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# **Myanmar**

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## 1. Introduction

Myanmar has had three post-colonial constitutions. The country has experienced two major periods of unconstitutional rule without a constitution: 1962 to 1974 and 1988 to 2010. From 2011 to 2021, Myanmar entered a new political phase of quasi-civilian rule under the 2008 Constitution. The 2008 Constitution was introduced by the military to pre-empt a transition to constitutional democracy.<sup>1</sup> The military has controlled the political transition since 2011 and from 1 February 2021 claimed to take power through constitutional state of emergency provisions, although their actions amounted to a coup.

Myanmar (known as Burma prior to 1989) is home to a diverse group of peoples. The majority of the 51.4 million people are ethnic Burmans and Buddhist.<sup>2</sup> Historically, the country fought and lost three wars against the British and as a result, by 1885, becoming a province of British India. Burma was briefly ruled as a separate colony under the constitutional structure of the Government of Burma Act 1935. On independence in 1948, a new constitution drafted by elected representatives came into force. However, from the early years of independence, Burma experienced various insurgencies and ethnic armed rebellions.<sup>3</sup> A coup in 1962 installed a one-party socialist system that was effectively dominated by the military. The façade of the socialist regime fell apart in 1988 and was replaced by direct military rule without a constitution. Demands for democracy, federalism and constitutional change persisted. In 1990, elections yielded a victory for the National League for Democracy (NLD)—the party led by Nobel Prize winner Aung San Suu Kyi—but the military junta refused to cede power.

Instead, in the 1990s, the military, known as the Tatmadaw, embarked on a process of negotiating ceasefire agreements with ethnic armed groups and facilitating a constitution-making process by establishing a National Convention. While some elected representatives from the 1990 election were permitted to participate in the National Convention, most participants were selected by the military. The core political and legal structure of the Constitution had already been predetermined prior to the National Convention and speeches were pre-scripted. In 1996, the National Convention broke down, with several NLD and ethnic representatives expelled from proceedings. It was not until 2003 that the National Convention was reconvened. The Constitution was ostensibly adopted based on a public referendum. In 2010, the military-backed Union Solidarity and Development Party (USDP) declared victory in fraudulent elections. In 2011, the USDP-led government officially took power under the 2008 Constitution.

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<sup>1</sup> Melissa Crouch (2020) 'Pre-emptive Constitution-making: Authoritarian Constitutionalism and the Military in Myanmar', 54(2) *Law & Society Review* 487-515.

<sup>2</sup> The caveat to this census figure is that it excludes most of the Rohingya population of over 1.3 million people.

<sup>3</sup> One broad account from the 1940s to 2000s is Ashley South, *Ethnic Politics in Burma: States of Conflict* (Routledge 2008).

The Constitution identifies the country as the Republic of the Union of Myanmar. The governance structure of the country includes the Union (central) government; seven Regions and seven States (the later named after non-Burman ethnic groups); the capital Naypyidaw as a Union Territory; and six new Self-Administered Areas within a State. The constitution-makers took a detailed approach in the drafting of the 2008 Constitution. The Constitution has 457 lengthy provisions that are divided into 15 chapters. The organization of the Constitution is important, with the military's governance agenda given priority in the chapters on Basic Principles (ch I), the branches of government (ch II-VI) and the military (ch VII). Only after this do sections appear on the duties and rights of citizens (ch VIII), the electoral process (ch IX-X), and other matters such as constitutional amendment (ch II-XV). The level of detail makes the Constitution a highly prescriptive document. In particular, the Constitution sets a high threshold for amendment, making it a difficult document to change.

This chapter considers the structural characteristics of the 2008 Constitution and demonstrates that the military is central to the constitutional order. It offers an overview of the major institutions of Myanmar's constitutional system, beginning with the most important institution, the military, and then explaining the Basic Principles of the Constitution. The chapter explains the role of the legislature, the importance of political representation, and the centralization of power in the executive. In contrast, the judiciary is a weak branch. There are very few constitutional review cases and so the courts do not play a key role in constitutional reform. Rather, the legislature and the military are the two dominant political institutions. The chapter concludes with reflections on how the peace process, formal constitutional amendment and the coup of 2021 are reshaping the meaning of the Constitution.

## **2. The Military and the Basic Principles of the State**

The Tatmadaw is the most powerful institution in Myanmar and has many privileges under the Constitution. The Constitution exists to endorse and sanction the role of the military in governance. The Tatmadaw is both a formal and informal part of all branches of government, legislative, executive and judicial. It has authority to exercise legislative power, executive power and judicial power. Its influence is a result of several decades of militarization of the state and is built on practices that formed when the military ran the country without a constitution.<sup>4</sup>

The Tatmadaw is led by the Commander-in-Chief, and neither he nor the Tatmadaw is subordinate to the executive. The Constitution does not limit the power or position of the Commander-in-Chief in any way, although the president has the power to appoint the Commander in Chief in consultation with the National Defence and Security Council. The Tatmadaw has significant institutional independence and there are no checks and balances on the power of the Tatmadaw.

The institutions of government are infiltrated by the military. The Tatmadaw holds 25 percent of seats in the national and sub-national legislatures. These seats are unelected and constitutionally reserved for military officers. Supporters of the Constitution argue that the reservation of 25 percent of seats means that the military cannot block legislative proposals. However, the presence of the military in legislative sessions does allow them to express disagreement on legislative proposals of a civilian government, or at times even refuse to vote. This has been particularly evident under the NLD government (2016-2021). Examples include in

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<sup>4</sup> Andrew Selth, 'The Defence Services' in Ian Holliday, Nicholas Farrelly and Adam Simpson (eds), *Routledge Handbook on Contemporary Myanmar* (Routledge 2018).

2016 when the Tatmadaw refused to vote on the proposal to create the Office of the State Counsellor and 2019 when the Tatmadaw refused to vote on the motion to establish a constitutional amendment committee.<sup>5</sup>

The system of reserved seats for the military also ensures that the military can infiltrate and monitor democratically elected members, such as by sitting on legislative committees. Tatmadaw officers also participate in various high-level appointments. For example, the military representatives, along with the upper house and lower house, each appoint a candidate for the positions of president and vice-presidents (there are two). This means that, at the very least, the military representatives appoint one of the vice-presidents. Moreover, the Tatmadaw officers have veto power over any constitutional amendment proposal.

The Tatmadaw maintains control over key areas of government administration – the Ministries of Home Affairs, Defence and Border Affairs. These three Ministers are appointed by the President on the recommendation of the Commander-in-Chief. These ministerial positions are important because the police fall under the Ministry of Home Affairs and so effectively remain under military control.<sup>6</sup> The Ministry of Border Affairs has historically been used to control and contain areas on the periphery that are more prone to conflict with ethnic armed organisations. The role of the General Administration Department is central to government administration.<sup>7</sup> Up until December 2018, the General Administration Department sat under the Ministry of Home Affairs; it has since been transferred to the Ministry of the Office of the Union Government.<sup>8</sup> This was intended by the NLD as means of bringing the administration under civilian control and a potential step towards the demilitarization of the administration.

The Constitution establishes a National Defence and Security Council and guarantees military officers and military appointees a majority of the eleven seats. Although the president has the power to call a meeting of the Council, he must consult the Council on any decision to declare a state of emergency. President Thein Sein made frequent use of the Council during his term in office. This indicates the close relationship between the government and the military at that time. In contrast, the NLD has been reluctant to call a meeting of the Council. Among the reasons for not doing so, the NLD is concerned that they may be outvoted on any decision made by the Council. For example, in late 2017, the Tatmadaw expressed its concern that a state of emergency should be declared in northern Rakhine State in relation to the conflict that had occurred against the Rohingya. The military called for the Council to meet and consider the issue. The Pyithu Hluttaw rejected these calls. The operation of the Council therefor remains contingent on the relationship between the military and the government of the day.

The Tatmadaw benefits from the Basic Principles in Chapter I of the Constitution.<sup>9</sup> The Basic Principles elevate military policies to constitutional mandates, and these in turn guide both the legislature and the courts. The Basic Principles are adapted from past constitutions in

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<sup>5</sup> Irrawaddy, 'The Parliamentary Battle over Amending the Constitution' (*Irrawaddy*, 18 March 2019) <<https://www.irrawaddy.com/specials/parliamentary-battle-amending-constitution.html>> accessed 5 May 2019.

<sup>6</sup> On reform to Myanmar's police force, see Andrew Selth, 'Police Reform and the Civilisation of Security in Myanmar' in Melissa Crouch and Tim Lindsey (eds), *Law, Society and Transition in Myanmar* (Hart Publishing 2014).

<sup>7</sup> Important research on the General Administration Department has been conducted by The Asia Foundation, see for example The Asia Foundation, *State and Region Governments in Myanmar* (Asia Foundation 2013).

<sup>8</sup> Frontier, 'Government reveals plans to bring GAD under civilian control' (*Frontier*, 22 December 2018) <<https://frontiermyanmar.net/en/govt-reveals-plan-to-bring-gad-under-civilian-control>> accessed 5 May 2019.

<sup>9</sup> For a more detailed explanation of the Basic Principles, see Melissa Crouch, *The Constitution of Myanmar: A Contextual Analysis* (Hart Publishing 2019) ch. 2.

Myanmar. The 1947 Constitution followed India in having a section on Directive Principles of State Policy. The subsequent 1974 Constitution had a socialist-style Basic Principles chapter. The text of the 2008 Constitution incorporates these different approaches to fundamental principles of the state together with a third source, which is military policy. The Basic Principles section operates to affirm the role of the Tatmadaw in the governance of the country. The Constitution emphasises duties and responsibilities, while rights are highly conditional and contingent on legislation. The military is given prime position in the political system and is central to the tripartite objectives of maintaining national unity, territorial unity and guaranteeing the sovereignty of the nation. These principles not only mirror the previous slogans of the former military regime but upgrade these military slogans to constitutional principles.

The chapter on Basic Principles mandates that the legislature must adhere to these principles in drafting laws, and the courts must comply with these principles in its role in interpreting both the Constitution and other laws. There is, however, no mechanism for enforcing these provisions. Although there have been no clear statements from the Constitutional Tribunal on the role of the Basic Principles, this chapter of the Constitution is intended as a central point of focus and orientation for the branches of government and the broader political system.

### **3. The Legislature and political representation**

The establishment of an elected body at the Union level in Naypyidaw and at the State/Region levels marked a new era in politics in Myanmar. Scholars have commented on the surprisingly robust nature of debate in the legislature.<sup>10</sup> Yet the design and structure of the legislature is also limited. The legislature is restricted in its representativeness, because not all seats are elected. The sub-national unicameral parliaments are limited in the powers they can exercise and remain accountable to the President.

The Legislature is a relatively strong branch of government and consists of three houses. The Lower House (Pyithu Hluttaw) represents electoral constituencies and the Upper House (Amyotha Hluttaw) grants equal representation to the 14 States and Regions as a form of ethnic and territorial based representation. Each State and Region has 12 representatives in the Amyotha Hluttaw. This distribution favours the sparsely-populated States. The Pyithu Hluttaw has a maximum of 440 members, while the Amyotha Hluttaw has 224 members. These two houses sit jointly as the Union Legislature (Pyidaungsu Hluttaw), which plays a significant role in the political process. Elections are based on a proportional representation system and any change to this system is understood to require constitutional amendment.

The Constitutional Tribunal has heard a case that raised the question of whether a system of proportional representation is constitutional.<sup>11</sup> In Myanmar, the electoral system is based on first-past-the-post. Debates over proportional representation are often concerned with giving ethnic minorities a greater share of the vote. The argument in favour of proportional representation has become increasingly convenient for the military, as it is assumed that this would increase the

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<sup>10</sup> There is a growing body of work on the parliament, see for example Thomas Kean, 'Myanmar's Parliament: From Scorn to Significance' in Nick Cheesman, Nicholas Farrelly and Trevor Wilson (eds), *Debating Democratization in Myanmar* (Institute of Southeast Asian Studies 2014); Renaud Egretreau, *Caretaking Democratization: The Military and Political Change in Myanmar* (Hurt & Co Publishers 2016); Chit Win, 'The Hluttaw and Conflict in Myanmar' in Nick Cheesman and Nicholas Farrelly (eds), *Conflict in Myanmar: War, Politics, Religion* (ISEAS Yusof Ishak Institute 2016) 199–220.

<sup>11</sup> Constitutional Tribunal Decision, Draft Law Case No 5/2014.

USDPs share of the votes and decrease the share of the NLD. The Constitutional Tribunal did not consider the issue of the validity of proportional representation in its court decision, instead dismissing the case on the grounds that the law in question was only a draft law and the Constitutional Tribunal cannot review draft laws for constitutionality. This is an example of the Constitutional Tribunal reading its mandate narrowly. Generally, any change to the electoral system to introduce proportional representation is understood to require constitutional change.

The role of the legislature under the Constitution is animated by four core functions: law-making, complaint resolution, executive oversight, and judicial control. While legislation can originate from either house, the Constitution requires that bills must ultimately be approved by a majority of both houses sitting jointly in the case of disagreement. Since 2011, there has been a significant amount of law-making activity and the legislative process has largely been driven by various legislative committees.

The power to propose legislation was at the heart of the most controversial Constitutional Tribunal case.<sup>12</sup> In 2012, the President sought an opinion from the Constitutional Tribunal asking it to declare that Union Level Organisations lack the power to propose legislation. The case arose in the context of delays over the legislative agenda, and tensions between legislative committees and the President. The Constitutional Tribunal sided with the President and held that because Union-Level Organisations (such as the Election Commission or the Supreme Court) fulfil an administrative function by submitting proposals to the Hluttaw, they could not also exercise the power to submit legislative amendments. Members of the legislature were concerned that the decision was unduly influenced by the President's Office. Motions to impeach all Constitutional Tribunal members were initiated, but before the process could be completed, the entire membership of the Constitutional Tribunal resigned. This constitutional crisis had a detrimental impact on the future legitimacy of the Tribunal and its decisions.

Again in 2017, the power of legislative committees was raised in a slightly different way, this time with a specific intention to target Shwe Mann as the chairperson of the most powerful legislative committee. Shwe Mann is the former USDP chairperson and former Speaker of the Lower House (2011-2016). During his term as Speaker, his ambitions often clashed with those of President Thein Sein. This case was brought to the Tribunal by military representatives. The Constitutional Tribunal held that the Union Legislature does have the power to form legislative committees and dismissed the court case.<sup>13</sup> Nevertheless, the consequences of the 2012 crisis continue to be felt. The 2017 case demonstrates that military representatives are willing to use legal means to challenge the constitutionality of laws.

#### **4. The Executive and the Centralization of Power**

The Constitution offers highly centralised powers to the party that wins a majority of seats and can form government. In 2010, the USDP won a majority of seats in the highly rigged election.<sup>14</sup> In 2015 and again in 2020, the NLD overwhelmingly won the elections. The political era from 2011-2021 therefore first had a USDP-led government and then an NLD-led government.

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<sup>12</sup> Constitutional Tribunal Decision, Parliamentary Committees Case 1/2012.

<sup>13</sup> Constitutional Tribunal Decision, Parliamentary Committees Case No 2, 1/2017.

<sup>14</sup> Michael Lidauer and Gilles Saphy, 'Elections and the Reform Agenda' in Melissa Crouch and Tim Lindsey (eds), *Law, Society and Transition in Myanmar* (Hart Publishing 2014) 201-224.

The Constitution introduces a presidential system with two vice-presidents. The President is the head of government. The majority of high-level executive positions are appointed by the President or with his consent, and these executive positions are accountable directly to the President. There are two vice-presidents, and these positions are all indirect appointments.

Most high-level executive appointments in Myanmar have strikingly similar eligibility requirements under the Constitution. Central to these requirements are loyalty to the Union, full citizenship (which requires both parents to also have citizenship) and not owing allegiance to a foreign power. Both the president, vice-presidents and Constitutional Tribunal members are also required to be familiar with military affairs. Although there were initial concerns that this constitutional requirement may mean that the positions were only open to former military officers, this has not been the case in practice.

The person who is elected President has the power to appoint many key political posts. The election of the heads of the 14 States and Regions (known as ‘Chief Ministers’) is not a democratic or direct process, but a decision that remains in the hands of the President. This stunts the independence of the States and Regions, and limits future possibilities for decentralization or federalism. At best, the Constitution offers a limited measure of power to sub-national governments. There is significant debate and discussion over section 261 of the Constitution and whether Chief Ministers could instead be elected in a more local and direct fashion, either by the relevant State and Region government or by the people of that State/Region. In 2019, the USDP submitted a proposal to the legislature for constitutional amendment on this issue, though it was unsuccessful.

On paper, the Constitution creates a strong presidency, but under the NLD this was displaced by the State Counsellor.<sup>15</sup> In early 2016, the role of the State Counsellor was established through the passage of a new law by the NLD government. The purpose of this role is to legitimate Aung San Suu Kyi as the leader of the government, even though she cannot constitutionally become president. The creation of the State Counsellor role shifted public understanding of the President, which became a more symbolic and ceremonial role.<sup>16</sup> The State Counsellor draws attention and authority away from the Office of the President and enabled Aung San Suu Kyi to lead the government.

The mandate of the State Counsellor is to foster a market economy, enhance democracy, promote peace and development, and work towards federalism. Some of these goals suggest an expanded view of the Constitution and implicitly challenge the existing language of disciplined democracy and the lack of explicit emphasis on federalism. In this role, Aung San Suu Kyi played a leading role in the ongoing national peace process. Infamously, she also led the government’s response to the grave violence, killings, mass displacement and humanitarian crisis in Rakhine State.

The executive and legislative branches are separate and distinct, with all ministers at the national level required to vacate any legislative position they held at the time of their appointment to the executive branch. The relationship between the executive and the other branches of government varies. Under the USDP-led government (2011-2016), the relationship between the

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<sup>15</sup> On the role of the executive in Myanmar, see Crouch, *The Constitution of Myanmar* (n 8) ch 5; see also Ian Holliday and Su Mon Thazin Aung, ‘Executive’ in Ian Halliday, Nicholas Farrelly and Adam Simpson (eds), *Routledge Handbook on Contemporary Myanmar* (Routledge 2018).

<sup>16</sup> The State Counsellor is an example of informal constitutional amendment, see Melissa Crouch, ‘Authoritarian Straightjacket or Vehicle for Democratic Transition? Constitutional Regression and Risks in the Struggle to Change Myanmar’s Constitution’ in Tom Ginsburg and Aziz Huq (eds), *From Parchment to Practise: Implementing New Constitutions* (Cambridge University Press 2020) (hereafter Crouch, ‘Vehicle for Democratic Transition’).

legislature and executive became increasingly hostile. This was primarily because of divisions within the USDP. This led to tensions about the role of the legislature in relation to the executive, and the extent to which the legislature can or should act as a check on the powers of the executive. Under the NLD government (2016-2021), the relationship between the executive and the legislature was one of unity, while the main source of tension was between the military representatives and the NLD-led government.

## 5. The Judiciary

The judicial system consists of three distinct institutions. There are Courts Martial for military personnel, which are under the control of the Tatmadaw and separate from the civilian judicial system. There is the Supreme Court, which is the apex court of the general court system, and below it a sub-national tier of State and Region High Courts, District Courts and Township Courts. There is also a Constitutional Tribunal that only deals with elite petitions on matters of constitutional law.

The President has significant powers over the courts, primarily through appointment and impeachment proceedings. In terms of the general court system, the President nominates the Chief Justice of the Supreme Court. Judges of the Supreme Court are appointed by the President and the Chief Justice. The majority are career judges, but several are known to have military backgrounds, including the Chief Justice. Similarly, the President also has power to appoint the Chief Justices of the 14 State and Region High Courts in collaboration with the Chief Minister of the State and Region (who is also appointed by the President). Nominations for judges of the High Court are made by the Chief Minister and the Chief Justice. This appointment process favours executive control over the courts and leaves little room for real or perceived judicial independence. There is no independent judicial commission in Myanmar.

The caseload of the Supreme Court is mostly criminal cases on appeal and matters of family law and civil disputes.<sup>17</sup> Since 2011, the Supreme Court has jurisdiction to hear constitutional writ cases.<sup>18</sup> These writs – mandamus, prohibition, certiorari, quo warranto and habeas corpus – are in theory designed for the protection of rights under the Constitution. The Supreme Court receives many writ applications each year, but most are not officially reported in the law reports, and few cases are directly connected to the protection of individual rights in the Constitution.

The rights that could in theory be protected by a writ application are those found in Chapter VIII of the Constitution and include equal opportunity, non-discrimination, freedom of expression, right to education, freedom of assembly, freedom of association and freedom of religion. These provisions are limited by law and are conditional on obligations. For example, the Constitution grants special recognition to Buddhism, although it also acknowledges other religions such as Hinduism, Christian and Islam. Further, the prohibition on the abuse of religion for political purposes (section 364) appears meaningless. Concerns have been raised about the use of religion in political and public life, particularly the rise of Buddhist extremism and instances of hate speech in the lead up to elections.

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<sup>17</sup> For the first quantitative analysis of the caseload of the Supreme Court, see Dominic Nardi and Lwin Moe, 'Understanding the Myanmar Supreme Court's Docket' in Melissa Crouch and Tim Lindsey (eds), *Law, Society and Transition in Myanmar* (Hart Publishing 2014) 95-115.

<sup>18</sup> For a comparative account of the writs in Myanmar as a constitutional transfer, see Melissa Crouch, 'The Prerogative Writs as Constitutional Transfer' (2018) 38 *Oxford Journal of Legal Studies* 653.



Chapter VIII has several main features: citizens duties, citizens rights, persons rights, remedies for breach of rights, restrictions on rights and state obligations, recognition and prohibitions. The provisions on rights are qualified because the right can only be enjoyed according to the law, meaning that the legislature can potentially impose limits on and define the content of the right. As Nick Cheesman has suggested, the concept of rights in Myanmar is one of conditional privilege and are not equivalent to a comparative conception of fundamental rights.<sup>19</sup> In many respects this is an anti-rights chapter because the emphasis remains on citizens duties to the state and in practise it is impossible to enforce rights. The military even has the power to limit rights if it is in the interests of public order and security (section 382).

The rights provisions stand alongside a variety of duties. There is an explicit requirement that all citizens must uphold the Constitution and the territorial unity, sovereignty and independence of the country. There is a constitutional duty of citizens to undergo military training and serve in the armed forces. Like some provisions of the Constitution, this appears to be a hollow duty, because there is no active program of compulsory military service in Myanmar. At best it is an example of a dormant constitutional provision that could be activated in the future, although it would likely be very unpopular if it were enforced. Another duty of citizens is the explicit requirement to pay taxes, which again is something that other constitutions would simply presume.

A separate judicial body, the Constitutional Tribunal, hears other constitutional matters. The Constitutional Tribunal is a forum for constitutional dialogue between democratically elected and unelected military officers.<sup>20</sup> The 2008 Constitution introduced this new body and its power of judicial review, although a limited power of constitutional review did exist previously from 1948 to 1962. The President and the Legislature appoint all nine members to the Constitutional Tribunal, whose term of office is tied to the term of the government (five years). There have been four benches of the Constitutional Tribunal (2011-2012, 2013-2016; 2016-2021; 2021-ongoing). The Constitutional Tribunal has heard less than 20 cases, so its role and influence are very limited. Petitions can only be brought by a limited range of elite political actors, including the President, the Supreme Court, the Election Commission, the Chief Ministers of the States/Regions, or at least ten percent of legislators at the national or sub-national level. This means that military officers who sit in the legislature can also bring constitutional review cases. Individuals or civil society groups cannot access the Constitutional Tribunal. Individuals alleging constitutional violations must instead attempt to use the Supreme Court's constitutional writ jurisdiction.

The Tribunal has narrowed the scope of its powers and has not played a leading role in clarifying the meaning of the Constitution. There has been no consideration by the Constitutional Tribunal of the meaning of individual rights, nor of the relationship between different rights. Most provisions of the Constitution have not been interpreted by the Constitutional Tribunal. Even in cases where the Constitutional Tribunal has made important statements, such as its first decision affirming the separation of powers, its decisions are often disregarded by the legislature or executive.

There is a lack of consistency in the approach of the Constitutional Tribunal over time and even within the same bench from case to case. In a handful of cases, the Constitutional Tribunal has endorsed the government's artificial categorisation of 'national races', and this has the effect of excluding some minority groups. In 2015, the Constitutional Tribunal considered a case

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<sup>19</sup> Nick Cheesman, *Opposing the Rule of Law; How Myanmar's Courts Make Law and Order* (Cambridge University Press 2015).

<sup>20</sup> See Melissa Crouch, 'Democrats, Dictators and Constitutional Dialogue: Myanmar's Constitutional Tribunal' (2018) 16 *International Journal of Constitutional Law* 421.

concerning citizenship and the right to vote. The Constitutional Tribunal ultimately took an approach that was sympathetic to nationalist Buddhists by ruling that only citizens could vote or run for office, thus excluding temporary white card holders, many of whom are Rohingya Muslims.<sup>21</sup>

Aside from the courts, the Constitution itself does not provide for any independent accountability institutions to protect rights. There is an Anti-Corruption Commission established by law that is appointed by the government and serves the same term as the government. There is also a National Human Rights Commission established by law, although its performance has been heavily criticised.

## 6. Constitutional Change and the Peace Process

From 2011-2021, Myanmar was a hive of local and international law reform initiatives and foreign aid and investment.<sup>22</sup> Constitutional law and the prospects of reform were key topics for discussion, debates, education, advocacy and study tours. There remains a preoccupation with constitutional amendment. Recurring issues in the debates over amendment include the role of the military, the prospects for federalism, and the process of amendment itself. This raises questions such as whether the Constitution can be changed, and if so how, given that the military retains veto power? Does the decentralization of power under the Constitution go far enough, and if not, is federalism the answer to many ethnic grievances to ensure future peace? How democratic is the Constitution, and what should be the role of the military in the future of Myanmar? How can the constitution of a territory rich in natural resources ensure the fair and equitable distribution of resources for the benefit of the people?

There have been several official and unofficial efforts at constitutional change in Myanmar. These include demonstrations by ‘anti-change’ proponents, that is, those who sympathise with the military and seek to retain the existing 2008 Constitution. At the same time, a national peace process has been underway since 2012.

The formal constitutional amendment provision—section 436—is perceived to be the only way to change the Constitution.<sup>23</sup> A proposal to amend the Constitution must be submitted in the form of a bill exclusively concerning amendment and must be supported by at least 20 per cent of all members of the Union Parliament, which means 133 of the 664 members. The Constitution sets out two different levels of amendment, depending on the provision concerned. Both tiers require more than 75 per cent approval in the Union Parliament. Any constitutional amendment would require negotiation and agreement across a range of parties.

The procedure for these two tiers of amendment varies slightly. The first tier requires approval in the Union Parliament and in a referendum. Tier 1 is the higher threshold: it requires more than 75 per cent approval in the Union Parliament plus a nationwide referendum with the votes of more than half of those who are eligible to vote (not merely half of those who cast a vote).

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<sup>21</sup> Mikael Gravers, ‘Myanmar Citizenship Law’ in Mikael Gravers and Flemming Ytzen (eds), *Burma/Myanmar: Where Now?* (NIAS Press 2014).

<sup>22</sup> The politics of aid in Myanmar is similar to that of countries such as Cambodia, see Tim Frewer, ‘The Politics of Aid in Myanmar’ in Melissa Crouch (ed), *The Business of Transition: Law Reform, Development and Economics in Myanmar* (Cambridge University Press 2017).

<sup>23</sup> For a discussion on informal constitutional amendment in Myanmar, see Crouch, ‘Vehicle for Democratic Transition’ (n 16).

This approval process applies to most of the provisions on the powers of the government and the military. Many argue that the Constitution is practically unamendable because the military members in the legislature have the final say on amendment.

The second tier for constitutional amendment only requires approval of the legislature. Tier 2 requires more than 75 per cent of approval of members in the Union Parliament. This requirement covers all sections of the Constitution other than those specifically mentioned in tier 1, such as the appointment and impeachment of MPs, the process of passing legislation, the process of forming parliamentary committees, the rights of citizens and remedies for protecting these rights, and elections. The inference that can be drawn from this two-tier structure of constitutional amendment is that the powers of the military and the founding principles of the Constitution should not be subject to change, while individual rights are subject to change by parliament and the military (without a referendum).

An intense campaign for formal constitutional amendment took place from 2013 to 2015. This was primarily led by the NLD and the 88 Generation, who were calling for major constitutional changing including the removal of the military from the legislature. Two bills were finally submitted to the Union Parliament, but only very minor amendments were approved, such as to the schedule of legislative power.<sup>24</sup> This did not satisfy the long list of demands from democratic actors or ethnic groups. The NLD, the main party advocating for reform, continues to reiterate its desire to amend the Constitution. This will not happen through formal amendment unless military members of the Union Parliament agree to any proposal submitted. In 2019, the NLD shifted its focus back to constitutional amendment and initiated the formation of a new committee in the legislature to consider potential amendments. This continuing attention to constitutional amendment remains an indication of dissatisfaction with the Constitution, and the relative lack of power that pro-democracy actors have to change it.

Related to constitutional amendment is the peace process. In August 2011, President Thein Sein reached out to ethnic armed organisations (EAOs) with the ambitious aim of negotiating and concluding a nationwide ceasefire. From 2011 to 2014, as a result of these peace dialogues, the Thein Sein government signed bilateral ceasefires with fifteen armed groups. The rush by the Thein Sein government to sign a National Ceasefire Agreement before the 2015 elections meant that only eight out of fifteen armed groups were willing to sign. The National Ceasefire Agreement refers explicitly to the idea of federalism, which is a departure from the Constitution. Only eight ethnic armed organisations signed the National Ceasefire Agreement, and two of these later withdrew from the peace process; some of the non-signatories are among the most powerful ethnic armed organisations. The Ceasefire Agreement does not anticipate the possibility of amendment, and neither the Tatmadaw nor the NLD government has indicated any willingness to consider amendment of the Ceasefire Agreement.

To summarize, the 2008 Constitution was drafted by the military to ensure a controlled transition from direct military rule to a system of government that blends civilian and military authorities, elected officials and unelected authorities. This military-state ensures that the military remains a central actor in the political process. The Constitution endorses a centralised Union rather than a federal system, it offers a limited system of elections and democracy, and it makes any future attempts at change extremely difficult. Despite the demands for federalism, democracy and constitutional change, there has not yet been major constitutional reforms on these issues.

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<sup>24</sup> For an analysis of the amendment campaign and the amendments proposed in 2015, see Melissa Crouch and Tom Ginsburg, 'Between endurance and change in Southeast Asia: the military and constitutional reform in Myanmar and Thailand' in *Annual Review of Constitution-Building Processes: 2015* (International IDEA 2016)

## **7. Postscript: The 2021 military coup**

At the November 2020 elections, the NLD again won an overwhelming majority of seats and was set to take office on 1 February. Although all incoming members of parliament had gathered in the capital, Naypyidaw, in anticipation of taking office, they were prevented from doing so. In the early hours of 1 February, the president Win Myint and State Counsellor Aung San Suu Kyi were arrested. Over the coming days and weeks, the military arrested many other members of parliament, as well as writers, journalists and artists. Weeks of sustained protests followed. From March, the police and military used overt and unprovoked violence against protestors and anyone seen to be supporting the Civil Disobedience Movement – from doctors to students to businesspersons and even to owners of photocopy shops that had printed posters.

The military has projected the fiction that it took control of the country out of concern that there was electoral fraud and issues with the voting list in the 2020 elections. Yet the military did not follow the procedure set out in section 417 to declare a state of emergency, and so its actions are best understood as a coup. While the military continues to argue that it is upholding and protecting the 2008 Constitution, the coup has led to calls for the 2008 Constitution to be abolished. Even the Committee of Representatives of the Pyidaungsu Hluttaw (the incoming elected representatives) identified the abolition of the 2008 Constitution as one of its goals.

The military is for now still claiming to act according to the provisions on states of emergency under the Constitution. This is difficult to justify because the process for declaring a state of emergency was not followed. Many of the institutions created by the constitution formally still exist, although the military has made new appointments to many institutions – from the administration to the courts. The Pyidaungsu Hluttaw no longer exists and the country instead is being ruled by a State Administration Council headed by the Commander in Chief. The military claims it will hold power for one to two years, after which time it intends to hold a new election under the Constitution. Since many NLD representatives are under arrest, and the party may either be banned or boycott a future election, the military has neither the mandate nor legitimacy to hold a fresh election. The 2021 coup is therefore both the end of the 2008 Constitution as it was currently understood, and a new era in Myanmar's constitutional history, one where the Constitution is openly manipulated by the military and ultimately rendered meaningless.