislature and the executive) and immunities. The framework undermines the civilian and democratic nature of the state.

There would be a special tribunal (as part of the judiciary), the Constitutional Tribunal, for the interpretation of the constitution and the resolution of constitutional disputes. Unfortunately its members would enjoy even less independence than ordinary judges, which is not much.

Tucked away towards the end of the constitution is the chapter on citizenship and human rights. Entitlement to citizenship is restrictively defined (and entitlement to stand for election even more so). Most rights are confined to citizens. The formulation of rights lacks precision (an important quality in bills of rights) and there are many escape clauses under which rights can be restricted or suspended. In particular many rights are made subject to 'the law', which renders them potentially meaningless. There are also wide provisions for emergencies during which rights are particularly precarious.

Strikingly missing from the constitution are independent institutions for the performance of politically sensitive tasks or mechanisms of accountability which need to be insulated from political influence or pressures. There is no judicial service commission to appoint or dismiss judges, no ombudsman or human rights commission, no commission for minority rights, and no integrity commission enforcing codes of conduct (including anti-corruption practices) for public officers. The constitution does have commissions for elections and public services, and auditor-generals, but they do not measure up to the standards for independent and effective institutions that most recent constitutions establish. The absence of independent institutions is the more unfortunate given the wide, often unfettered powers given to executive authorities and armed forces.

### ***Citizenship and Human Rights***

These provisions normally come early in a constitution, in order to define the members of the political community that constitutes the state or nation, as well as to

delineate their rights, freedoms and duties. In the Myanmar constitution, they appear towards the end.

There are relatively few provisions on citizenship. The only substantive principle governing the acquisition of citizenship gives it to “All persons born of parents both of whom are nationals of Myanmar” (VIII/1(a)). All persons who are already citizens under the current laws retain the status.

The effect of these provisions is to deny citizenship to numerous persons who, under principles which are fairly universal, would expect to be citizens. Most countries give citizenship to a person born in that country or at least if one of whose parents is a citizen. There must be many persons with only one parent who is a Myanmar citizen. They will not become citizens of Myanmar. It is unlikely that they will be citizens of another country, especially if they are born in Myanmar, and will therefore be stateless. Under international law every person has the right to citizenship. Many rights, particularly in Myanmar, are connected to citizenship, so these people will be largely rightless as well as stateless.

Other matters of citizenship, including naturalization and revocation of citizenship, are left to be determined by law. These matters, especially revocation, are serious enough that most recent constitutions tend to specify the rules in the constitution itself. This is the more important when there is a regime, like that now in Myanmar, which has little regard for the rights of its people and can use revocation or threat of revocation to silence its critics. When a constitution says that a matter ‘shall be determined by law’ or ‘in accordance with law’ (without specifying the principles underlying it and imposing on the state a requirement to pass the law), it means that the matter has not been resolved and is left to the will or decision of state authorities. In general the constitution should avoid this approach.

When we turn to rights and freedoms given under the constitution, we find a similar parsimonious approach. There are a large number of provisions with the bill of rights (many of which violate international norms, including treaties which Myanmar has ratified)<sup>12</sup>. Most rights are confined to citizens; international law allows such restriction only for rights regarding elections and participation in public affairs.

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<sup>12</sup> The most internationally respected treaties that Burma/Myanmar has signed are the Convention on the Prevention and Punishment of the Crime of Genocide (adopted 1948, entry into force: 1951); Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) (entry into force: 1981); Convention on the Rights of the Child (CRC) (adopted 1989, entry into force 1989). It is not a party to the ICCP. However, there many other international treaties Burma/Myanmar has signed/ratified depending on the scope of your analysis, which include: Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929. (Geneva Convention); Convention relative to the Treatments of Prisoners of War. Geneva, 27 July 1929. (Geneva Convention); Convention of the Prevention and Punishment of the Crime of Genocide, 9 December 1948. (Geneva Convention); Geneva Conventions of 12 August 1949. (Geneva Convention); Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954. (Geneva Convention); Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954; C1 Hours of Work (Industry) Convention, 1919 (ILO); C2 Unemployment Convention, 1919 (ILO); C6 Night Work of Young Persons (Industry) Convention, 1919 (ILO); C11 Right of Association (Agriculture) Convention, 1921 (ILO); C14 Weekly Rest (Industry) Convention. 1921 (ILO); C15 Minimum Age (Trimmers and Stokers) Convention, 1921 (ILO); C16 Medical Examination of Young Persons (Sea) Convention, 1921 (ILO); C17 Workmen's Compensation (Accidents) Convention, 1925 (ILO); C18 Workmen's Compensation

Secondly, many of the rights are subject to ‘law’ (as mentioned above this is most unsatisfactory). The most glaring example of this is article 9, which reads, “Nothing shall, except in accordance with existing laws, be detrimental to the lives and personal freedom of any citizen’. Thus the most fundamental of rights is at the mercy of the whims of the regime (either in respect of whether the right is available at all, or in truncated form)!

The third problem is with the formulation of rights. Rights should be expressed as entitlements of individuals or communities, which they can mobilize on their own and seek their protection and promotion from the state or in appropriate cases, non-state institutions. Many ‘rights’ here are stated in the form of what the state might do (as for example in regard to the right of religion, where it says that the State shall ‘recognise a number of specified religions’)—a much weaker form of protection.

The fourth problem is the wide limitations that can be imposed on rights and freedoms. We have seen that many rights are subject to the law—without any indication of the core of the right. Similar difficulties arise in respect of permitted limitations on rights. For example, a number of key rights (including rights and freedoms of expression, assembly, associations and union, language, and culture) may be limited for reasons of ‘state security, prevalence of law and order, community peace and tranquility or public order and morality’. It is hard to think of a limitation that cannot be justified under this formulation. In addition all the rights can be suspended during periods of emergency (emergency provisions are discussed in the sections on the presidency and Tatmadaw). The permitted scope of limitations should be specified with greater precision and should be governed by the principle of necessity and compatibility with democratic principles and values.

Several important rights are missing. Little is said about collective rights and nothing about rights of indigenous peoples, minorities, children, and the disabled.

In brief, the bill of rights shows the great distrust on the part of the regime of people’s rights and freedoms. They are grudgingly granted, and taken away with the other hand. There is pervasive fear that the state will not be able to control society—the control syndrome comes out in almost every article. So does xenophobia and the fear of religion and its values. The very structures and dynamics of the state, including the dominance of the armed forces, to which the paper now turns, shows that even if the

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(Occupational Diseases) Convention, 1925 (ILO); C19 Equality of Treatment (Accident Compensation) Convention, 1925 (ILO); C21 Inspection of Emigrants Convention, 1926 (ILO); C22 Seamen's Articles of Agreement Convention, 1926 (ILO); C26 Minimum Wage-Fixing Machinery Convention, 1928 (ILO); C27 Marking of Weight (Packages Transported by Vessels) Convention, 1929 (ILO); C29 Forced Labour Convention, 1930 (ILO); C42 Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934 (ILO); C52 Holidays with Pay Convention, 1936 (ILO); C63 Convention concerning Statistics of Wages and Hours of Work, 1938 (ILO); C87 Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO). Documents Signed but not ratified by Myanmar: Final Act of the Diplomatic Conference of Geneva, 12 August 1949. (Geneva Convention), Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Opened for Signature at London, Moscow and Washington. 10 April 1972 (Geneva Convention); Convention on the prohibition of the Development, Production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January 1993 (Geneva Convention)

rights had been drafted with greater care, and greater concern with their protection, it is highly unlikely that people would be able to enjoy rights.

### ***Electoral system***

Before we turn to the legislative and executive authorities (normally the heart of the constitution), both of which involve a measure of elections, a brief account of the electoral system is provided: institutions, qualifications of voters, and procedures. The responsibility for the organization of elections lies with the Union Election Commission. The President appoints its members, mostly with a judicial or legal background (or 'persons deemed by the President to be eminent') with the approval of the Pyidaungsu Hluttaw (approval can be withheld only if a nominee does not have formal qualifications for the post). The President can remove a member through the usual impeachment process (see the box below)

### **Impeachment**

The following officials can be impeached: President, Vice-Presidents, Union Ministers, State/Regional Chief Ministers and other ministers, Attorney-General and Advocate General, Union and State/Regional Auditors General, Chief Justice and other judges of the Supreme and High Courts, judges of the Constitutional Tribunal, and members of the Election Commission. For some of them (including the President and Vice-Presidents) impeachment is the only method of accountability—and removal. The grounds for impeachment are the same in all cases, but there are slight differences in procedure, although in each case the decision on impeachment is made by the relevant Hluttaw.

The grounds for impeachment are: (1) treason; (2) violation of any provision of the Constitution; (3) misconduct; (4) lack of qualifications prescribed in the Constitution for the office; and (5) inefficient discharge of duties assigned to the official. Not all of these are usually associated with impeachment. Impeachment is a serious matter and has a complicated, semi-legal procedure, hardly suitable in cases where the office holder is not qualified or has ceased to be qualified, nor is it appropriate to deal with ‘inefficient discharge of duties’—the former should be dealt with by courts and the latter by a political process. The charge of treason should be handled by courts. It also seems inappropriate to impeach an official for the violation of any provision of the Constitution; rather it should be reserved for serious violations.

The paradigmatic procedure in respect of Union officials is for members of one house of the Pyidaungsu Hluttaw to bring charges (initiated by at least one quarter, and endorsed by at least two-thirds, of its members) and for the other house to investigate and try the charges, a two-thirds majority of its members needed for an adverse finding. This procedure is used for: President, Vice-Presidents, Union ministers, Attorney General, Auditor General, judges, and members of the Election Commission. For officials of the state or regions (Chief Minister and other ministers, advocate general and auditor general), operating with a unicameral Hluttaw, at least one quarter of members bring charges which are investigated by a committee set up by its Okkahta (that is, the chairperson, and in some contexts the President) from its members and tried by the entire Hluttaw. The President can also bring an impeachment charge against judges to the Speaker of the Pyidaungsu Hluttaw, acting as a unicameral body. In this case the charges are investigated by a committee consisting of an equal number of members of the two houses, and tried in a joint meeting. Normally the removal is done by the President, except in his own case, when it is the responsibility of the Speaker of the Pyidaungsu Hluttaw. But in the case of judges, the President can be both accuser and responsible for removal. The President can remove Union ministers on his own, but the Pyidaungsu Hluttaw only through impeachment.

The Commission draws up constituencies, prepares voter rolls, establishes tribunals to resolve electoral disputes, and enacts and administers laws on elections and political parties (although another article gives this responsibility for legislation on political parties to the Pyidaungsu Hluttaw). Its acts and decisions on electoral procedures, appeals from electoral tribunals, and on political parties are ‘final and conclusive’ (IX/12).

*The right to vote*

The right to vote is given to “every citizen who has attained 18 years of age on the date on which elections commence, who is not disqualified by law, who is eligible to vote, and who has the right to vote under the law”(IX/1). This is rather ominous, suggesting that citizenship itself may not be the central concept in the right to vote; who can vote depends on the law. The constitution states that the following persons are not entitled to vote: a member of a religious order, a person serving a sentence, a destitute (perhaps more accurately, an undischarged bankrupt), a person of unsound mind, or a person banned under election law. Under the law on disqualification, any citizen can be banned by the Pyidaungsu Hluttaw (normally acting on the initiative of the government). The right to vote is fundamental to citizenship and any ground for disqualification, which itself must be reasonable, should be prescribed in the constitution, not left to the discretion of state authorities. The first law on elections would be made by the current regime, known for its exclusionary politics (as part of transitional arrangements, see below).

*The right to stand for elections*

The basic qualifications to contest elections are the same for all elected bodies. The candidate must be 25 years of age or older (except for the Amyotha Hluttaw, one of the two bodies in the bi-cameral legislature, charged with electing representatives in equal numbers from the regions and states (4/2(b)), where the age is at least 30 years). She must be a citizen born of parents both of whom are citizens, and have settled in Myanmar for at least 10 consecutive years before the elections (except for those who stayed away with the permission of the government) and additional qualifications that may be prescribed by Union law.

There are a number of factors which disqualify a person from being a candidate. They include being a citizen of or owing allegiance to a foreign state; enjoying rights in a foreign country equivalent to those of a citizen; being a member or otherwise associated with an organization that relies on funds from a foreign state or religious or ‘other’ organizations; a person who incites or a member of an organization which incites others to vote or not to vote; or a member of a religious order. Also disqualified are civil servants or employees or associates of organizations that utilize state money or other property (an exception is made for Tatmadaw members). A person who has committed an electoral offence is also disqualified if ‘authorities’ have so decided.

Some of these qualifications and disqualifications are not unusual; others most decidedly are, and are targeted at persons the regime dislikes. Requirements that both parents of a candidate should be citizens<sup>13</sup> and that the candidate must be ‘settled’ in Myanmar for at least 10 years are stringent and unreasonable and contrary to internationally accepted standards (as reflected in the decisions of the UN Human Rights Committee<sup>14</sup>)—and the denial of a fundamental right of citizenship. It is

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<sup>13</sup> It is unclear whether the parents should have been citizens at the time of the candidate’s birth or subsequent acquisition of citizenship would suffice.

<sup>14</sup> The Human Rights Committee has explained the significance of its decisions on Article 25 of the ICCPR, which deals with the right to vote and to take part in public affairs, in General Comment 25 (1996). It said that Article 25 ‘lies at the core of democratic government based on the consent of the

obvious that these are targeted at leading members of the NLD and others who have been in exile. The disqualification of ‘members of a religious order’ (defined later as ‘priests, monks’) is also a violation of basic democratic rights (although its origins have something to do with the wishes of a section of Buddhist monks in 1947)<sup>15</sup>. Members of religious orders are also denied the right to vote (IX/2(a)). There are two broad and ambiguous disqualifications. The first is of a person who obtains directly or indirectly, or is a member of an organization which obtains directly or indirectly, any pecuniary or other asset from “a foreign country’s government, or religious organization or other organizations.” (c4, s.33(g)), regardless of the purpose for which the asset is given or received. The second is a person who “incites” others to vote or not to vote misusing religion for political purposes, or is a member of an organisation which so “incites” (c4, 33(h)) (what is “misuse of religion for political purposes”?). The breadth of these provisions can be used against the opponents of the regime, when all they are doing is taking part in public affairs: a fundamental breach of a citizen’s rights.

The qualifications for candidacy for the President or Vice-Presidents are even more stringent (and are discussed in the section on the Presidency below).

In these ways the military junta deprives some of the most important persons and organizations from participation in the electoral process and casts serious doubts on the sincerity and good faith of the regime to reconcile the people and reform the country’s political system.

Normally, an elected legislator has a term of five years. But it is possible for a legislator to be recalled at the initiative of as little as 1% of the constituents, for reasons which are similar in the constitution to impeachment procedure (see the box on impeachment on p 21). If the Commission finds that the complaints are justified, it removes the member. This is an easy way to remove a legislator unpopular with the

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people and in conformity with the principles of the Covenant’. No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The conduct of public affairs is a broad concept which relates to the exercise of state power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs should be established by the constitution and other laws. Participation in public affairs includes lobbying, and for this and other reasons the freedom of expression and of the media must be secured.

<sup>15</sup> As the regime has reminded the UN, this disqualification was first introduced in the 1947 (independence) constitution. The reason and the controversy regarding its adoption is described by the late Maung Maung in his book, *Burma’s Constitution* (1961), as follows, ‘In 1946, when the Governor’s Legislative Council debated the question of franchise, the opinion of the Buddhist priest was sought on whether they should have the vote or not. The elder eminent *sangha* expressed the view that priests should be aloof and isolated from mundane matters; that politics bred anger and ambition and the emotions from which priests should strive to keep free; that, therefore, they should not have the vote in parliamentary and other elections. The Young Sangha Associations, however, thought that if the people chose to give the *sangha* the vote, it should not be refused, for what the *sangha* were concerned with was not escape from the world but service to humanity. The Council, after considering the two views, accepted that of the elder *sangha*’ (p. 120-1).

I have seen no evidence that Buddhist leaders were consulted by the military government on the retention of this disqualification.

regime; there are few safeguards against its political abuse (particularly as there are no appeals from decisions of the Commission).

The Commission plays an important role in the regulation of political parties. The constitution defines Myanmar as a ‘discipline-flourishing genuine multi-party democracy’ (Basic Principle 3). Perhaps it is in the rules governing political parties that the meaning of this becomes clear. Political parties have to follow the objective of ‘non-disintegration of the Union, non-disintegration of national solidarity and perpetuation of sovereignty’ and must be ‘loyal to the State’ (X/1). A party has to be registered and these criteria no doubt will be a major consideration in the decision to grant or withhold registration. Registration can be cancelled by the Election Commission if the party has links with or supports ‘insurgent groups, waging an armed rebellion against the State, or organizations or persons the State has declared as committing terrorist acts or organizations the State has declared unlawful’ (X/4). Other grounds for de-registration are the receipt, ‘directly or indirectly’ of financial, material and other assistance from the government or religious organization, or any organization or individual, of a foreign country, and if the party ‘abuses for political purpose’.

The constitution does not specify whether only candidates sponsored by a registered political party can stand for elections (which the concept of a ‘discipline-flourishing multi-party democracy’ might suggest). If this is so, the Commission’s control over registration and deregistration can have significant impact on who or which group can contest elections.

Nor does the constitution specify the system of voting for the president or the legislative bodies (making it hard to predict its bias or result). The system of voting can achieve different results, for example favouring or disadvantaging minorities or women. For these reasons electoral systems assume great importance in multi-ethnic states, and increasingly the principles (and sometimes the details) of the voting system and a truly independent electoral system are inscribed in the constitution.

The constitution’s legal framework for parties and elections (in which the Election Commission is really a creature of the President) allows ample scope for outlawing political activities of opponents of the regime and for their exclusion. This is like strangling democracy at birth.

## **Legislative bodies**

The paper starts with legislative authorities, not because they are the most important (they are not), but because their composition and powers help us to understand the structure and dynamics of the political system.

Legislative bodies exist at various levels: the Union, States or Regions, Self-administered Zones or Divisions, the Capital Territory and possibly other Union territories. They all have the same period of tenure: five years, which run concurrently for all of them. Of the greatest interest is the Union legislature. It is bi-cameral, known collectively as Pyidaungsu Hluttaw. One house represents the people and townships and is called Pyithu Hluttaw and the other represents the states and regions and is called Amyotha Hluttaw. The picture, however, is a bit more complex. In each

house a certain number of members represent the Tatmadaw and are nominated by the Commander in Chief as in the case of Pyithu Hluttaw, 110 out of a total of 440 members, and in the other house, 56 out of a maximum of 224 members. Membership of the Amyotha Hluttaw is complicated. Four Tatmadaw members have to be appointed from each region and state (it is not clear how this will be done since the Tatmadaw is one organization; it is envisaged a law will provide the modalities). 12 members are to be elected from each state and region; this number includes a representative from each self-administered division or self-administered zone.

Some provisions deal with the different functions of the two chambers (for example most impeachment proceedings are brought by members of one house and tried by the other) and there are rules which govern the resolution of disagreements between the two houses after votes have been taken separately in them (perhaps only in relation to legislative bills). But the Pyidaungsu Hluttaw has its own corporate personality: it has a Speaker and there are references to its 'leaders'. After general elections, the Pyidaungsu Hluttaw has to meet within 15 days of the first session of the Pyithu Hluttaw. And it seems that there are several issues which are handled with the two houses sitting together from the very beginning (as for example when the President institutes impeachment charges against ministers or the chief justice). When considering a declaration of emergency by the President, it seems that it is the Pyidaungsu Hluttaw in its corporate character that meets (as it is Speaker of the Pyidaungsu Hluttaw who is to convene the meeting). Other occasions include the approval of Presidential nominations (see below) and the deliberations and decisions on the budget. It is also stated that some bills must first be introduced in the Pyidaungsu Hluttaw.

In these instances it seems that the Pyidaungsu Hluttaw is transformed from a bicameral to unicameral legislature. From the wording of the text of the Draft Council it is not always (or perhaps ever) clear when a reference is made to the functions or procedures of the Pyidaungsu Hluttaw, whether it has joint or separate meetings. Perhaps in the end the distinction may not matter much, at least in the law making procedure. For as the paper will show below, if the two houses disagree on a bill, the matter is resolved by them sitting as one house, with each member having one vote. As the Pyithu Hluttaw has more members, this procedure favours it. But this way of resolving differences seems to apply only to the law making procedure, and so perhaps it does matter whether, for particular functions, the Pyisaungsu Hluttaw is sitting as one body or two.

The structure of the legislature is designed to achieve several objectives. The Tatmadaw alone is to be represented in both the houses, in each with one fourth membership. There is double deficit of the democratic principle: special representation of the armed forces, and secured through a nomination rather than an elected basis. The Tatmadaw representatives will no doubt act on the instructions of the Commander in Chief; they remain members of the armed forces and subject to military control. They may be the only group able to act as a cohesive body which would enhance their influence beyond their numbers. Moreover any committee dealing with affairs which concern the Tatmadaw or defence or security will consist exclusively of these members, although they may co-opt non-Tatmadaw members when 'necessary'. This would greatly handicap the legislature in attempting to exact accountability from the armed forces.

As to the balance between the Burmans and ethnic minorities, the former will dominate both houses. We can safely assume that most Tatmadaw representatives will be drawn from the Burmans, as they dominate the armed forces, and that will tilt the balance in their favour. The population principle in the Pyithu Hluttaw will also favour Burmans (although it is not clear how the 330 popular constituencies will be tied to townships). The Amyotha Hluttaw will have equal representation from the states and regions, but this number will include one representative from each of the self-administered areas, which is likely to give special weight to Burmans (as it is expected that these areas will be carved out of ethnic states). However, it is the Tatmadaw members who will hold the balance, and this will no doubt tilt it in favour of Burmans.

The rules for decision making by Pyidaungsu Hluttaw also tilt the balance against forces for democracy and the participation of minorities. It acts as an electoral college for the election of the country's president. However, for this purpose it divides into three groups: representatives of states and regions, representatives from townships, and Tatmadaw representatives from the two houses. Each group would elect a person, either from or outside the Hluttaws, as vice-president. The Hluttaws, sitting together, then elect one of the vice-presidents as president (and the president assigns responsibilities to the two vice-presidents). This system gives the armed forces an opportunity to nominate at least one candidate from their ranks (and to cast the votes of all the Tatmadaw membership for that candidate), or at the least the appointment of a vice-president.

Since the final decision is made jointly by the members of the two houses, on the basis of an overall majority, it would mean, were the Burmans to be united, that their candidate would become president. If the democratically inclined of the Burman members were not able to work together with members of minorities, the military sponsored candidate would win. In either event, no member of a minority could expect to become president.

### ***State and Regional legislatures***

Each state or region would have its own legislature or Hluttaw, which is unicameral. There are two types of elected members, two by each township and one by each 'national race' with a population of at least 0.1% of the population of the state or the region (provided that it has not 'already got' the state or region or a self-administrative area within it). The non-elected members are drawn from the Tatmadaw nominated by the Commander in Chief; their number is one third of the total of the elected members (or one fourth of the total membership).

### ***Union territory legislature***

As far as the Nay Pyi Taw is concerned, the constitution provides for the Nay Pyi Taw Council, constituted and appointed by the President. However, he must obtain from the Commander in Chief nomination of one or more members of the Tatmadaw for 'co-ordination of matters of security of Nya Pyi Taw'. This body is more of an administrative than a legislative body.

Legislation for union territories in respect of legislative powers delegated to states or self-administered areas will be made by Pyidaungsu Hluttaw.

### ***Self-administered zone or division legislature***

A body called ‘self-administered zone/division’ has the authority to make laws on matters invested in the zone by the constitution or delegated to it by law of either the national or state/region Hluttaw. It combines law making functions with executive authority. It consists of at least 10 members from two or three categories: those elected to the state/region Hluttaw from townships within the area; representatives of the Tatmadaw for ‘security and border affairs’; a representative of each “national race” (consisting of at least 10,000 persons and ‘without states or regions of their own’) chosen by members from the preceding two categories; and other suitable persons chosen by the preceding categories (to make a minimum of 10 people). The number of Tatmadaw members of the self-administered zone or division must be one fourth of the total.

## **Executives and Presidency**

The executive powers of the Union are vested in the president. It is easier to relate the powers and responsibilities of the president than to categorise the executive system. The president is elected by the Pyidaungsu Hluttaw, which acts as an electoral college in the way described above. But he or she is not accountable to the Pyidaungsu Hluttaw in the normal parliamentary system. He or she can only be removed on impeachment, which requires a two-third vote in the Hluttaw charging and the Hluttaw trying the president. Otherwise the president has a term of five years (renewable for one further term), which runs concurrently with the five years of all Hluttaws. This suggests an executive presidency, a view enforced by the rule that the President appoints and dismisses ministers at will and ministers cannot be members of the legislature. On the other hand, the grounds of impeachment include ‘inefficient discharge of duties’ (art. 17), which has resonances of a parliamentary system—but not the two-thirds vote!

The procedure for the election of the president (and vice-presidents) has been described but not the qualifications for these offices (which are set out in III/4). A candidate must be ‘loyal to the Union and the citizenry’; must be a citizen of Myanmar who was born in the country of parents who were also both born in the country and belonging to a ‘nationality of Myanmar’. But even such a candidate would be disqualified if he or she or their spouse, parents, or children and children’s spouses owe allegiance to a foreign country, are its citizens or have rights equivalent to citizenship—a fundamental breach of internationally accepted norms. The candidate must be at least 45 years of age, and have resided continuously in the country for at least 20 years up to the time of the election. These provisions constitute an extraordinarily wide net, designed to get at specific individuals or categories of persons, and are demonstrably against the human right to participate in public affairs, to elect and to stand for public office.

Impeachment is the only way the president or vice-presidents can be removed. The rules governing impeachment are muddled. The grounds of impeachment are: treason; violation of the constitution; misconduct; ceasing to have the formal qualifications for the office; and inefficient discharge of duties (III/16). It is not clear why the president

or vice-president who has ceased to be qualified to be elected should not lose office automatically (which is almost a universal rule), and is instead put to an impeachment process in which he or she could actually, given sufficient political support, escape removal although no longer qualified! Equally, impeachment, which requires a two-thirds voting majority hardly seems the instrument to deal with inefficiency or disqualification.

Proceedings for impeachment can be initiated in either house, by not less than a quarter of the members of that house, but cannot be forwarded for trial to the other house unless two-thirds of the members support the charges. If the other house, after investigations during which the president or vice-president has the right to be heard, determines that the charges are proved and that they are such that the person is no longer fit to continue in office, that conclusion would be sent to the leader of the Pyidaungsu Hluttaw who proclaims the removal.

#### *Constituting the Union government*

The constitution describes the president, occupying ‘a position of the highest honour in the whole of the Union’, as head of the Union who represents the nation. He or she is Executive head of the State (which term covers not only the Union but the entire country). There are separate executives for states, regions and self-administered areas, but they come under the overall authority of the president (as shown later).

The government of the Union consists of the president, the two vice-presidents, and ministers who are appointed and can be dismissed by the president. However, his discretion is limited with regard to ministers responsible for defence, security and home affairs, and border affairs—their appointments are made on the nomination of the Commander in Chief from the Tatmadaw (it is not entirely clear from the English version whether the Commander in Chief has to submit more names than there are appointees, but the better reading is that the president has to choose the names given (The Tatmadaw Commander in Chief must submit more than one name per position as per the Burmese reading (c. 5 s. 232 (b) (2)). As to the removal of one of these Tatmadaw ministers, the president has to ‘co-ordinate’ with the Commander in Chief, but the text is unclear whether the initiative for removal lies with the president or the Commander in Chief (V/5(h)).

The ministers and deputy ministers must be approved by the Pyidaungsu Hluttaw. But the only ground on which approval can be refused is if the presidential nominee does not have the formal qualifications prescribed for the office (which are the same as for membership of the Pyidaungsu Hluttaw (V/2 (c)), except that additionally ministers must be at least 40 and deputy ministers 35). Indeed the rule about the approval of other offices, at both the Union and state/region levels, applies in the same limited form. This means that legislative scrutiny is not of particular importance or a serious hindrance for the president.

The president allocates ministerial responsibilities except that he must assign responsibilities for finance and budgetary process to the two vice-presidents, one for the Union and the other for states and regions (art. 16).

### ***Powers and responsibilities of the President***

All executive powers of the State are vested in the president. Although vice-presidents and ministers perform functions given by the president, he or she is not bound by their advice and presumably can give them directions as to the discharge of their functions. In other words, there is no collective responsibility of the 'cabinet' (a term not used in the constitution); the executive is, constitutionally, the sole responsibility of the president. Within this all embracing power, the president is given specific powers, some of which are mentioned below. However, it should be noted that over three of the most important ministries (defence, security and homes, and border affairs), presidential control is somewhat limited under the constitution, and may be even more limited in practice (a point discussed later).

The president chairs several important bodies. Two are of particular importance: the National Defence and Security Council and the financial commission for recommendations on the budgets of the union and states/regions (whose composition and functions are discussed later). He appoints members of the Election Commission, and appoints key officials of the Union at other levels (diplomats, judges, heads of public services, the Attorney General, Advocates General and Union and state/regional Auditor Generals, with the approval of the relevant Hluttaws). He participates in the appointment of the Commander in Chief. Most of the people he appoints he can also remove by demanding resignation or through impeachment. This means that few of these office holders have any real security of tenure; given the status of the President, it is hard to envisage the Pyidaungsu Hluttaw turning down an impeachment charge preferred by him.

He wields considerable foreign affairs powers, including treaty making and ratifying, on delegation from the Pyidaungsu Hluttaw. He exercises war powers. The president plays a key role in the declaration of emergency and in administration during that period (emergency provisions are discussed in the next section). He can address the Pyidaungsu Hluttaw when he likes and request the convening of its special sessions. He signs bills passed by the Pyidaungsu Hluttaw, for which purposes he has delaying powers, but not a veto. Along with the Commission on Finance, he plays an important role in the budgetary process (discussed in the section on relations between the Union and sub-national entities).

He confers titles and honours, and grants pardons, and amnesties, the latter on instructions from the NSDC.

### ***The powers of the President in respect of states, regions and self-administered areas***

Executive powers are distributed among the Union, states, regions and self-administered areas (V/1(b)). In principle each level exercises executive authority over matters in respect of which it has authority to legislate or matters which have been delegated to it by law or administration. But what is the 'executive authority' in states, regions and self-administered areas?

The government of states and regions consists essentially of the Chief Minister and other ministers. The size of the cabinet is determined by the Union President with the approval of state/region Hluttaw. The Chief Minister is nominated by the President from among the members of state/region Hluttaw and approved by the Hluttaw. Other ministers are drawn from different sources: nominations by the Chief Minister

(including of the Hluttaw members representing ‘national races’), the Commander in Chief from the Tatmadaw, and the leading authority of self-administered areas. The list of nominees is sent to the local Hluttaw for approval, after which the Union President makes the formal appointments, and allocates portfolios in consultation with the Chief Minister, including of who will be in charge of self-administered areas and for the affairs of “national races” (in respect of whom he can relax the age requirements). The ministers for security and border areas have to be Tatmadaw members nominated by the Commander, whose permission is also required if additional Tatmadaw members are to be appointed to other ministries.

In addition to the usual impeachment procedure, the Chief Minister or a minister can be removed for inefficiency by the President (and if the minister is a Tatmadaw nominee of the Commander, after ‘coordination’ with the Commander). In these ways the President can control the administration of the state or region.

### ***Accountability of the President***

The President is not a member of the Hluttaw and is not directly accountable to it. However, the Union government has to implement administrative resolutions passed by Pyidaungsu Hluttaw and to report on the ‘entire affairs’ of the Union to that Hluttaw. Control by the Hluttaw of financial appropriations to the government under the constitution are very weak: for if the budget requested is not passed, the government is entitled to an amount equal to the previous year’s appropriations—a most unusual rule (most constitutions allow the government to use sums equal to only part of the previous year’s appropriation pending budget approval) (see later for the discussion on the preparation and approval of the budget). In practice the President would be under considerable influence of the Tatmadaw (see below in the section on Tatmadaw).

Nor can the courts question or scrutinize the President’s conduct. Principle 14 of the chapter devoted to Sharing of the Executive Power (5) gives the president very wide immunities, “The President shall not be responsible to any Hluttaw or to any court for the exercise or performance of duties and functions vested in him by the constitution or under any of the existing laws for any of his actions in the exercise and performance of these powers and functions”.

The only way to hold the President accountable is through impeachment (the rules for which are discussed above). This is the legal position; in practice it is extremely unlikely that the members of the Pyidaungsu Hluttaw would bring charges, or vote against the President (unless of course the armed forces wanted him out).

### **Tatmadaw and Commander in Chief**

The armed forces are an integral and permanent part of the machinery which will govern the country. The Basic Principles define the crucial role of the Tatmadaw, as follows: (a) it is strong and modern and has the monopoly of the use of force; (b) it has the right to administer independently all affairs concerning forces; (c) it has the right to administer participation of the entire people in state security and defence; (d) it is mainly responsible for safeguarding non-disintegration of the Union, non-disintegration of national solidarity and perpetuation of sovereignty; and (e) it is mainly responsible for safeguarding the constitution. Most of the powers of and in

relation to the Tatmadaw are vested in the Defence Services Commander in Chief (he is defined as the ‘Supreme Commander of all armed forces’) (I/9). An examination of the powers that the constitution gives to the Commander in Chief provides a vivid insight into the role of the armed forces in the political and security system of Myanmar.

He (we may safely assume no woman is likely to hold this post for the foreseeable future)<sup>16</sup> is appointed effectively by the National Defence and Security Council, which, as noted above, has at least six out of 11 members; the six being nominees of the Commander in Chief (the President is bound by the recommendation of the NDSC). It is the only significant post in the state which does not require parliamentary approval. It is the only post for which no qualifications are prescribed. And it is the only constitutional post for which no time period is specified for its tenure nor is there any procedure for removal of the holder.

The paper has already explained the role of the Commander in Chief in appointing from the Tatmadaw at least a quarter of the members of the various Hluttaw. They play a significant role in the election of the State President and are ensured at least one Vice-President. They can also play an important role in the proceedings and decisions of these bodies, while the Tatmadaw itself is shielded from parliamentary scrutiny. Through nomination by the Commander in Chief, the Tatmadaw holds most of the key ministerial posts at all levels (including the capital territory and other potential union territories, and self-administered areas). These ministers cannot be removed without the permission of the Commander. Because one of the ministries (at all levels) concerns border affairs, the Tatmadaw’s presence and influence will penetrate deeply into ethnic states, on the peripheries of the country.

Under the general responsibility for external and internal security, the Tatmadaw will be able to undertake a wide range of activities and direct the work of other organisations (as the Basic Principle says, administer people’s participation in security and defence). It will no doubt have access to large resources. Under the pretext of safeguarding security and the constitution, it can restrict people’s human rights and freedoms.

#### *The autonomy of the Tatmadaw*

Even during normal times, the Tatmadaw will enjoy great powers and autonomy, and is exempted from many fundamental constitutional principles. It ‘has the right to independently administer all affairs concerning the armed forces’. There is a separate system for them for the administration of justice; but the final decisions in all matters of military justice is with the Commander; the Supreme Court has no jurisdiction over it. Through the NDSC, the Tatmadaw decides on the grant of amnesties.

Tatmandaw members do not resign when appointed to a legislature or executive, as other public servants must. They continue to be subject to military discipline and rule, and therefore take orders from their military superiors. They are inserted in the constitutional and administrative structures of the state to protect the interests of the

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<sup>16</sup> Article 8 of Chapter VIII on rights allows discrimination against women in public employment for posts ‘that are naturally suitable for men only’!

armed forces and to assert their dominance. Their accountability is to the armed forces and not the public.

Ways in which the Commander may be more powerful than the President: the President runs the machinery of the state over which he does not have total control, particularly the Pyidaungsu Hluttaw, while the Commander is in total control of the armed forces; the Commander has more control over the Hluttaws than the President; the President has a relatively minor role in the appointment of the Commander while the Commander can have significant influence in the election of the President; the President cannot remove the Commander while the Commander can prompt the bringing of impeachment proceedings against the President (through his control over at least a quarter of the members of each house); the President requires the approval of the Commander for some of his acts but not the reverse; the Commander has a major role in the formation and functioning of the cabinet; in the third type of emergency (explained in detail below) the Commander takes over all powers (including it would seem that of the President).

## **Judiciary**

The judiciary consists of what might be called ordinary courts, the courts martial, and the Constitutional Tribunal. At the apex of the ordinary courts is the Supreme Court (which is the only ordinary court at the Union level). Each state and region has a High Court, while self-administered areas, townships and districts have their own courts.

The Supreme Court consists of the Chief Justice and between seven to eleven other judges. The President appoints the Chief Justice with the approval of the Pyidaungsu Hluttaw; and other judges after consultation with the Chief Justice and the approval of the Pyidaungsu Hluttaw (VI/2 (c)). The Pyidaungsu Hluttaw can reject the nomination only if the nominee does not have the professional qualifications specified in the constitution (which includes the subjective assessment of the President that the nominee is a ‘legal expert of prominent reputation’) (VI/3(4)). The normal term of these judges is until the age of 70, but earlier removal is possible if impeachment charges are brought by the President (in which case the Pyidaungsu Hluttaw itself hears the charges) or by a house of the Pyidaungsu Hluttaw (in which case the other house hears the charges). Grounds for impeachment include ‘misconduct’ and ‘inefficiency’. Although article VI/6 says that the President can ask a judge to resign, it would seem that the order to resign can only be made if the presidential charges of impeachment are upheld by the Pyidaungsu Hluttaw—otherwise there will be a breach of a fundamental principle of justice.

High Courts have a chief justice and between three and seven other judges (VI/10). Their appointment has to be approved by the state/regional Hluttaw, that of the Chief Justice on nomination of the President after consulting the Union Chief Justice and the Chief Minister of the state or region, and the other judges by the Chief Minister after consulting the Union Chief Justice. Their tenure is until they reach the age of 65; and as with Supreme Court judges, they may be removed on impeachment charges before then. For the High Court Chief Justice, the charges must be brought by the President and for other judges by the Chief Minister. Charges are heard by the state/regional Hluttaw.

The Supreme Court has exclusive original jurisdiction in respect of treaties, disputes between governments at different levels (unless they involve a constitutional issue, see below) and other matters prescribed by law. It is also the final appellate court in respect of decisions of High Courts and, if prescribed by law, from other courts. High Courts have original jurisdiction as well appellate and “revisional jurisdiction in accordance with the law” (c. V, s. Sharing of the Judicial Power, c. 1(e)) over lower courts.

The composition and jurisdiction of other courts is to be determined by law.

Little is stated about the courts-martial other than they fall under the administration of the Tatmadaw and that the decision of the Commander in Chief is final in military justice (VII/10 and 11).

### ***Constitutional Tribunal***

Curiously, provisions concerning the Constitutional Tribunal are located in a different section of the constitution from those on the ordinary courts (they appear at the end of the constitution, in the last chapter (XV), entitled “General Provisions”) (although, in the Burmese version, they are in the judiciary section). The primary responsibility of the Tribunal is the interpretation of the constitution. More specifically, its functions are to: (a) interpret the constitution, (b) scrutinize whether laws passed by the various Hluttaws or acts of the executive authorities are consistent with it, (c) decide disputes between governments at various levels concerning the constitution, (d) decide disputes on the respective powers of the Union and other governments, (e) decide disputes on the implementation of Union laws by governments at other levels; (f) handle matters relating to Union territories on the request of the President; and (g) undertake other tasks prescribed by law. There is no appeal from its decisions.

Other courts have no jurisdiction over the interpretation of the constitution. But it is of course their responsibility to enforce the constitution. Should a dispute arise in a court in any proceeding on the interpretation of any provision of the constitution, that court has to suspend its hearing and refer the matter to the Tribunal for its ruling (it is not obvious whether the court should also send its own understanding of the relevant provision (c. VI, 323-324)) (XV/21)). Presumably the interpretation is sent to the court to apply it in disposing of the case; the decision applies to all cases (c. VI, 323-324)).

A matter concerning constitutional interpretation can be referred to the Tribunal by a number of authorities: President, Speakers of the Pyidaungsu Hluttaw and its two houses, the Chief Justice, Chairman of the Union Election Commission, Chief Ministers of state and regions, Speakers of state/regional Hluttaws, chairs of the Leading Body of Self-Administered Areas, and at least 10% of the members of either house of the Pyidaungsu Hluttaw (XV/23 and 23). It is most likely that this reference is in the nature of an advisory opinion, that is to say that the issue has not arisen in the context of litigation nor related to specific circumstances.

### ***Composition of the Constitutional Tribunal***

There are nine members of the Tribunal, including the chairperson. The President and the Speakers of the two houses of the Pyidaungsu Hluttaw each nominate three

persons for the approval of the Pyidaungsu Hluttaw (which also approves the nomination of the chair from this list). The qualifications are similar to those for the Chief Justice other than age and the additional requirement of knowledge or understanding of political, administrative, economic and security issues (XV/10).

Members are appointed only for five years, co-terminous with the terms of the President and the Pyidaungsu Hluttaw (XV/15). The question of whether they are eligible for another term is not addressed. A member can be removed on impeachment for the reasons and by the procedure similar to those for the Chief Justice.

The constitution does not ensure the independence of the judiciary. The procedure for the appointment of judges is highly political and the rules for their tenure do not give them the security that is necessary for the fair and impartial administration of justice. There is no statement about the independence of the judiciary or about the remuneration or pension of judges. There is no independent commission with responsibility for these matters or the organization and management of courts.

There is little indication of the relationship between courts martial and the normal court system. All matters of military justice are left to the Tatmadaw and Commander in Chief. The usual practice is to restrict military courts to crimes of a military nature; and the military courts' jurisdiction is confined to these crimes committed by members of the armed forces. The constitution says nothing about the procedures to be followed. The trend, internationally, is to ensure that members of the military, as citizens of the country, are entitled to the same sort of guarantees of fair trial as non-members, and that allegations of violations of human rights of citizens by members of the military should be tried by the ordinary, and not military, courts. The Constitutional Court of Colombia has held that gross violations of human rights are not 'service related acts' and must be tried by ordinary courts. The constitution does not say anything about judges of the courts martial. There is increasing recognition internationally of the importance of introducing civilian elements into military criminal justice systems<sup>17</sup>. The normal safeguards of due process must be ensured: public hearings, right to counsel and fair defence, and the right to a competent, independent and impartial tribunal.

The separation of the Constitutional Tribunal from other courts may owe something to the recent popularity of constitutional courts (although with its common law traditions, Burma may be in less need of one than civil law countries). But the worry is about the structure of the Tribunal. The tenure of five years is very short. The reason for the limited tenure is that, as the constitutional adjudication cannot be entirely free from political considerations, the court should be periodically renewed to reflect changing political forces and ideas. But the standard tenure of constitutional courts is ten years. The other problem with the constitution is all the judges are appointed, and their tenures expire, at the same time. In most countries the appointments are staggered, so that there is an element of continuity, to ensure both a political balance and the accumulation of experience. In Myanmar the five year term is too short for either the independence or the experience of judges, and the linking of their term to that of the president might lead to total dominance by the president.

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<sup>17</sup> See International Commission of Justice publication, *Military Justice and International Law: Military Courts and Gross Human Rights Violations* (available on ICJ website, [www.icj.org](http://www.icj.org))

## **The relationship between the Union, States and Regions, and Self-Administered Areas**

An account of the territorial organization of the state has already been given. Ethnic minorities have long agitated for a truly federal system, once they were persuaded to join Burma at the time of independence, instead of seeking their own sovereign states. Now the paper examines the constitutional, political and economic relationship between the various levels of government. This will enable us to understand better the inter-dependence between the different governments and the autonomy of sub-national units.

Legislative powers are divided three ways: between the Union, states or regions, and self-administered areas. Executive authority largely follows the legislative. At each level there are legislative, executive and judicial authorities. There is provision for the allocation of resources among them. The Union legislature is bi-cameral, with one house representing the states and regions. The structure of these territorial components may give the impression that the constitution is based on federal principles. I now consider whether this claim is justified.

### *Division of legislative and executive powers*

There are three lists of legislative powers: federal, state/region, and self-administered areas. Union powers include defence and security (including topics like arms and ammunition, and war powers), foreign affairs (including international, regional and bilateral relations), financial and planning (including currency, budgetary process, most sources of revenue, the Union fund, loans, foreign aid, and state assets), the economy (including trade, imports and exports, corporations and business organizations, tourism), agriculture (including land, dams and water supply, animal reproduction and disease control), energy and mining (including electricity, oil, gas, minerals, forests, wildlife), industry (including industrial zones, science and technology, intellectual property rights, weights and measures), transport and communication (including inland water transport, maritime shipping, ports, aviation, roads and road transport, railways, posts and TV and satellite communication), social sector (including education, sports, health, fire services, social security, labour, arts and culture) and 'management' (including state secrets, prisons, management of village and urban areas, citizenship, narcotic drugs and psychotropic substances, census), and the judicial sector (including administration of justice, penal and civil laws, lawyers).

States and regions have no powers in relation to defence, security or foreign affairs, but otherwise their lists contain many issues which appear in the national list. In the financial area, they manage their budgets and other funds, can raise revenue from land taxes, excise duties, and taxes on buildings, water, and wheels. They control assets owned by the state or region, and investment of state/regional funds within the country. In the economics sector, their powers over economic activities, trade and co-operative activities carried out in the region or state derive solely from laws enacted by the Union (in other words they have no constitutional powers in these areas). They have powers over agriculture, pest control, fertilizers, agricultural loans, water as authorized by the Union, and fresh water fisheries. In the energy and mineral sectors,

they have powers over small electricity production and distribution industry, salt and salt products, cutting of gem stones, village owned fuel wood plantations and gardens. They have few significant powers in the industrial, transport, or social sectors (other than human settlement and housing development) and none in the justice sector (although courts at different levels are to be established, presumably under Union law).

The third list of the powers of self-administered divisions and zones contains town and village planning; construction, repair and maintenance of roads and bridges; public health; development plans; fire prevention; pasture; forest protection and conservation; environmental conservation in accordance with the law enacted by the Union; water and electricity supply in towns and villages; and town and village markets.

Powers not vested in any of these lists ('residual powers') are with the Union. The Union has complete legislative authority over Union territories. As we have already seen, during periods of emergencies, most or all powers revert to the Union, in the form of the President or the Commander.

The provisions dealing with the conflict of laws passed at these three levels are unclear (c. IV, s. Sharing of Legislative Power, c. 15)—a matter of particular concern since it would appear that the powers given to states/regions and self-administered areas are also given to the Union. The broad categories of Union powers cover the more narrow and specific powers available at lower levels. The general rule in federal or autonomous areas is that the law enacted by a government in respect of subjects within its exclusive list is supreme and government at another level cannot make law over that subject. But when powers are shared ('concurrent') so that a law on a subject can be made at more than one level of government, it is necessary to have rules which determine what law will prevail over others. Here the normal rule is that the law of the 'higher' level will prevail over the 'lower', but it is also possible to give superiority to law passed at the lower level.

### *Compatibility of laws*

In the constitution, a hierarchy has been established under which the laws of the self-administered areas have to give way to the laws of the states/regions and the Union, and the laws of the states/regions have to give way to those of the Union. The constitution does say that the laws at each level must be compatible with the constitution, but this would appear to be no protection to the states/regions or the self-administered areas. They have no exclusive powers; and given the hierarchy of laws, the law of the Union as well as of states and regions will prevail over that of the self-administered areas, and the Union law will prevail over that of states and regions. In other words, the Union can make laws in any area, but states, regions and self-administered areas cannot make laws other than in the lists given to them.

The outcome is that the legislative powers given to states, regions and self-administered areas (although not very significant) are ultimately dependent on the self-restraint of the Union.

***Finance and resources: relations between the Union and State, Regions and Self-Administered Areas***

As indicated in the discussion on legislative powers, the primary sources of taxation and other revenue belong to the Union government. It includes revenue from oil and other natural resources, and income and corporation taxes. The primary sources of the revenue of states and regions are likely to be tax on land and timber (except teak and others that may be designated) and excise. However, it is most probable that the single most important component of their revenue would be the contribution from the Union Fund. A fiscal commission will be responsible for re-distribution of revenue through its role in the budgetary process.

The Union and states and regions have their own budgets. The primary responsibility for preparing proposals for the Union budget lies with the Vice-President designated by the President and for the state and region budgets, with the other Vice-President. These proposals are submitted to the Financial Commission which recommends appropriations for the budgets and other special funds and loans, from the Union Fund. The Commission is presided over by the President; other members are the two Vice-Presidents, the Union Attorney General, the Union Auditor General, Chief Ministers of Regions and States, Chair of the Nay Pyi Taw City Council and the Union Minister of Finance.

These proposals are then submitted by the President to the Pyidaungsu Hluttaw in the form of a Union budget for approval. Only the Union government can submit national plans, annual budgets, and taxation proposals to the Pyidaungsu Hluttaw.

Chief Ministers of states and regions prepare their own budgets (including subventions from the Union Fund) and submit them to their Hluttaws. These budgets cover expenditures of the self-administered areas as well. This gives the impression of considerable financial autonomy for states and region. The fact is that the Union budget includes appropriations to the states, and these are determined by the Union. The most significant components of state budgets are transfers from the Union. In addition a Union Vice-President has oversight of the preparation of state and regional budgets.

Consequently, states and regions will depend heavily on subventions from the Union and may not be able to take significant initiatives for development of their areas. This will also restrict their ability to make use of their legislative and executive powers.

***Executive: relations between the Union and State, Regions and Self-Administered Areas***

The paper has already demonstrated that while there are distinctions between the legislatures at different levels, the system of the executive is unified. In other words, the executive at every level is subject to the overriding authority of the President. Another element is the brooding presence of the Tatmadaw at every level. These two factors will centralize control over ethnic states as in other parts of the country.

In summing up the relations between the Union and sub-national entities, it can be said that despite appearances, Myanmar will be a highly centralized state. It certainly

falls short of the federal model in a number of ways. The Union and states/regions do not form co-ordinate authorities. The centre always dominates, and can invade any area of the powers of sub-national entities. Presidential powers negate role of states or second chambers in numerous decisions. The President appoints state executives. Each level of government reports to the one above, and all are responsible to the President, establishing a hierarchy that is incompatible with autonomy. State powers are very limited; and can be overridden easily. The structure and powers of the Amothya Hluttaw do not enable it to protect the interests of sub-national entities. The judiciary is weak and not independent, so it cannot act as umpire over the scheme of Union-state relations. The whole scheme of sub-national powers and structures is not entrenched in a way that it cannot be amended by the Union authorities, without any participation of the sub-national authorities. It is in the exercise of emergency powers that the true fragility of sub-national entities (and of the separation of powers) appears most sharply—a matter to which the paper turns now.

### **Emergency Powers**

The scheme for the declaration and exercise of emergency power fundamentally affects the powers of the President, the Commander, other executive bodies and the Hluttaws at all levels, and the relationship between them—in fact the whole constitutional scheme (chapter XI). An appreciation of the emergency powers is critical to the understanding of the logic and dynamics of the whole of the constitution.

There are three types of emergencies, with different procedures for declaration and approval, duration and consequences. The first type deals with a situation when it is deemed by the President that it not possible to carry out executive functions in any part of the country in accordance with the constitution. The President can declare an emergency after ‘coordinating’ (which presumably means agreeing) with the NDSC (XI/1). In this case the executive powers in the state or region concerned pass over to the President, to be exercised by a body or person of his or her choice. The President himself or herself exercises directly legislative powers in that area.

A type II emergency arises in a situation which endangers life and property. The President declares the emergency with consultation with the NDSC or if this not immediately possible, with its members who are most intimately connected with the Tatmadaw (XI/3). In this case, local authorities and the civil service (in the area covered by the emergency) have to accept the assistance of the Tatmadaw in the discharge of their functions, in the normalization of the situation. The President may also declare martial law, “if necessary”, transferring significant administrative and judicial powers, concerning ‘community peace and the rule of law’, to the Commander in Chief (XI/4), to be exercised directly by him or his delegates.

The third kind of emergency gives even wider powers to the Commander and the Tatmadaw. Such emergency can be declared by the President after consulting the NDSC, if there is threat to the ‘disintegration of the Union or national solidarity or the loss of national sovereignty’ (XI/8). The President transfers legislative, executive and judicial powers to the Commander in Chief to enable him to take necessary measures to restore the nation to a normal situation. From that time all the legislative powers of Hluttaws and leading bodies are terminated and they are automatically dissolved when their terms come to an end (XI/9). Likewise the authority of all executive bodies

is terminated. All legislative, executive and judicial powers are transferred to the Commander in Chief (although the posts of President and Vice-Presidents remain) who may appoint a 'suitable body or a suitable person to exercise executive and judicial powers' (XI/10). The Commander can restrict or repeal any human rights provisions.

Unlike emergency types I and II (which may be restricted to an area and for specified duration), emergency type III covers the whole country and lasts initially for one year. It can be extended for two periods of six months each at the request of the Commander and after consultation with the NDSC.

Significant powers pass to the NDSC when the emergency is declared over and the powers of the Commander are revoked, especially if the term of the Hluttaws has come to an end (XI/18). It will exercise 'State sovereign power' until the new President is elected and other authorities formed in accordance with the Constitution. Meanwhile it will form constitutional and administrative bodies at all levels of government, including the Union Election Commission. The NDSC would hold elections to the Hluttaws within six months of the annulment of the special powers of the Commander. All the authorities which exercise powers during the emergency or at its termination to restore security, stability, community peace and the rule of law will have immunity from legal process (XI/94).

In brief, the NDSC will greatly influence the decision on the declaration of this kind of emergency. Once declared, the whole constitutional order is suspended, including constitutional institutions and processes. All state powers (without the limited safeguards provided under the constitution) pass to the Tatmadaw, through the Commander and the NDSC. There is no accountability for the acts of the Tatmadaw; on the contrary, there is legal immunity for all acts committed during the emergency and its aftermath. The NDSC will be responsible for holding elections through an election commission that it will establish—and thus without guarantees of a free and fair process.

In all types of emergency *all* fundamental rights can be suspended in their entirety (a most unusual constitutional provision).

Accountability to the Pyidaungsu Hluttaw also varies with the type of emergency. In types I and II, notification of the declaration of the emergency and the measures undertaken have to be given to the Pyidaungsu Hluttaw within 60 days for its approval (perhaps the longest interval in any constitution). In the third type, no time limit within which the notification must be given is specified (and it is of course likely that the term of the Hluttaw will have expired before the notice is given).

The total system of the separation of power collapses when a type III emergency is in place; all state powers pass to the Commander. Also the distribution of power and the distinctiveness of institutions at different levels in the country become ineffective. The state becomes completely centralized, under the total dominance of the Commander and the Tatmadaw. Few forces will remain active which could agitate for return to constitutional rule (faulty as that would be under the constitution). Myanmar would return to the situation from which the constitution is intended to rescue it from!

## **Amendment Procedure**

That the constitution is not seen as a transitional instrument is evident from the rules for its amendment (Chapter XII). The process of amendment is initiated in the Pyidaungsu Hluttaw through the submission of a bill, with the support of at least 20% of its members. The provisions of the constitution are divided into two categories for the purpose of amendment. Both require a vote of ‘more’ than 75% of all its members for adoption. This would undoubtedly give a veto to the Tatmadaw. But some provisions will also require the support in a referendum of ‘more than half of those who have the right to vote’. In practice this is a stringent condition for many people in fact will not vote, but their number will be taken into account when calculating whether a majority supports the amendment.

Provisions which are subject to the vote in both the Pyidaungsu Hluttaw and the referendum cover wide ground: State Fundamental Principles, the State Structure, the Formation of Legislature, the Formation of the Executive, the Formation of Judiciary, and the State of Emergency<sup>18</sup>.

Normally, when a constitution is adopted after prolonged negotiations and wide consultations, there is naturally the wish to preserve it against over-hasty amendments, perhaps promoted by groups which do not enjoy significant support in the community. But stringent conditions in respect of a constitution which is as deeply flawed as this are a sign of determination to prevent full democracy and participation and the protection of rights.

## **Transitional Provisions**

The transitional provisions, that is, what is to happen between the adoption of the constitution in the referendum and its implementation after elections, provide for the continuation of the existing system, its law and regulations, and staff (Chapter XIV). The State Peace and Development Council would continue to exercise ‘State sovereignty’ and perform all the functions of the Pyidaungsu Hluttaw.

It is normal to provide that existing laws and institutions continue if they are compatible with the constitution, and until they are amended in accordance with the new constitution. However, when a constitution provides for such a major change in the system, it is useful to provide in some detail as to how the transition would be made, including some kind of a time table, especially for the elections to the executive or legislative body which trigger off the implementation of the constitution. Here all authority to bring the new constitution into effect is left to the State Peace and Development Council. The Council is not bound by any time table, although the regime has promised that elections would be held in 2010. It is also stated that all work done by the Council to bring the constitution into force is in accordance with the constitution, so that effectively the Council could postpone elections for a long time and prevent the implementation of the constitution—if political circumstances do not suit it.

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<sup>18</sup> It is not entirely clear whether all the provisions covered in these topics (XII/4(a)) are so entrenched. XII/4 (c) says that “Articles that are relevant to or inclusive in Chapters stated in the paragraph (a) ) shall be prescribed when the Constitution is drafted”.

## V Assessment

Even by its own standards the constitution fails. Some objectives of constitutional reform cluster around the unity of the nation and the state (by recognizing the diversity of its people). It is unlikely that many groups in the country (ethnic minorities, democratically inclined Burmans, and Buddhists and followers of other religions) would wish to participate in these so-called reforms. The territorial restructuring of the state will not produce autonomy and self-government that would satisfy ethnic groups who have long struggled for adequate recognition of their culture and land rights. The special place envisaged for Buddhism and the Myanmar language seeks to continue the exclusion of minorities. Another objective, genuine multi-party democracy will remain elusive, given the structure of state institutions: the rather fragmented nature of representative institutions and the dominance of the Union executive throughout the country. It is unlikely that a system of political parties can develop when power is so highly concentrated in the President and the Commander-in-Chief (and presidential elections are a matter of agreement among a small group of self-perpetuating hierarchy and not the result of universal franchise and the commander is handpicked by his close associates). Nor is there any prospect for the “noblest and worthiest of worldly values, namely justice, liberty, and equality”. The denial of justice, liberty and equality (indeed the fear of these ‘virtues’) is inscribed in virtually every principle of the Draft. The lack of the independence of the judiciary will negate any prospect of justice, as will the immunities given to the two principal holders of power. The only objective that the constitution will achieve is the privileged position of the armed forces. But this objective will be achieved by the negation of other objectives: non-disintegration of the Union and the nation, multi-party democracy, the separation of powers, self-government, justice and liberty. The scenario, sketched in the extensive provisions on emergencies, of a return to full blown, bloody, and unmitigated military rule shows that even the framers of the Draft, assuming that they really favoured the objectives, have little confidence that their constitutional scheme will achieve these other objectives.

Let me elaborate these arguments. The process of drafting fundamental constitutional principles was deeply flawed. It did little to involve the people in deliberations of the kind of future they wanted. The agenda and the pace were driven by the military to suit its purposes—and democracy was not among them, as shown by the disdain of democratic forces and procedures. No attempt was made to use the process to develop national consensus or national identity. Little was also done to bring advocates of democracy and ethnic inclusion into the process. Despite references to Myanmar’s multi-cultural and multi-ethnic character, there is no adequate and proper recognition of its diversities. The underlying assumption was that military might was needed to keep the country (not yet a nation) together: coercion, not persuasion or negotiation, is still the basic approach. Perhaps its ultimate role as the ‘guardian’ of the constitution will be preservation of the ‘sanctity’ of absolute emergency powers.

The role given to the armed forces will be a constant threat to national integration, democracy, and human rights and freedoms. The military has a tradition of waging war in ethnic areas and suppression of democracy in Burma. The militaristic traditions of the present regime, the very anti-thesis of democracy, is likely to continue. Its dominance, rooted in the Burman community, will do little to change the exclusionary bias and practices of the past and present. Under the Tatmadaw’s banyan tree-like shadow over the entire country, democratic practices cannot grow. The spurious

legitimacy that the Draft purports to confer on the armed forces (as a central component of the state and as guardian of the constitution) places it in the centre of constitutional arrangements. The exemption of the military from any democratic and judicial principles, while playing a critical role in the political process, will mean that the most important organization in the country, with its tentacles in every institution and region of the state, will bring anti-democratic practices at the heart of government. The civilian authority and forces have no control over the military; on the contrary the military will control civilian forces, through its members in every legislative and executive institution in the country, and through the National Defence and Security Council.

Nor is the office of the President likely to promote democracy or participation. The mode of election, both in the nomination of candidates and the selection of the winner, gives great importance to a small circle of people. Undoubtedly the military will have a key role in the nomination of the President. Should the President be tempted into an independent line, the Tatmadaw appointed Vice-President, will no doubt remind the president of his or her vulnerability to the military. Non-operation between the President and the Commander in Chief will cause deep tensions within the constitutional framework and is unlikely to be tolerated by the Tatmadaw. The electoral system will enable the Tatmadaw to keep its hold over that office. On the other hand, a more transparent and participatory process of elections, through universal franchise following proper election campaigns, would have promoted the role of political parties as sponsors of candidates, and given people a sense of their own authority as ultimate custodians of state sovereignty.

The extensive powers given to the President, the absence of collective responsibility, the dependence on the military, and his legal immunity for the improper exercise of powers, will further undermine democratic and judicial principles. The fragmented nature of the member of legislative and executive bodies will most likely prevent co-operation among democratic forces, at the same time as the need for democratically inclined and minority members to work together will be great.

The inadequate recognition of the multi-cultural and multi-ethnic character of the country and the aspirations of minorities is manifest in a number of provisions. The paper has already shown that the complex structure of territorial division of the country and a plethora of institutions at every level of government is merely a subterfuge to hide the highly centralized nature of the state and administration. It will give no real autonomy to the communities within which these institutions are lodged. They will have to fit within structures and relationships decreed in the constitution and have little power to adjust them to their own demography, internal diversity, and aspirations. The presence of the Tatmadaw will be everywhere. The framers of the Draft have clearly been more concerned with political control than cultural pluralism.

There is no mention of proportionality—in representation, presence in state institutions, and other forms of participation—that are now widely recognized as essential for inclusion of marginalized communities. The significance of a few provisions about the representation of ‘national races’ at lower levels of government is unclear: it is unlikely that they will make any real differences, and will perhaps lead to the co-optation of their leaders. Even in states, minorities will have to work with

Union authorities and the Tatmadaw if they are to exercise any power, and may thus be deeply compromised.

On the issues of language, culture and religion, crucial to minorities, little authority is given to regional or self-administered communities. They will be prevented from using local languages in administration or education in their states. As the Karen Human Rights Group has stated, the language issue is of great importance to the insurgent organizations that control or have controlled territory and population.<sup>19</sup> Where their control of territory has been recognized by ceasefire, e.g. as in the case of the Wa and Kachin, and they have the will and resources to conduct their own schools, the language of schooling is in accordance with their choice, variously, their ethnic language, Burmese, English or Chinese (in the case of the China-border area). Moreover the ethnic communities will have little control over their traditional land, which is central to the culture of many communities.

Finally, the constitution's provisions relating to human rights and freedoms are deeply flawed (and deliberately so). As the paper has demonstrated, neither the process of constitution making nor the contents of the Draft pay any heed to generally accepted human rights principles. It is likely that the judiciary—central to the maintenance of rights—will not be independent and will not be able to protect human rights. No other institutions, like a human rights commission or ombudsperson, is provided or envisaged. The actual terms in which rights are framed leave many possibilities of their derogation, and indeed suspension. Nor are the structures of state, dominated by the military, conducive to respect for rights.

Thus on fundamental issues facing Myanmar, the constitution is most likely to fail the people. And the difficulties in the transition from its faulty principles and structures to a more democratic and equitable society are deliberately embedded in the constitution

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<sup>19</sup> Karen Human Rights Group, <http://www.khrg.org/khrg2007/khrg0701.html>, Development by Decree: The Politics of Poverty and Control in Karen State, April, 2007, p. 76.