Bingham Centre Myanmar Project

Bingham Centre for the Rule of Law
October - November 2014

www.binghamcentre.biicl.org
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<td><strong>Constitutional Amendment: section 436 and options for the amendment process</strong></td>
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<td>This session will include two short talks on the amendment provisions in Myanmar’s Constitution as well as discussion and questions. Other countries considered will include France, South Africa, Indonesia and the UK.</td>
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<td>Naina Patel and Alex Goodman</td>
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<td><strong>Executive Power: selecting the President and Executive powers</strong></td>
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<td>This session will include a short talk followed by discussion and questions. Other countries considered will include Argentina, Brazil, Turkey, Indonesia and the UK.</td>
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**Friday 31st October**

**Saturday 1st November**

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<td>Dr Andrew McLeod</td>
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<td><strong>Mechanisms of Accountability: the Courts, Judiciary and administrative justice</strong></td>
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<td>This session will include discussion and questions. Issues considered will include the powers of the Supreme Court to issue writs; Courts Martial; the Constitutional Tribunal and judicial appointments.</td>
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<td>Raman Gaythri of Lexis Nexis</td>
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Constitutional Awareness
Myanmar
September 2014
CONSTITUTIONAL AWARENESS

This document is a guide to the Constitution and constitutional reform.

It consists of:

A. What is a Constitution? (p.1-6)
B. Key Provisions of the Current Burmese Constitution (p.7-14)
C. Possible Areas for Reform (p.14-25)

The document is not written for the specialist in constitutional law. Nor is it intended to be fully comprehensive. It selects those issues which appear to be most relevant to Burma/Myanmar at the present time.
CONSTITUTIONAL AWARENESS

A. WHAT IS A CONSTITUTION?

A Constitution is a collection of rules and principles which set out how a state will be governed.

It forms the framework for all decisions made by every government official and, particularly the legislature (the law making body), executive (President/Prime Minister/ministers) and the courts.

It also sets out the rights of everyone which must be respected by the state and therefore establishes the relationship between the government and the people.

**Why is a constitution important?**

A constitution is important because it ensures that those who make decisions on behalf of the public fairly represent public opinion.

It also sets out the ways in which those who exercise power may be held accountable to the people they serve.

And it sets out where government powers end by guaranteeing individuals’ specific rights and freedoms. These rights help to assure the protection and promotion of human dignity, equality and liberty.

Constitutions may provide for the division of powers between the central government and the regions.

Constitutions should be agreed rather than imposed so as to provide an acceptable framework for the settling of different political views. They help provide for a stable society by ensuring that, although everybody may not agree with the government all the time, the people accept the legitimacy of the system of choosing governments.
What does a constitution contain?

A constitution will often contain a number, if not all, of the following features:

**A Preamble**: This sets the constitution in context, outlining the state’s fundamental values and objectives.

**The Identity of the State**: The constitution may set out the official language or languages, the country’s flag, who is eligible to be a citizen and the position of the state in the world.

**A Bill of Rights**: The constitution will set out the rights of individuals and the circumstances in which these may be limited or suspended.

**Commitment to the rule of law**: Many constitutions endorse the rule of law, whereby laws must be clear and accessible, equally enforced, and where people have the opportunity to assert their rights in courts where they must receive a fair trial before independent and impartial judges.

**The Role and Composition of the Legislature (Law Making Body)**: The constitution will set out who will make up the legislature and how its members will be chosen. There may be one or two bodies and the constitution will say what their respective roles are.

**The Role and Composition of the Executive (President/ Prime Minister/ Ministers)**: The constitution will determine who will be part of the executive and how they will be chosen. It sets out the powers of the executive including those of the head of the executive (president / prime minister). In some constitutions the head of state has a great deal of powers, and in others the head of state is more in the nature of the representative of the people, and the main executive power is wielded by a prime minister. The constitution also sets out how the executive is accountable for the exercise of power to the legislature, the courts and the people.

**The Structure and Appointment of the Judiciary**: The constitution sets out conditions for choosing judges and their independence from the other branches of government (the legislature and the executive) as well as the kinds and levels of courts. The role and method of appointment of the government legal advisor (Attorney General) and public prosecutors will also normally also be provided for in the constitution.

**Provisions for Elections**: The constitution sets out requirements for elections. These may include which voting system is to be used, regulations for political parties, who may stand for election and regulations regarding how elections are to be carried out fairly and honestly.
**Other Important Bodies:** The constitution may provide for additional bodies such as a central bank, and bodies to support democracy, for example an Electoral Commission, Anti-Corruption Commission, Financial Oversight Commission or a Human Rights Commission.

**The Structure of the State:** The constitution will determine how power is to be allocated between the national, regional and local levels.

**The Economy and Distribution of Resources:** Some constitutions set out which economic system a state is to follow (for example, market economy or socialism). Most however leave that question to the choice of the people. It may also determine how natural resources and other wealth are to be allocated between levels of government or regions.

**The Role and Control of the Armed Forces/Police:** The constitution may set out the duties of the military and police as well as provisions for their supervision, control and accountability.

**Emergency powers:** The constitution should address who can declare an emergency and in what circumstances, and who is granted what powers during an emergency.

**Amendment Provisions:** The constitution will set out how it can be changed, normally by a majority of more than 50 per cent of the members of the legislature and sometimes also by a referendum of the people.

**What distinguishes a Constitution from Laws Made by the Legislature?**

Because they form the framework for all decisions and actions of officials, the rules and principles outlined in constitutions are normally regarded as superior to laws passed by the legislature.

This means that representatives in the legislature should only pass a law if it is compatible with the constitution. The courts normally have the role of deciding whether a law conflicts with the constitution.

Since constitutional rules have this higher status there are often tougher requirements for changing them than for ordinary law. However, it is important that a constitution can be amended so it can undergo improvement and respond to changing circumstances.

Constitutions also usually allow for the suspension of some or all of its provisions, but only in time of emergency, such as when it is seriously necessary to safeguard national security or vital public interests.
How can a constitution protect individuals’ rights?

A constitution can protect individuals by outlining their rights, normally in a ‘bill of rights’ at or near the beginning of the constitution.

The rights which the constitution contains are normally owed to everyone in a country with the exception of rights which may be reserved for citizens only, such as the right to vote.

Civil and political rights include rights such as to life, to personal liberty, protection from torture, protection from slavery, freedom of expression, the right to equal treatment and the right to demonstrate peacefully.

These rights place limits on the power of the state and the constitution permits everyone to assert them through access to courts where there is a further right to a fair trial before impartial and independent judges.

Some countries have a right to administrative justice, which impose a duty on all public officials to act within the law, to give people fair hearings and to act reasonably.

Some constitutions also contain economic, social and cultural rights such as the right to housing, the right to education, the right to healthcare, the right to work and even environmental rights.

These may be important to allow people to enjoy their political and civil rights by helping to guarantee them an adequate standard of living. However, some people believe including these ‘positive’ rights in a constitution limits the government’s ability to make economic and social policy. A constitution may therefore determine that the state’s duty to guarantee such rights can be realized gradually over time.

The rights included in a state’s constitution will also be determined by which international treaties it has signed, such as UN Conventions on various rights, since these set out detailed requirements for how states should treat individuals.

Absolute rights are rights which cannot be limited in any situation or for any reason, for example, protection from torture.

Limited rights can be restricted in certain circumstances. The right to free speech, for example, may not extend to speech which offends the reputation of others or which incites racial or religious hatred. The constitution should outline how and when rights can be limited.

Derogable rights are those which can be suspended, for example, during a state of emergency. Such rights might include the right to freedom of expression or assembly. The constitution should set out in what circumstances suspension is allowed.
Non-derogable rights are those which a state can never suspend, for example, protection from torture.

Who is protected?
The rights set out in the constitution are in most cases owed equally to everybody. However, they may be most important to those who have faced disadvantages in the past, for example, ethnic minorities and women.

As a result the general principle of equality outlined in the constitution may need to be accompanied by clear protections for women or minorities against discrimination.

Enforcement
The constitution is also important in determining how rights will be enforced. It should in particular outline the role of courts in deciding rights violations and the compatibility of legislation with constitutional rights.

The constitution may also provide for independent bodies to assist enforcement of rights, such as a Corruption Commission, or a Human Rights Commission which can receive complaints, monitor respect for constitutional rights and promote their recognition.

How do the Government and Courts Function?

A constitution establishes three main bodies: a legislature which passes laws, an executive which implements the law and a judiciary which enforces compliance with the law. It also determines how power is to be allocated between these three.

The legislature is made up of representatives of which all, or a majority, are elected by the people for specified lengths of time. It is responsible for passing laws, holding the executive to account, debating issues of the day and representing the people.

The executive plans and promotes government policy and is responsible for putting the law into action. It also plays a role in proposing new legislation and supervising state bodies such as the civil service and the military. The head of the executive may have further specific powers including the power to appoint members of the executive and the power to refuse or delay legislation, enter into international treaties and the power to make war or declare peace.
The courts administer justice – between two private persons or institutions, or between a person and the state. It is therefore of vital importance that judges are impartial and independent from the government or other interests. To ensure independence, judges must be appointed on the basis of merit rather than on the basis of their personal or political connections. For the same reason, the constitution must also set out strict guidelines as to when a judge can be removed.

**How is Power Allocated between the Centre and the Regions?**

A constitution must also set out how power is to be allocated between the national and regional level.

**Unitary states** are governed as a single unit with the central government playing the most important role. Although there may be local government to deal with certain matters, the central government will have the freedom to grant and withhold the powers which it enjoys.

A **constitutionally decentralized union** is a state in which the constitution devolves some powers to the regions. The different regions may enjoy the same powers or the powers may differ in different regions (known as ‘asymmetrical devolution’).

In **federal states**, the constitution shares power between the central (federal) government and the regions (usually known as states or provinces).
B. KEY PROVISIONS OF THE CURRENT BURMESE CONSTITUTION

Bill of Rights:

Various civil, political, economic, social and cultural rights are set out in the Constitution. Many of these rights are reserved for citizens.

Some rights are given as absolute. These include:

the protection from a penalty that violates human dignity [art. 44], the right to equality under the law [art.347], the right against discrimination [art.348], the ban on enslaving and trafficking individuals [art. 358] the right of defence and appeal under law [art. 19(c)], and the right to equality, liberty and justice [art. 21(a)].

However, many rights set out in the Constitution can be limited in certain circumstances which are often very general and wide-ranging. These include:

the right to freedom of conscience [art.34], protection against actions harmful to life and personal freedom [art. 353], the right of expression, assembly, and association [art.345], protection from forced labour [art. 359], the right to freely develop literature, culture, arts, customs and traditions [art. 365], protection against being held in custody for more than 24 hours without the approval of a judge [art. 376], the right to compensation for complaints entitled under the law [art. 381] and, protection against sexual discrimination when civil service positions are believed to be suitable only for men [art. 352].

All of the rights set out in the constitution are derogable since they can be suspended in a state of emergency [art.414; art.420].
The Role and Composition of the Legislature

How is the Legislature chosen?

The Pyidaungsu Hluttaw (the legislature) is made up of two bodies: the Pyithu Hluttaw and the Amyotha Hluttaw [art.74].

The Pyithu Hluttaw has a maximum of 440 representatives [art.109].

330 representatives are elected by the people to represent townships by population.

110 representatives are Defence Services personnel put forward by the Commander-in-Chief of the Defence Services.

The Amyotha Hluttaw has a maximum of 224 representatives [art.141].

168 of these are elected by the people: 12 from each State and Region, including one representative from each Self-Administered Division or Self-Administered Zone.

56 representatives are Defence Services personnel put forward by the Commander-in-Chief of the Defence Services (4 from each Region or State).

Representatives are elected (or appointed) for 5 years [art.119; art.151].

What are the powers of the Legislature?

The Pyidaungsu Hluttaw is responsible for making law [art. 95; art.96].

A proposed law is passed if it achieves a majority of support in both Hluttaws [art.95 (a)]. If there is a disagreement between the two Hluttaws this must be discussed and resolved in the Pyidaungsu Hluttaw [art. 95 (b)].

The Pyidaungsu Hluttaw also plays a role in approving, refusing or limiting spending proposed by the President in the Union Budget Bill [art.103]. However, there are certain items of spending which the Pyidaungsu Hluttaw cannot reject [art.103 (b)].

While the legislature has an important role to play in discussing proposed law and raising and answering questions, Article 89 prevents the minutes of the Pyidaungsu Hluttaw being published if their publication is forbidden by law.
The Role and Composition of the Executive

The Constitution sets out a presidential system in which power is shared between the executive (of which the president is the head), the legislature and the courts [art.16; art.11 (a)].

How is the President chosen?

The President is chosen by the Presidential Electoral College [art.60 (a)]
The Presidential Electoral College is made up of three groups: Hluttaw representatives elected from the Regions and States, Hluttaw representatives elected on the basis of township and population, and Defence Services Hluttaw representatives [art.60 (b)]. Each group selects a Vice-President and from among these three people, a President is elected by all the Pyidaungsu Hluttaw representatives [art.60 (c), (e)]. Once elected the President holds the position for 5 years and can be elected President no more than twice [art.61].

Article 59 sets out the requirements which a person must meet to be elected as President. These include citizenship, residency and age requirements, as well as a requirement that the person is loyal to the Union and well acquainted with its affairs. In addition, Article 59 (f), states that a candidate’s parents, spouse, child or child’s spouse cannot be loyal to a foreign country, be a citizen or subject of a foreign country, or enjoy the rights of a citizen or subject of a foreign country.

What are the Powers of the President?

The President has the power to choose the members of the Union Government [art.232; art.237] except for the Vice-Presidents who are elected by the Electoral College. Whilst the people he/she chooses must be agreed to by the legislature, it can only disagree if it can prove that the person does not meet the requirements for the role [art. 232 (c), (b); art.237 (a), (b)]
The Ministers of Defence, Home Affairs and Border Affairs must be chosen by the President from a list given to him/her by the Commander-in-Chief of the Defence Services [art.232 (b)].

The President has a number of further powers including:
- Starting or ending relationships with other countries with the approval of the legislature [art.206]
- Making or ending agreements with other countries with the approval of the legislature
Making a speech to the Pyidaungsu Hluttaw, the Amyotha Hluttaw, or to the whole country [art.209]
Calling an emergency session of the legislature [art.211]
Putting into effect a law that is needed urgently when the legislature is not assembled [art.212]
Taking military action in the case of aggression against the Union in agreement with the National Security and Defence Committee [art. 213].
Deciding on non-constitutional disagreements over management at the state, region and self-administered zone level with the help of the government [art. 226].

The President must sign a proposed law approved by the legislature within 14 days. During this time the President can give feedback to the legislature. However, after 14 days it will become law with or without the President’s signature [art.105]. Article 215 states that the President is not accountable to the legislature or the courts for using the powers outlined above. However, the Constitution does set out provisions for the legislature to remove the President in certain circumstances [art. 71].

The Structure and Appointment of the Courts:

How are judges chosen?

The President chooses the Chief Justice of the Union (the head of the Supreme Court) with the agreement of the legislature. The legislature can only disagree with the person the President has chosen if this person does not meet the requirements for the role [art. 299].
With the help of the Chief Justice, the President then chooses the rest of the judges for the Supreme Court [art. 299 (d)] and the Chief Justices of the High Courts of the Regions and States [art.308 (b)]. The rest of the judges at this level are then chosen by the Chief Minister and Chief Justice of the State or Regions [art.308 (b)].
Finally, the President chooses a third of the judges of the Constitutional Tribunal [art.321]. Another third are chosen by the Speaker of the Pyithu Hluttaw and the final third by the Speaker of the Amyotha Hluttaw. The members of the Constitutional Tribunal hold this role for five years [art. 335].
What are the powers of the courts?

Power is shared among the Supreme Court of the Union (which is the highest court of appeal), High Courts of the Regions, High Courts of the States and Courts of different levels including Courts of Self-Administered Areas [art.18]. The High Courts of the Regions and States have the power to hear and settle cases and appeals [art. 306]. The Supreme Court has the power to give written orders to:
- Require a person held by the authorities to be brought before a court so it can be determined whether their imprisonment is legal.
- Make a lower court or public official perform a specific duty
- Stop a lower court doing something the law forbids
- Require a person who is exercising some right or power to prove they have the authority to do so
- Review a decision of a lower court
The Constitutional Tribunal is responsible for interpreting the rules set out in the Constitution and checking that laws made by the legislature are consistent with the Constitution [art.46]. However, the Constitution does not specify the effect of a decision by the Constitutional Tribunal that an inconsistency exists. It appears the Tribunal is simply to state its findings and any inconsistent law will therefore continue in force.

The Structure of the State:

How is power distributed between different levels?

The Constitution allows for powers of the executive, legislature and court to be shared between the Union and States, Regions, Self-Administered Divisions and Self-Administered Zones [art.11 (b)]

The Constitution provides for the creation of legislatures at the State and Region level [art.161] and in Self-Administered Divisions and Self-Administered Zones [art.196]. These legislatures may make laws in certain areas. However, laws passed by the Pyidaungsu Hluttaw are superior and there are few areas in which Region or State legislatures have exclusive law making powers [art.198 (b)].

The Constitution also gives executive power to Region or State governments in areas in which Region or State legislatures can make law [art. 249]. However, Chief Ministers of the Region and State are chosen by the President [art.261 (b)] and are accountable to him.
There are courts at the State, Region, Self-Administered Area, township and district level that have the power to hear cases and appeals. However, the President chooses the Chief Justices of the High Courts of the Regions and States in consultation with the Chief Justice of the Union [art.308 (b)].

The powers of the Regions, States, Self-Administered Divisions and Self-Administered Zones can be withdrawn in the case of an emergency [art.411; art.413].

The constitution forbids States, Regions, Self-Administered Divisions and Self-Administered Zones from leaving the Union [art.10].

**The Role and Control of the Armed Forces:**

All armed forces in the Union are under the command of the Defence Services [art. 338].

The Commander-in-Chief of the Defence Services is in charge of all armed forces [art.20 (c)].

The President choses the Commander-in-Chief from a person suggested and approved by the National Defence and Security Council (art.342).

**What are the powers of the armed forces?**

The Constitution makes the Defence Services responsible for safeguarding the Constitution [art. 20 (f)] and protecting the Union from all internal and external dangers [art.339].

The Defence Services has the power to order the involvement of all people in Union security and defence [art.20 (d)].

The Constitution allows the Defence Services the right to independently control all affairs of the military [art.20 (b)].

Military justice is to be dispensed outside the normal court system in Courts-Martial [art. 319]. In deciding matters of military justice the decision of the Commander-in-Chief of the Defence Services is final [art.343 (a)].

There is no provision for any civilian oversight or control of the actions of the armed forces.
Emergency Powers:

In what circumstances can a state of emergency be called?

If administrative duties cannot be carried out in a Region, State, Union Territory or Self-Administrated Area in accordance with the Constitution [art.410].
If there is (or is likely to be) an emergency threatening people’s lives, shelter and property [art.412].
If there is a situation which may lead to disintegration of the Union, disintegration of national solidarity or a threat to national sovereignty [art. 417].

Who can declare an emergency?

In the first two cases above the President, after discussing with the National Defence and Security Council, can announce a state of emergency, stating which areas it affects and for how long [art.414 (a)].
In the third case above the President, after discussing with the National Defence and Security Council, can announce a state of emergency which is to last a year and covers the whole Union. This state of emergency can be extended twice for up to six months each time [art.421 (b)]. Article 40 (c) also allows the Commander-in-Chief to take over in this circumstance.

Who holds emergency powers and what are they?

During the first type of emergency, executive and legislative powers of the Region, State or Self-Administrated Area can be transferred to the President [art.411].
During the second type of emergency, military services can offer help to the administration or the President may announce a military administration with executive powers and the powers of the courts passing to the Commander-in-Chief of the military [art.413].
In the third type of emergency the powers of the executive, legislature and the courts pass to the Commander-in-Chief [art.418]. Once the emergency is over, these powers are given to the National Defence and Security Council until the legislature comes together again [art.427].
In all cases of emergency, citizens’ rights may be withheld as required [art.414; art.420]. Furthermore, no legal action may be taken against the actions of those in power during a state of emergency [art.432].
**Amendment Provisions:**

A suggested amendment must be submitted to the Pyidaungsu Hluttaw by 20% of its representatives [art. 433; art.434; art.435]. It must have the support of 75% of the Pyidaungsu Hluttaw representatives to be passed [art.436]. Amendments relating to specific sections of the Constitution must also be approved by a majority of those eligible to vote in a nation-wide vote [art. 436(a)].

**C. POSSIBLE AREAS FOR REFORM**

**Bill of Rights**

**Important Additional Rights**

The Constitution currently does not include a number of important rights. It does not ban torture or cruel punishment. It does not grant the right to legal advice for defendants, or the right to be heard by the courts on a matter in which you are involved, or the right to present and challenge evidence. It also does not protect against being tried twice for the same crime and it does not require a presumption that a person is innocent until proven guilty. These are all rights which could be included if the Constitution were changed.

Consideration might also be given to rights which are contained in a number of new constitutions such as the right to administrative justice, which places a duty on all public officials to act within the law, to give all persons a right to be heard, and not to act in an arbitrary fashion. Environmental rights are also increasingly being adopted in modern constitutions.
Absolute and Limited Rights

There are other important rights which the Constitution does protect, but this protection is often weak. It may therefore be necessary for these rights to be strengthened.

The ban on actions which are damaging to life and freedom, for example, may be overridden by a law which allows such actions. Similarly the right against forced labour may be overridden by a law which allows forced labour consistent with the public interest.

These are examples of limited rights which it may be preferable to make absolute. This would mean that they were recognised by those in power as rights which should be protected in all circumstances. Other rights which it may be desirable to make absolute include protection against being held in custody for more than 24 hours without the approval of a judge.

In some cases it will still be necessary to have limitations on rights in order to protect the freedom of others. The right to free speech for example may be limited by a law which prohibits the incitement to violence, particularly against another ethnic group.

However the limitations which the Constitution sets out are currently very broad, allowing for rights to be limited in a wide range of circumstances. Freedom of expression, freedom of assembly, for example, are all currently limited by laws made for Union security, law and order, community peace or public order and morality.

Most constitutions and international human rights instruments, specifically provide the circumstances under which rights may be curtailed. They require the purpose for the limitation on a right to be legitimate and really necessary in a democratic society. Any laws curtailing the rights must be clear and the measure taken must be proportionate to its objective. In short, the limitation must be compatible with a democratic society and not go any further than is necessary.
The Right to Vote and the Right to Stand for Election

The right to vote and the right to stand for election are two more examples of rights which may be considered to be overly limited. Not only do they require citizenship which is hard to acquire, but the right to vote can also be denied through a law even despite the right’s inclusion in the Constitution [art.391].

These rights are also denied to members of religious orders and prisoners [art. 392; art.121]. Denying these rights to members of religious orders conflicts with the principle of non-discrimination on the basis of religion which is guaranteed elsewhere in the Constitution [art. 348].

Given the importance of allowing people to choose who represents them in the system which governs them, changes might be made to extend the right to vote. Any limitation on a right to vote must be for a good reason, and be proportionate to that reason. Otherwise, limitations on the right to vote may undermine people’s choice freely to choose who represents them and threaten the legitimacy of the legislature and the laws that it makes.

Rights for Ethnic Minorities, Women, Children and the Disabled

There may also be a need for clear constitutional protections of equal ethnic minority rights given the past history of ethnic strife.

Consideration might be given to allowing ethnic minorities a greater role in governing their own communities and to protect their culture and language. The right to develop literature, cultures, arts, customs and traditions is presently limited in the Constitution since this right may to be denied if it is harmful to national unity.

Women’s rights may also need to be explicitly protected, particularly as some civil service positions may presently be reserved for men.

Finally, the Constitution currently sets out no specific rights for children or the disabled. These might be included.
Human Rights Commission

A Human Rights Commission has been established by President Thein Sein. Given the important role a Human Rights Commission could play in protecting and promoting rights it may be desirable to make provisions for the Commission in the Constitution.

It will be necessary to outline the functions of the Commission, how it is to be funded and who its members are to be.

International principles suggest that the Commission should be given the right, as well as the duty, to:

Protect and promote rights
Send its opinions, recommendations, proposals and reports on human rights to the government, legislature and any other body
Ensure the compatibility of national laws with international human rights standards
Help with the country’s reports to United Nations committees
Work with international, regional and other national human rights institutions
Help with human rights education
Publicize and promote human rights

The Commission may also be granted a role in hearing and considering complaints of rights violations.

It will be important that the Commission is independent from the executive whose exercise of power it will have to check.

It is widely held that to ensure independence, its members must represent a wide range of different people, it should not be reliant on the government for funding and its role should be established.

Placement of the Bill of Rights

Unlike most constitutions, the Constitution does not place a “bill of rights” at the beginning of the Constitution. Consideration should be given to whether all the rights found in the constitution should be placed together in a bill of rights at the beginning of the constitution.
The Role and Composition of the Executive

Choosing the President

The first area of potential reform here relates to how the President is chosen. The President is currently chosen by the Electoral Presidential College rather than directly by the people, and the military has an important say in this decision. It should be considered therefore whether the President (and Vice-Presidents) should be directly elected by the people. This would make the President more representative of the people and more accountable to them for his/her exercise of power.

Military influence in the Executive

As well as playing a role in choosing the President the military also influences the executive by appointing the Ministers of Defence, Home Affairs and Border Affairs. The reform of these powers should be considered.

Requirements for being President

One very important issue to consider is whether the requirements which must be met in order to be elected President are unreasonable.

This relates specifically to Article 59 (f), which states that a candidate’s parents, spouse, child or child’s spouse cannot be loyal to a foreign country, be a citizen/subject of a foreign country or enjoy the rights of a citizen/subject of a foreign country. Requirements that the President was born in the state’s territory to parents who were both citizens, and must have resided in the country for the last twenty years, may also be considered too tough.

Whilst some conditions based on the candidate’s connection and loyalty to the country may be desirable (for example, a requirement of citizenship), the requirement set out in Article 59 (f) does not seem to have a relevant bearing on the candidate’s ability to perform the role of President, or indeed, his/her loyalty to the country. Thus, it appears to undermine the commitment to equality (and against discrimination) outlined elsewhere in the constitution (e.g. art. 6(e): art. 21(a): art 347: art.348 and art.349). This is because the unequal treatment Article 59 (f) promotes is not based on requirements relevant to the office. Particularly irrelevant and disproportionate seems to be the citizenship of a previous spouse or the spouse of a child.
It also unnecessarily restricts the electorate’s choice of candidates who would otherwise be fit to undertake the role: their ability to choose a leader without unreasonable restriction is a fundamental democratic principle.

Separating Power between the Executive, Legislature and Courts

The Constitution currently concentrates power in the executive and in some cases the powers of the executive prevent checks on it by the legislature and the courts. It may therefore be desirable to give greater power to the legislature and the courts so that power is more evenly shared out.

One important area in which this may be achieved concerns the executive’s powers to choose people for key roles including judges and ministers. The current Constitution only allows the legislature to disagree with the person the President has chosen if this person does not meet the required qualification. This could be relaxed to give the legislature a greater say in who is chosen for important positions.

It must also be asked whether the President should still have the power to put into effect a law that is needed urgently when the legislature is not assembled or the power to settle non-constitutional disagreements over management at the state, region and self-administered zone level, or whether the first power should be reserved for the legislature and the latter power for the courts. This would allow for power to be more truly separated between the executive the legislature and the courts.

Finally the ability of the legislature and courts to check the President’s power could be undermined by the fact that the Constitution says he/she shall not be answerable to them for the exercise of the powers and functions of his/her office. It is important that the powers of the President can be checked because it is a fundamental principle of democracy and the rule of law that no-one is above the law.
The Role and Composition of the Legislature

Choosing Members of the Legislature

Currently 25% of the members of the legislature are non-elected Defence Services personnel chosen by the Commander-in-Chief of the Defence Services.

It should be considered whether the Constitution should be changed towards a situation common in most democracies that the legislature is fully elected and therefore only made up of representatives chosen by the people. This could be done progressively, in stages.

Transparent Law Making

Information about how and why the legislature make laws is not always open to the public. This is because the Constitution prevents the minutes of the legislature’s sessions being published, when the law so provides. It should be considered whether the Constitution should guarantee the public access to information about the legislature’s discussions so that people can see what their representatives are saying and doing.

The Structure and Appointment of the Courts

Choosing Judges

Although the Constitution recognises the independence of the courts, one concern is that this is undermined by the power the Constitution gives to the President to choose judges. Even if this choice is exercised objectively this power gives the appearance of bias and therefore calls into question the courts’ independence from the executive.

If the courts are independent they are more likely to hold governments to account and ensure that laws passed by the legislature are enforced. If they are not independent there is a risk that judges may be influenced by the executive who has given them their position.
Ensuring the Independence of the Courts

One possible way of ensuring independence is by taking the constitutional power to choose judges away from the executive and giving it to an independent appointments commission, perhaps with a majority of lawyers and some lay people. This has been done by many countries and is increasingly becoming an international standard.

Whatever means is adopted for choosing judges however, it will be extremely important that it prevents judges being chosen for the wrong reasons: reasons which are not based on merit alone.

Another way to ensure the independence of the courts is to allow judges to hold their positions for many years and to have strict guidelines setting out when a judge can be removed. If judges can be easily removed for making an unpopular decision they will be under pressure not to exercise their independence.

Whilst the Constitution allows judges of the High Court and Supreme Court to serve up until the age of 70 and 65 respectively, judges appointed to the Constitutional Tribunal only hold their positions for five years.

One reform which might be considered therefore is allowing the judges of the Constitutional Tribunal to hold their positions for much longer. It may also be desirable to stagger when they are chosen so that if the executive or legislature does play a role in helping to choose judges, one particular government will not be able to influence the character of the whole court.

Finally, given the controversy surrounding the nine members of the Constitutional Tribunal in 2012, and the threats to remove them from office, it might be timely to make clear in the constitution the right of the legislature or executive to remove a judge who makes an unpopular decision.
The Powers of the Constitutional Tribunal

Another area for consideration is whether the Constitution should more clearly set out the powers of the Constitutional Tribunal with regards to legislation it decides is incompatible with the Constitution. At present it seems as if the Constitutional Tribunal has no power to ‘strike down’ such a law (with the result that the law has no further effect).

Most constitutions do allow the highest constitutional court to strike down a law which conflicts with the constitution. Should the Constitution allow the Tribunal to strike down such a law so that it has no effect? Or should it remain in effect despite the Tribunal’s decision that it is incompatible, leaving it to the legislature whether to alter or abandon the law? Alternatively a constitution could allow for the Canadian model whereby the legislature can choose to remake the law after it has been struck down by the Constitutional Tribunal but must renew this decision every few years.

The power of the Constitutional Tribunal in this respect will be particularly important with regards to laws which are deemed incompatible with fundamental human rights.

The Structure of the State

Distribution of power between the centre and regions

One important area of possible reform concerns the distribution of power between the Union and the Regions, States and Self-Administered Areas:

Should power remain concentrated at the Union level?

Should there be a decentralization of power with greater power being transferred to the States, Regions and Self-Administered Areas?

Should the Union be replaced by a federation in with the constitution guarantees substantial powers to the States, Regions and Self-Administered Areas? These powers could be granted to all regions or only to some?

This is a particularly important issue given that many ethnic minority communities desire to play a greater role in determining their political fate.

Some possible ways of achieving greater de-centralization, if this is what is desired, are:

Allowing ministers of the Region and State to be locally elected
Granting State and Regional governments greater budgets and/or allowing them greater powers to raise money through taxation.

Allowing State and Regional legislatures to make laws on a wider number of areas.

**The Role and Control of the Armed Forces**

*Supervision of the Military*

The constitution currently provides for no supervision of the military’s actions by anyone outside of the military.

In addition, the legislature play no role in approving the Commander-in-Chief and there are no qualifications required for the role, no provisions regarding how long the role is to be held and no provisions regarding how to remove the Commander-in-Chief.

In most democracies the military is under civilian control, under the supervision of the executive.

It may also be necessary to set out clear requirements for holding the position of Commander-in-Chief, how long it can be held and under what circumstances the Commander-in-Chief might be removed.

*Military Justice*

Under the current Constitution allegations of human rights violations, including forced labour and sexual violence by the military, cannot be judged by the normal courts. Rather they are decided on in Courts-Martial with the Commander-in-Chief having the final say.

One possible option is for the Supreme Court (or another court) to supervise the decisions of the Courts-Martial. This may be particularly important since there is currently no right to appeal a decision of the Courts-Martial.

Another option is for members of the military to be brought to justice by the ordinary court system in cases where they have, for example, violated human rights.
Emergency Powers

Declaring an Emergency

The current Constitution sets out three circumstances in which a state of emergency can be declared. These are reasonably wide-ranging circumstances and it may be desirable to have more narrow definitions of an emergency. This is especially important because of the impact a state of emergency currently has on individual’s rights. Whilst the President has the power to declare a state of emergency, it may be asked whether this should be approved by the legislature or reviewed by the courts. One option is for the President’s declared state of emergency to come to an end after a specified time unless the legislature agrees it can continue. Currently the first two types of emergency outlined in the Constitution do not have time limits.

Emergency Powers

The constitution currently allows both the President and the Commander-in-Chief of the Defence Services to exercise emergency powers which include powers over the executive, legislature and the courts. The first question is whether the role played by the courts should ever be fully transferred to either the President or the Commander-in-Chief, given the importance that courts are always available and free to administer independent justice. Another question is whether emergency powers should continue to be exercised by a person who is not democratically accountable, namely the Commander-in-Chief. It may also be considered whether the President’s use of emergency powers should be overseen by the legislature or the courts.

Emergency Powers and Individual Rights

The current Constitution allows for all rights to be suspended in the case of an emergency. Are there some rights which should not be able to be suspended even under an emergency (for example, the right to life, the right to a fair trial, the ban on slavery and the ban on torture)? As said above in the discussion about limitation of rights, if the Constitution does allow certain other rights to be suspended in an emergency it may be that the circumstances in which those rights can be suspended should be clarified.
Amendment Provisions

There are currently very tough requirements for changing the Constitution. These are very hard to fulfil and therefore make constitutional change extremely difficult. The requirement for the support of 75% of the Pyidaungsu Hluttaw to make an amendment to the constitution is higher than most amendment provisions. It gives the Defence Services representatives particular power to block changes by voting together. It may be desirable to make the requirements for changing the constitution less difficult, for example, by needing only the support of a two thirds majority in the legislature. It should also be considered whether amendments for certain parts of the Constitution should always require the support of half of the voting population. There are advantages in protecting a constitution from frequent and rushed amendments. One advantage is that this gives the constitution credibility. However, the ability to change the constitution is important so that it can be improved and can respond to changing circumstances. If any of the possible changes outlined above are to be made it will be necessary to be able to change the Constitution.
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INTRODUCTION

1. The Constitution of the Republic of the Union of Myanmar, Myanmar’s third and current constitution (“the Constitution”), was adopted following a referendum on 10 May 2008, held just eight days after Cyclone Nargis, the most devastating natural disaster in Myanmar’s history. There was little or no public participation in the production of the text of the Constitution; indeed the proposed text was published just one month before the referendum and was unavailable to a large part of the electorate.¹

2. However, Myanmar has recently taken a significant step towards participatory democracy by inviting public views on the amendment of the Constitution. In July 2013 the Joint Committee for Reviewing the Constitution of the Republic of the Union of Myanmar (“the Committee”) was established with the aims of:
   - guaranteeing the perpetuation, peace, stability and development of the Republic;
   - bringing eternal peace to all national races and ethnic people by bringing unity between them; and
   - carrying on democratic reforms for building the state.²

One of the Committee’s first actions was, on October 3 2013, to announce a nationwide consultation exercise aimed at garnering advice from a broad range of political parties, organizations and individuals as to how the Constitution might be amended. This exercise ran until December 31 2013. The Committee has stated that it received 28,247 letters in response.³

3. During the consultation period, the Bingham Centre for the Rule of Law (“the Bingham Centre”) took part in a project to encourage participation by the citizens of Myanmar in that consultation exercise. The Bingham Centre assisted in many well-attended workshops across different parts of Myanmar between October and December 2013. As a result of these workshops, over 500 people submitted responses to the Committee. A summary of the Bingham Centre’s experience of people’s priorities for reform is set out below.

4. However, the immediate priority for reform identified by the overwhelming majority of delegates at the numerous workshops was to amend the onerous procedure for amending the Constitution, without which reform is likely to be extremely difficult. This paper seeks to put those popular concerns into context by comparing to other constitutions around the world the three elements of this procedure, which, in our view, combine to make it so onerous. Those three elements are:
   - The Constitution’s parliamentary procedure for amendment, whereby the agreement of more than 75% of the members of each Hluttaw (chamber of Parliament: together the Pyidaungsu Hluttaw), is required (the Constitution, section 436).
   - The provisions of the Constitution whereby 25% of the members of each Hluttaw is appointed from the military.

² These aims reflect some of the goals of the Constitution of Myanmar itself expressed in the Preamble as a resolution to “...steadfastly adhere to the objectives of non-disintegration of the union, non-disintegration of national solidarity, and perpetuation of sovereignty... [to] stalwartly strive for further burgeoning the eternal principles namely justice, equality, and perpetuation of peace and prosperity of the National people”.
membership) comprised of 75% elected members and 25% members nominated from the Defence Services by the Commander-in-Chief of the Defence Services (the Constitution, sections 109 (b) and Article 141(b)).

- The provision of the Constitution whereby amendments to key provisions must, having been approved by the Pyidaungsu Hluttaw, also be approved in a nation-wide referendum by more than half the people eligible to vote (the Constitution, section 436(a)).

The effect of all these provisions taken together is that firstly, those members of the Defence Services nominated to the Pyidaungsu Hluttaw by the Commander-in-Chief hold a practical veto over any proposed amendment to the constitution, and secondly, in order to amend the provisions that give rise to that situation, not only must the veto be surmounted but more than half of those eligible to vote in a referendum must also assent.

5. The purpose of this paper is, therefore, to firstly provide guidance on how the priorities for reform in Myanmar can be put into operation by exploring the amendment provisions of the constitution in the light of international standards in constitutional democracies and practice around the world, and secondly, to examine the way in which the constitution may be reformed.

6. The Bingham Centre does not itself promote or seek any particular amendments, which must depend entirely on the wishes of the Myanmar people.

7. The first part of this paper summarises a comparative analysis of the Constitution and shows that the elements of the Constitution considered at paragraph 4 above render it the most entrenched and difficult to change in the world. The analysis suggests that the amendment process within the current Constitution is impractical and fails to accord with both the established principles of constitutional democracy and the norms of the majority of constitutions across the rest of the world.

8. The second part of this paper considers the process of reform and the three main options open to Myanmar: (1) changing the constitution according to its own procedures (incorporating an analysis of Indonesia’s reform process); (2) adopting a wholly new constitution (incorporating an analysis of South Africa’s process of reform); and (3) reforming key parts of the constitution without following the amendment procedure (citing an example of a post-war reform process in France). The analysis suggests that although all three options might be seen as legitimate, an initial attempt to amend the constitution in accordance with its own terms may be most conducive to the maintenance of peace in Myanmar.

9. In Annex A we summarise the Bingham Centre’s experience from the seminars conducted in Myanmar and in Annex B we set out in tabular form the relevant provisions of each constitution of the world.
THE PROCESS OF CONSTITUTIONAL AMENDMENT

10. In light of what seemed to us a widespread concern amongst those who participated in the workshops we attended, we considered that it would be most helpful in this paper to analyse the extent to which the existing procedures within the Constitution for amending it bore comparison to the other constitutions of the world, and how they fared against accepted principles of modern constitutional democracies.

11. The Myanmar Constitution requires that before any one of its most important provisions are amended, three steps must be taken. First, for an amendment to be considered by the Pyidaungsu Hluttaw, it must be proposed by 20% of representatives of the Pyidaungsu Hluttaw (section 435 of the Constitution). Second, any proposed amendment then requires the prior approval of more than 75% of all the representatives of the Pyidaungsu Hluttaw (section 436 (a) and (b) of the Constitution). Third, in relation to most of the important provisions of the constitution, there is then a further requirement that the proposed amendment be supported by a nation-wide referendum in which more than half the people eligible to vote must assent (section 436(a) of the Constitution). These provisions may have evolved as a strengthened form of Myanmar’s own 1974 Constitution, which required the support of a 75% majority in Parliament and a referendum in order for it to be amended.4 As to how these provisions compare with others around the world (and here we focus our attentions on the second and third steps of the process, which seem to us to have the greatest impact on the mechanics of reform)5 there is great variety in the amendment provisions adopted in the world’s constitutions.

A. Amendment by Majorities

12. Of the 189 constitutions we studied (including Myanmar) 177 have amendment procedures, which require amendments to be approved by a certain majority in parliament. A strong majority of countries (whether unicameral or bicameral) require changes to the constitution to be approved by two-thirds of members of Parliament.

13. No constitution in the world, other than Myanmar’s, has an amendment procedure which requires approval by more than 75% of members of parliament for amendments of all and any provisions of the constitution in both chambers of a bicameral parliament.6 There are just three other countries which require the approval of more than 75% of members of parliament for constitutional amendments, but in each case an amendment is easier to achieve than in Myanmar.7 As to those countries:

- Azerbaijan requires amendments to be adopted by a majority of 95 votes (which amounts to approximately 76% of the 125 members of the unicameral legislature) in two votes six months apart.8 However, Azerbaijan is unicameral (meaning it has only one house in Parliament) and a constitutional amendment is therefore easier to

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5 The requirement that 20% of the representatives of the Pyidaungsu Hluttaw propose any amendment to the Constitution does not strike us as either exceptional or particularly onerous; there are certainly countries whose constitutions contain more onerous provisions for proposing an amendment, for example, the “more than 50%” requirement in Article 157 of the Constitution of the Republic of Azerbaijan.
6 See Annex B.
7 The Constitutions of Benin, Cote d’Ivoire, Kazakhstan, Niger and Togo provide that an amendment to the constitution may be passed either by a 4/5 majority of members of parliament or by a lesser majority followed by a referendum. The Constitution of Liechtenstein requires that amendment be approved by either the unanimous vote of the members present of the Diet (Parliament) or by a majority of 3/4 of the members present at two successive sittings of the Diet.
8 The Constitution of Azerbaijan, Art. 156.
achieve than in Myanmar, where a majority over 75% in both chambers is required. Furthermore, there is no appointed element in either chamber, nor do the military hold a practical veto over proposed changes to the constitution.

- Burundi requires that a proposal for amendment of its constitution be adopted with a majority of four-fifths of the members composing the National Assembly, but two-thirds of the members of the Senate. Again, the military do not hold a practical veto over proposed changes to the constitution and there is no additional requirement for a referendum in order to change key provisions.

- Eritrea requires amendments to be approved by a 75% majority vote of National Assembly members and approved again one year later by four-fifths of all members. However, like Azerbaijan, Eritrea is unicameral so this process is not as onerous as in Myanmar. Moreover, the military do not hold a practical veto over proposed changes to the constitution and there is no additional requirement of a referendum when amendments are proposed in relation to key provisions.

14. The following amendment mechanisms are noteworthy because (in isolation and without factoring in the additional hurdles in Myanmar) they come close to being as rigid as Myanmar’s “more than 75%” requirement:

- We have identified seventeen countries in the world which require a vote by which exactly 75% (rather than more than 75%) of members of at least one house of parliament must approve any kind of constitutional amendment. Ten of these countries are unicameral rather than bicameral and the provisions for amendment of the constitution are therefore less restrictive than those in Myanmar, which requires over 75% majority in both chambers. Of the other seven, Algeria and Bhutan require approval by 75% of members in chambers sitting in joint session (so the Chambers become effectively unicameral for the purpose). Russia requires 75% of the total number of members of the Council of Federation to approve an amendment and further requires not less than two-thirds of the total number of deputies of the State Duma to approve the amendment. The three remaining countries (Madagascar, Sudan and Rwanda) require exactly 75% (rather than more than 75%) approval in both chambers for all constitutional amendments. None of these countries is rated as a “free” country by Freedom House.

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9 Venice Commission (2001), European Commission for Democracy Through Law) Report on Constitutional Amendment, Adopted by the Venice Commission at its 81st Plenary Session, Strasbourg, 11-12 December 2009, Study no. 469 / 2008, available at http://venice.coe.int, at p.20 points out that “if a qualified majority is necessary in both chambers, as for example in the German parliament, then this may in effect be a stricter requirement than 2/3 in a unicameral system.”


12 These are Algeria, Benin, Bhutan, Gambia, Kazakhstan, Liechtenstein, Madagascar, the Maldives, Mongolia, Niger, Sao Tome, Russia, Rwanda, Sudan, Syria, Yemen and Taiwan.

13 The Venice Commission Report (n 9) at p.20 points out “if a qualified majority is necessary in both chambers, as for example in the German parliament, then this may in effect be a stricter requirement than 2/3 in a unicameral system.”


Some constitutions explicitly render a limited number of specific provisions or principles unamendable at any time and under any circumstances (for example those relating to fundamental rights).  

We have identified twelve countries, which require a vote by a higher-than-normal majority as high as 75% in specified and limited circumstances - either for specially entrenched constitutional provisions, as an alternative to approval by a referendum, or in other special circumstances.  

15. However, on close analysis, none of these countries requires a majority for amendment which is as rigid as Myanmar’s “more than 75%” requirement by both chambers and in all circumstances.  

16. The rigidity of the existing provisions has been justified on the grounds that it ensures that the Constitution’s principles are firm and secure. Constitutionalism does indeed require that the fundamental rules of a constitution established for the effective exercise of democratic state power should be stable and predictable, and not subject to easy change, but at the same time, even quite fundamental constitutional change is sometimes necessary in order to improve democratic governance or to adjust to political, economic and social transformations. The twin demands of the rule of law on the one hand and popular democracy on the other thus require that constitutions strike a balance between rigidity and flexibility which is appropriate to the context of the country in which they are operating.  

17. Although there is no overarching prototype for determining the correct balance between stability and flexibility and how it should be struck, there is a fairly widespread similar practice. In general, most constitutions strike the balance at requiring the approval of no more than two-thirds of members of parliament. In contrast, the requirement that over 75% of Myanmar’s Pyidaungsu Hluttaw supports a constitutional amendment is so strict that amendment (at least perhaps other than once in the course of the exceptional current reformatory process) according to the current process will be virtually impossible. For this reason, the country’s stability and unity may be better served by a more flexible and adaptable constitution, better able to assist in its development as a constitutional democracy.  

B. Military Appointees in Parliament  

18. In countries where democracy has been established over some time, military presence in the legislature is unheard of in modern day constitutions. In fact, a number of constitutions explicitly prohibit the military undertaking a political role. This is because the presence of the

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20 These include Azerbaijan, Belgium, the Czech Republic, Cyprus, Germany, France, Italy, Luxembourg, Moldova, Romania, Russia, Turkey and the Ukraine. The Portuguese Constitution also states a number of fundamental principles which may not be altered by amendment.  
21 The Bahamas, Dominica, Papua New Guinea, South Africa, St Lucia, Swaziland, the Solomon Islands and Trinidad and Tobago (the latter requiring the approval of two thirds of each house for ‘ordinary’ amendments to the constitution, but in relation to specified provisions, the approval of 75% of members of one house, and two thirds of the other is required).  
22 Burkina Faso and the Central African Republic.  
23 Lebanon and Mauritania.  
26 Venice Commission Report (n 9), 3.  
27 Venice commission Report (n 9), 4.  
29 See Annex B.  
30 E.g. the Constitution of Malawi, s.51; the Constitution of Macedonia, Art. 64; the Constitution of Turkey, Art. 76; the Constitution of Venezuela, Art. 330; and the Constitution of Togo, Art 52 all disqualify serving members of the military from standing for election.
military in parliament offends the widely recognised importance of constitutional separation of military and legislative power (discussed further below at paragraphs 25 - 26 below). Sections 198 - 210 of the South African Constitution for example expressly enshrine the principle of the separation of powers, stating that “national security is subject to the authority of Parliament and the national executive” and set out in detail the role of the military and the limits of its powers, thus ensuring proper civilian oversight of the military.

19. As the summary of our analysis contained in Annex B demonstrates, the only other country we have identified (of the 189 constitutions considered) which specifies the appointment of military personnel to parliament is Uganda. Currently the armed forces in Uganda appoint 10 members to the Ugandan Parliament, but this does not afford sufficient power to veto constitutional amendments.\(^{31}\) It is perhaps also worth commenting that pre-1999, Indonesia’s military enjoyed significant political power, including 100 reserved seats in the Legislature and high ranking government positions. However, constitutional amendment ended the military’s formal political role.\(^{32}\) The people now elect all members of Indonesia’s Parliament and members of the military no longer hold government positions. Given the parallels between Indonesia’s transition and what might be achieved in Myanmar, we have considered Indonesia’s experience in more depth at paragraphs 37-38 below.

20. That is not to say that it is contrary to the principles of a constitutional democracy for members of the legislature to be appointed *per se*. A number of constitutions provide for appointed members of parliament (though not from the military).\(^{33}\) These non-elected representatives are generally appointed by the head of state or an independent appointment commission and usually comprise minority groups or experts or political appointments. The rationale for such appointments is generally to secure the protection of minorities or to enhance the quality or variety of legislative scrutiny, but not to safeguard national security.

21. However, in most countries that have legislatures with an appointed element, the appointed members of parliament cannot veto constitutional change, either because the proportion of appointed members of the upper house is too small,\(^{34}\) because amendments can be approved by an alternative method to Parliamentary approval,\(^{35}\) or because the upper house with appointed representatives is expressly prohibited from blocking either constitutional amendments or legislation generally, and can only delay legislation.\(^{36}\) For instance, the British House of Lords (which is wholly appointed) can delay bills for a year rather than permanently veto those with which it disagrees. If the (wholly elected) House of Commons passes a measure again after one year, it can be enacted without the approval of the House of Lords.

22. While the usual practice is that the elected members of Parliament have “the final say”, there are some exceptions to this.\(^{37}\) For example:

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\(^{31}\) The Constitution of Uganda, s. 78 (c) states that Parliament shall consist of “such numbers of representatives of the army, youth, workers, [persons with disabilities and other groups as Parliament may determine”]. Currently, Ugandan forces have the right to elect 10 representatives to Parliament. Whereas Myanmar’s Constitution mandates that the Military must have a certain number of seats Uganda’s Constitution is permissive and defers the issue to legislation. This means that military presence in Parliament is easier to reform in Uganda than Myanmar. The Uganda model has been subject to some concern, and explained according to its unique and chaotic constitutional history. It is, the literature notes, not a model that is widely recognized.

\(^{32}\) The Constitution of Indonesia 1945 (reinst. 1959, rev. 2002), Article 2(1).

\(^{33}\) These are Afghanistan, Albania, Algeria, Antigua and Barbuda, the Bahamas, Bahrain, Barbados, Belarus, Belize, Bhutan, Brunei, Bulgaria, Cambodia, Cameroon, Canada, Gambia, Grenada, Guyana, India, Iran, Ireland, Italy, Jamaica, Jordan, Kazakhstan, Kiribati, Kuwait, Lesotho, Madagascar, Malawi, Malaysia, Namibia, Nepal, Papua New Guinea, Rwanda, Said Arabia, Senegal, Sierra Leone, St Kitts and Nevis, St Lucia, St. Vincent and Grenadines, Swaziland, Togo, Tonga, Trinidad and Tobago, Uganda and Zimbabwe (see Annex B).

\(^{34}\) E.g. Algeria, India, Italy, Botswana, Belarus, Bhutan, Georgia, Gambia, Nepal, Papua New Guinea, Qatar, Uganda and Zimbabwe (see Annex B).

\(^{35}\) E.g. Burkina Faso (see Annex B).

\(^{36}\) E.g. UK, Grenada, St Lucia, Jamaica, Antigua and Barbuda, St Kitts and Nevis, Cambodia, Dominica, Grenada, Guyana, Ireland, Malawi, Namibia and Singapore (see Annex B).

\(^{37}\) E.g. Canada, Trinidad and Tobago, Bahamas, Barbados, Belize, Bahrain, Brunei, Burkina Faso, Jordan, Malaysia, Saudi Arabia, Jamaica, Madagascar, Kiribati and South Sudan (see Annex B).
• In Canada, the wholly appointed Senate has a power of veto over proposed amendments to the constitution which fall within the federal sphere of power (while for all other constitutional amendments it has the power to delay legislation for six months but not to prevent it). However, there are some notable democratic checks and balances within the Canadian system:
  o This power is not universal but limited to the sphere of federal government.
  o The literature notes that due to the Senate’s lack of perceived democratic legitimacy in practice it rarely exercises its extensive legislative veto powers.
  o Canada’s Senators are appointed by the Governor General of Canada on the advice of the Prime Minister and represent a range of sectional interests designed to protect individual and minority rights so as to redress deficits in the breadth of representation, which might otherwise obtain.

• In Belize, the Senate has the power to block amendments relating to Part II of the constitution relating to fundamental rights alone. In Kiribati, the appointed representative of the Banaban community can veto constitutional amendments affecting the Banaban community only. In South Sudan the appointed element can block constitutional amendments, however this is during the transitional period only. In Trinidad and Tobago, Barbados, the Bahamas, Bahrain, Brunei, Jordan, Malaysia, Rwanda, St. Vincent and Grenadines, Tonga and Saudi Arabia, the appointed Senate has the power to block all constitutional amendments. However, the majority of these countries are not rated as “free” by Freedom House.

• There are also some examples of countries where an unelected or appointed head of state has the power to veto constitutional amendments. For example, the Prince of Monaco and the King of Bahrain can both veto constitutional amendments. In a number of constitutional monarchies, powers formally vested in the king are in reality vested in an elected Government. For example, under Belgium’s Constitution both houses of parliament make decisions on alteration of the constitution in common accord with the King on the points submitted for revision. However no act of the Monarch is valid without the signature of (a) member(s) of the government, which thereby become(s) solely responsible.

23. While it is not therefore universal practice that democratically elected members have “the final say”, it is a norm amongst the overwhelming majority of those countries which might be described as stable and established constitutional democracies. We consider that the comparative analysis of the constitutions of the world we have undertaken shows that:

• It is a near-universal norm that members of the legislature should not be appointed from or by the military;

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42 The Constitution of South Sudan (2011), Art. 56.
43 Freedom House rates Bahrain, Brunei, Jordan, Saudi Arabia and South Sudan as “not free” and Malaysia and Rwanda as “partially free.” The remaining 7 countries are rated as “free”. See Freedom House ‘Freedom in the World 2013’, available at http://www.freedomhouse.org/sites/default/files/FIW%202013%20Booklet_0.pdf.
Where members are appointed to parliament, this is often rationalised by democratic principles (for example to secure particular expertise or representation of minorities in parliament), but never as a means of ensuring security;

The overwhelming majority of constitutions, and certainly of the constitutions of well-established democracies do not allow appointed members of parliament a power to veto the decisions of the elected members or in cases where they do, such powers are normally restricted to amendment of certain aspects of the constitution and controlled by other checks and balances; and

In no other constitution in the world does the military exercise a power of veto.

24. In Myanmar, the consequence of the fact that (1) 25% of the members of each house of the Pyidaungsu Hluttaw in Myanmar are appointed by the Commander-In-Chief of the Defense services, and (2) that an amendment to the Constitution requires the approval of more than 75% of each house of the Pyidaungsu Hluttaw is that the military appointees in the Pyidaungsu Hluttaw hold a practical power of veto over constitutional changes even where such changes are supported by every elected member of the Pyidaungsu Hluttaw. This entrenchment of military control over the Constitution singles out Myanmar’s Constitution from all others in the world and is out of step with international constitutional standards.

25. It is a fundamental and widely accepted principle of constitutionalism that the military should be subject to civilian control and the rule of law. This flows from two basic principles of (1) popular sovereignty and (2) separation of powers. The principle of “popular sovereignty” is that the will of the people is the source of governmental authority and legitimacy. According to this principle, the people legitimately hold the power to establish the constitution and the system of government and the people remain responsible for the system which they establish. The “separation of powers” institutionalizes the rule of law, separating law-making agents from law-executing agents in order to prevent the rule of law degenerating into the rule of men. It mandates that the military should not form part of the legislature in order to ensure that military are properly subject to civilian control and the rule of law. This means that the military must have sufficient power and autonomy to carry out its role of protecting security but its power should be separate from and should not dominate other aspects of governance.

26. The military’s political power under the Constitution has been justified within Myanmar by the country’s on-going transition from authoritarian rule to democracy. In particular the argument is made that the Defence Services should be given the right to sit in Parliament in order to protect Myanmar from internal insurgencies and external threats. We do not agree that a military presence in parliament is necessary to protect a country from internal and external threats. The constitutions of the world adopt a variety of mechanisms for ensuring that the military has sufficient power to perform its constitutional role of providing security, yet all (except to a limited extent Uganda’s) do so while maintaining a separation of powers between civilian and military authority. The existing academic literature generally assumes that any legislative role for the military, however limited it may be, is undesirable. For example, in

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49 Ibid.
pioneering works on democratic transitions and consolidation, Juan Linz and Alfred Stepan have argued that the military’s imposition of “reserve domains” on an elected government impedes democracy.\(^{53}\)

### C. The Referendum Requirement

27. Section 436(a) of the Myanmar constitution provides that where an amendment of specific important provisions of the constitution is supported by more than 75% of the Pyidaungsu Hluttaw the amendment must thereafter be supported by a majority of those eligible to vote in a nationwide referendum. It is not unusual that amendments to specified parts of a constitution must be supported by a referendum.\(^{54}\)

28. What is onerous in the Myanmar context is, first, the breadth of the referendum requirement (it is required to amend most of the sections of the constitution); secondly, that there is such a large majority required in the Pyidaungsu Hluttaw before the referendum is held; and thirdly, that it is combined with the power of the military to veto approval by the Pyidaungsu Hluttaw.

29. Of the 198 constitutions reviewed, only one other country, Azerbaijan, requires over 75% majority parliamentary approval before a referendum is held.\(^{55}\) All other constitutions with a referendum requirement mandate a majority approval in parliament of 75% or less, or otherwise permit a referendum as an alternative to parliamentary approval. The majority of the countries reviewed with a referendum requirement also require the approval of no less than two-thirds of members of parliament. Of the 189 countries reviewed, only eleven countries\(^{56}\) require a mandatory referendum for some or all amendments alongside a 75% majority parliamentary approval. Five of these countries are unicameral rather than bicameral and the provisions for amendment of the constitution are therefore less restrictive than those in Myanmar, which requires over 75% majority in both chambers. Of the other six countries, Swaziland requires approval by 75% of members in chambers sitting in joint session (so the chambers become effectively unicameral for the purpose). The five remaining countries\(^{57}\) require exactly 75% (rather than more than 75%) approval in both chambers alongside a referendum for some or all constitutional amendments. In each case amendment is easier to achieve than in Myanmar because the military do not hold a practical veto over proposed changes to the constitution.

30. We would not suggest that there is a principled objection to the requirement that constitutional change be supported by referendum per se. Nor, is there an in-principle objection to a requirement that certain provisions of a constitution may only be amended with the support of a qualified majority of members of parliament and a referendum, particularly in circumstances where the constitution itself has been passed as a consequence of a genuine referendum with widespread public participation. However, the cumulative effect of all three of Myanmar’s

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\(^{54}\) E.g. Kenya, Latvia, Lithuania, Moldova, Montenegro, Poland, Serbia, Sri Lanka, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines all require referendums in support of certain amendments and Swaziland and the Ukraine all require that the amendment of certain provisions be approved both a higher-than-normal majority (though less than 75%) in parliament and a referendum. The Bahamas, Dominica, Spain and Swaziland require that the amendment of certain provisions be approved by a 75% majority and a referendum.

\(^{55}\) The Constitution of Azerbaijan (rev. 2009), Article 152, requires all constitutional amendments to be approved by a referendum.

\(^{56}\) These are the Constitutions of Gambia, Liechtenstein, Madagascar, the Maldives, Rwanda, Yemen, Taiwan, the Bahamas, Dominica, St Lucia, and Swaziland. The Constitutions of Benin, Kazakhstan, and Niger, which all provide that an amendment to the constitution may be passed either by a 4/5 majority of members of parliament or by a 75% majority followed by a referendum. In Bhutan, Mongolia and Sao Tome amendment must be passed by 75% of members of parliament and a referendum is only required on an optional basis, upon demand by parliament, or upon decision of the Head of State.

\(^{57}\) Gambia, Liechtenstein, Rwanda, Yemen, the Bahamas, Dominica, St Lucia and Swaziland.

\(^{58}\) Taiwan, Madagascar and the Maldives.

\(^{59}\) Madagascar, Rwanda, Bahamas, Dominica, Swaziland and St Lucia.

\(^{60}\) Rwanda, Bahamas, Dominica, Swaziland and St Lucia.

\(^{61}\) Madagascar.
barriers to amendment discussed above is in our view out of step with most if not all the constitutions of the world, and in conflict with the principles discussed above.

D. Summary of Analysis

31. The following conclusions can be drawn from the foregoing comparative analysis:

- Myanmar’s general amendment procedure, requiring more than 75% approval of the members of two chambers for all and any amendment to the Constitution is, even on its own, more inflexible in terms of voting requirements than all major constitutional democracies, and nearly all other constitutions in the world.

- The appointment of one quarter of the members of the Pyidaungsu Hluttaw from the military is unique in the constitutions of the world, as is the practical power of veto operated by the military which it gives rise to. Few other countries (and apart from Canada, no major democracies) allow such sweeping powers to unelected members of the Pyidaungsu Hluttaw, let alone to military members.

- The additional requirement that there be the support of the populace in a referendum in respect of amendments to many of the most important provisions is not unusual but when considered in the context of the provisions discussed above effectively obstructs even minor constitutional change.

32. The foregoing comparative analysis suggests that the combination of these three factors together render the Myanmar Constitution considerably more inflexible and difficult to amend than any constitution in the world, and certainly any recognised constitutional democracy. Given Myanmar’s current transition to constitutional democracy, it may be that greater flexibility would be of value to its people, particularly at this time.

33. In drawing that conclusion we do not exclude consideration of some of the other stringent mechanisms employed across the world for entrenching constitutional provisions. We have considered for example that a number of established and stable constitutional democracies whereby require the consent from two different parliaments, one before and the one after an intervening election (Belgium, Denmark, Estonia, Finland, Greece, Iceland, Luxembourg, the Netherlands, Norway, Spain and Sweden). Some parts of the Canadian Constitution can only be modified by a unanimous vote of all the provinces plus the two Houses of Parliament. However, while these provisions are not directly comparable, in our judgment they are not more inflexible than the provisions of Myanmar’s Constitution.

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34. There are broadly three options for constitutional reform in Myanmar: (1) amend the Constitution according to its own procedure; (2) replace the Constitution by broad consensus but without complying with the terms of the process itself; or (3) retain the existing Constitution while amending aspects of it outside of its own terms.

A. Option 1: Amendment According to the Existing Process

35. By amending the Constitution according to its own procedures, there can be no contention that the resultant constitution lacks legitimacy in formal terms. On the other hand, by amending rather than replacing the Constitution, the new constitution is tied to the current Constitution and may be tarnished by a perceived illegitimacy of the former.

36. Myanmar’s Constitutional amendment procedure entrenches military power, so an organic constitutional transition is only possible if actually supported by the military. In recent history, various countries have transitioned from authoritarian rule to constitutional democracy via organic development. Hungary, South Korea Poland and Indonesia are key examples. In our view, the latter (given its geographical proximity, and constitutional similarities) is the most useful comparator. Indonesia’s recent history shows that a powerful military can reform itself through an organic constitutional reform process, provided there is strong pressure from the public and within the constitution-making body itself.

37. The role of the military in Myanmar politics has been compared to that enjoyed by the armed forces of Indonesia since President Suharto’s seizure of power in 1967. Pre-1999, Indonesia’s military enjoyed significant political power, including 100 reserved seats in the Legislature and high ranking government positions. A process of constitutional amendment between 1999 and 2002 ended the military’s formal political role, such that the people now elect all members of Indonesia’s Parliament and members of the military no longer hold government positions. The removal of military appointees in the parliament was a critical part of a wholesale process of constitutional reform which took place piecemeal over a number of years, but which saw the country gradually reduce the influence of the military over Indonesia’s affairs and transition in phases from “partially free” (Freedom House 2004) to “free” (Freedom House 2014). According to the World Bank, “Indonesia is now one of Asia Pacific’s most vibrant democracies that has maintained political stability and emerged as a confident middle-income country”.

38. Although military reform could have been achieved in Indonesia without military co-operation, the military did ultimately support all constitutional reforms, including the elimination of military representation in parliament. Some of the drivers of this transition in Indonesia were:

- Political compromise whereby the military pledged support for certain reforms (e.g. ending the military’s formal political role) in return for being given the right to formulate its own internal reform agenda and to maintain its territorial power structure;

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Public demand for better governance and accountability; and

A policy of making decisions via consensus rather than open votes in Parliament where possible, combined with deal-making which saved the amendment process from deadlock and enabled controversial amendments to be passed.  

39. Recent developments in Myanmar such as the establishment of a Parliamentary Constitutional review committee; a public consultation process and indeed the public comments in support of reform by the President suggest that some of those with power in Myanmar may be willing to engage in constitutional democratisation, through organic reform. It may be that Indonesia’s example offers some inspiration and lessons for Myanmar.

B. Option 2: Replacement of the Constitution without following the Constitutional Procedure

40. Whole-scale replacement of a constitution usually occurs as a result of a popular uprising or as a result of negotiations. Recent history has seen numerous examples of constitutions being replaced wholesale through negotiated and controlled transitions across Eastern Europe, South America, Africa and South-East Asia. Perhaps the most successful and important example of a peaceful transition is South Africa in which the process was notable for the participants’ willingness to reach a broad-based consensus.

41. From 1990 to 1997 South Africa transitioned from apartheid to a constitutional democracy. South Africa’s 1983 constitution institutionalised the apartheid system within the legislature.

42. South Africa’s constitution-making process occurred in two stages, designed and negotiated by South Africa’s diverse political parties. The first stage, from approximately February 1991 to April 1994, involved amongst a number of reforms, the negotiation of an interim constitution being the first stage to agreeing a final constitution in the second stage of reforms. South Africa’s interim constitution was largely drafted through multi-party negotiations (many political parties such as the ANC having been legalised as part of the first stage of reforms). Although the relatively closed-door negotiations caused anger, they may have been necessary to the establishment of a democratically elected parliament and constitution-making process. Political parties did, however, consult with their constituencies on key issues in the negotiations and over time, these forums became increasingly open to the media and public scrutiny.

43. One of the key conflicts during South Africa’s constitutional negotiation process was the method for adopting and drafting a new constitution. Under the 1983 Constitution, amendments had to be approved by each house of the Tricameral Parliament, which gave representatives of white minority interests a veto over constitutional amendments and excluded representatives of the black majority from any input. The governing National Party wanted to retain its veto over the constitution-making process, and so argued that negotiated agreements

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81 Republic of South Africa Constitution Act 110, s. 99.
had to comply with the existing 1983 Constitution and be adopted by the Tricameral Parliament. The ANC would not agree to this and the compromise was reached that an interim constitution would be drafted to establish a democratically elected constitutional assembly which would in turn draft and adopt a final constitution. This, however, led to a further dispute concerning the size of the supermajority that would be required for that constitutional assembly to adopt the final constitution. The National Party wanted a requirement that 75% of the members of the new assembly had to agree, which would effectively have given it a veto over the final constitution, but in the end the parties settled at 66% of the Constitutional Assembly and the House of Senators.

44. The final constitution had to comply with a number of principles including (of importance to the National Party) that (i) it had to be consistent with 34 constitutional principles in the Interim Constitution; (ii) the newly established Constitutional Court was to certify the final constitution for consistency with these constitutional principles; and (iii) the Interim Constitution envisaged national unity, reconciliation and an amnesty process. The Interim Constitution was formally enacted by Parliament and came into force on 27 April 1994.

45. The South African success in persuading the Tricameral Parliament and ruling government to adopt an Interim Constitution, which ensured its own demise, may be instructive to Myanmar. However, the disadvantage of wholesale replacement of the Constitution without following the procedure prescribed in the current constitution is that it might well leave the perception that the substitution of the old constitution for the new was not legitimate and might leave ground for discontent.

46. For these reasons, a new constitution, or an amendment to the existing Constitution which was itself adopted by a sound process (for example, following a referendum, even if not that which is prescribed by the Constitution), might be said to be lawfully adopted in accordance with democratic principle and the rule of law.

C. Option 3: Amend Part of the Constitution without Complying with the Amendment Process

47. Given the difficulties and risks of whole-scale replacement, an alternative option would be to amend the most problematic aspects of the Myanmar Constitution (such as the practical military veto over constitutional amendments) without following the amendment procedure. A precedent for this is the 1962 amendment to France’s 1958 Constitution, which established direct Presidential elections and which was adopted without the approval of both chambers of Parliament as per the requirements for constitutional amendment set out in article 89 of the extant constitution. This amendment was approved by popular referendum and subsequently endorsed by the Constitutional Court.82

D. Summary of Analysis

48. Despite the availability of three options for reform, there would seem to be merit seeking to amend the Constitution in accordance with its own terms – at least initially. Failing a successful outcome, the alternative options might subsequently be considered.

82 For discussion see M. Rosenfeld, A. Sajó, and S. Baer, Comparative Constitutionalism: Cases and Materials (Thomson/West, 2003).
49. In the course of writing this article, on 2 January 2014, President Thein Sein publicly offered his support to the reform process. Myanmar may well be embarking on a process of peaceful reform with the amendment of the constitution as a first step. The Bingham Centre has no view on how Myanmar’s constitution should be amended, but we have set out in Annex A a summary of the views of the many hundreds of citizens of Myanmar we met in the course of the seminars in Myanmar.

50. Notwithstanding this, one of the goals of both the Committee and of the Constitution itself is to perpetuate peace in Myanmar. With that in mind, and in light of what we learned from the people engaged in the workshops in Myanmar, we consider that in the first instance the current efforts to amend rather than completely overhaul the constitution would seem well placed.

51. Further, we are able to say that the current amendment procedure is more onerous than any other constitution in the world. If Myanmar is to embark on a process of organic reform (as many of those whom we encountered in our work in Myanmar would wish) then it may be that procedures need to be adopted which are far more flexible than the existing ones and that amendment to the amendment process ought to be in the first rank of changes to the Myanmar Constitution. An initial attempt to amend the Constitution in accordance with its own terms may be most conducive to the maintenance of peace in Myanmar.

52. We are also able to say with confidence that the constitutional role of the military in the legislature and its practical veto over constitutional reform is unique; out of step with constitutional norms across the world; and contrary to fundamental normative principles of constitutional democracy. It seems to us that if Myanmar is to achieve the unity and stability which are the goals of the Committee and its constitution, the experience of Indonesia and South Africa affords confidence that this can be achieved peacefully.
ANNEX A: The Bingham Centre’s Work in Myanmar

The Consultation Exercise and Responses

1. The Centre took part in three sets of workshops in Myanmar concerned with the consultation on proposed amendments to the constitution. The first workshop on 14 October 2013 was held in Yangon, Myanmar with around 90 delegates comprising pleaders and advocates, pupils and students of the Myanmar legal system. The Centre followed up on this by participating in a tour of Myanmar between 4 and 12 November 2012, attending eight seminars in Mawlamyine, Pham, Bago, Nay Pyi Taw, Mandalay, Taungyi, Meittila and Yangon. It then provided assistance to a further tour organised and run by lawyers’ associations and others within Myanmar which took place between 2 and 13 December 2013, and which held seminars in Myitkyina, Hakha, Monywa, Magwe, Pathein, Sittwa and Dawei. Nearly 500 individuals (all living in Myanmar) wrote submissions to the Committee as a result of these seminars.

2. The Centre expressed no opinions as to how the constitution of Myanmar might be changed, but sought to facilitate and inform the people of Myanmar about the constitution and to put it into context so as to permit others to make useful and informed responses. The training manual prepared for the workshops is available on the Bingham Centre website: http://www.biicl.org/news/view/-/id/164/. That manual contains a detailed analysis of the constitution which is not repeated here.

The Priorities for Reform of the People of Myanmar

3. The themes which were most common amongst participants in the seminars are set out as follows.

Amendment of the Constitution

4. The provision in section 436 of the constitution that 75% + 1 of the Pyidaungsu Hluttaw must give prior approval to any amendment of the constitution should be replaced with a more flexible mechanism for amendment.

Electoral Reform

5. All members of the Pyithu Hluttaw and the Amyotha Hluttaw should be elected by the people of Myanmar in a multi-party system [sections 109 and 141]. Some people suggested reducing the proportion of Defence Services Representatives to nil in phases (for example to 15% in the first term and thereafter to nil).

6. There was a widespread desire to ensure greater decentralisation and election of regional and state government bodies. Clearly, this is a very broad and nuanced topic and very detailed consideration and negotiation would need to be undertaken as to the precise means by which this might be achieved.

7. Many people advocated directly electing the president.

Qualifications and Selection of the President and Vice-President

8. There was near unanimity that the criteria for qualification of the President and Vice President in sections, 59(c), 59(d), 59(e), 59(f) and 59(g) should be deleted in their entirety. It was suggested that the criteria for qualification as President, Members of the Pyidaungsu Hluttaw (ss120 and 152) and Judges (ss301 and 310) should be standardised.
Popular Sovereignty over the Military

9. Most delegates considered that the military should be subject to civilian control [s.20(b)] and its overall influence reduced for example by reducing or abolishing the role of the military in the national legislature (see above) and abolishing the Defence Services personnel’s Presidential Electoral College by which at least one Vice-President and one of three presidential candidates is selected by that group. [Section 60(b)(iii) and 60(c)].

Provisions on State of Emergency

10. The provisions relating to a state of emergency (section 40 and Chapter XI, especially sections 412, 414, 421 and 432) should be significantly more restricted, tightly defined and controlled. The following amendments were amongst those commended for consideration:

- Require the approval of the Pyindaungsu Hluttaw prior to, or within a short space of time after, any declaration of a state of emergency.
- Impose maximum time limits on any declaration of emergency after which the declaration must be scrutinised and approved by the Pyindaungsu Hluttaw.
- Define more tightly the circumstances in which a state of emergency may be declared.
- Require definition of the emergency giving rise to the declaration.
- Require the declaration to state which constitutional provisions are suspended.
- Empower suspension of only such provisions of the constitution as are necessary to address the emergency.
- Ensure that legal action may be pursued for abuses of power in states of emergency.

Judiciary (Sections 19, and Chapter VI, particularly sections 299-301, 321)

11. The independence of the judiciary as guaranteed by section 19 of the Constitution should be augmented by specific provisions to secure independence, incorruptibility and freedom from political influence. The majority agreed that the following measures should be considered to achieve this:

- Establish an independent appointments commission
- Judges to sit in panels of three (to minimise the potential corruption of single judges)
- Qualifications to ensure that all judges are legally qualified and of high calibre (sections 310, 333).
- A constitutional right to jury trial in criminal and civil matters.

12. Further widely supported measures included:

- Restricting the jurisdiction of the court martial system to military offences (sections 293 and 319);
- An individual right of petition to the Constitutional Tribunal (section 325-6);
- The constitution should express the obligation of the legislature to obey, follow and respect the rulings of the Constitutional Tribunal (sections 46 and 320-336);
- There was support for the publication of the law and records of all meetings of the Pyidaungsu Hluttaw (section 89) to ensure transparency of the legislature.

Criminal Justice (sections 373-376)

13. The constitution should be amended to ensure the criminal justice system respects the highest standards of the rule of law. A large majority considered the following measures would help achieve this:
• Amendment to section 375 of the constitution so as to express a constitutional right to legal representation immediately following arrest or detention and thereafter throughout the criminal justice process.
• Amendment to section 375 and 19(b) to acknowledge a right of a person to a fair trial including a right to be heard in their own defence.
• Constitutional recognition of the presumption of innocence in criminal trials.
• Amendment of Section 376 so as to make the right to be brought before a magistrate within 24 hours of being held in custody an absolute right without exception, consistent with section 21(b) (save a limited possible exception based on practicability, for example in remote rural areas).

Fundamental Rights

14. A large majority of those with whom we met considered the following changes should be made:

• Remove the powers vested in the military to revoke or suspend fundamental rights (section 382).
• Limitations on rights to Freedom of Expression and Freedom of Assembly (section 354) should be restricted solely to circumstances defined by the constitution and such restrictions should be no more than are in accordance with the law and necessary in a democratic society.
• Make the prohibition on forced labour (section 359) absolute and non-derogable;
• Amend provisions which discriminate between citizens and non-citizens so as to apply universally (sections. 348, 354, 356, 365, 381);
• The equality provisions [sections 21(a), 347, 348, 350 and 352] should remain subject to amendments that
  o the vague exclusion of women from “positions that are suitable for men only” (section) should be deleted;
  o the right of women to equality before the law in all respects should be expressly stated;
  o there should be an express prohibition on discrimination against disabled people.

15. Two summaries of the work of the Bingham Centre and its experience in meeting the people of Myanmar were submitted to the Committee in Nay Pyi Taw setting out (broadly) the suggestions above, alongside more than 500 individual submissions made by the delegates at the workshops.
Constitutional Support
Bingham Centre for the Rule of Law
Section 436 and Options for Amendment
Naina Patel, Director of Education and Training
Alex Goodman, Research Fellow

Structure of the Session
- Presentation of the key aspects of section 436 and the options for reform (30 mins)
- Breakout sessions on the arguments for and against the reform of section 436 (30 mins)
- A debate on the reform of section 436 (30 mins)
- Presentation of the key options for the process of reform (30 mins)

Part I
Section 436 and Options to Amend
Section 436

**s. 435** "If 20% of the total number of the Pyidaungsu Hluttaw representatives submit the Bill to amend the Constitution, it shall be considered by the Pyidaungsu Hluttaw."

**s. 436(a)** "If it is necessary to amend the provisions of sections 1 to 48 in Chapter I, Sections 49 to 56 in Chapter II, Sections 59 and 60 in Chapter III, Sections 74, 109, 141 and 182 in Chapter IV, Section 200, 201, 248 and 276 in Chapter V, Sections 310 to 318 in Chapter VI and Sections 319 and 320 in Chapter XI of this Constitution, it shall be amended with the prior approval of more than 75% of all the representatives of the Pyidaungsu Hluttaw, after which in a nation-wide referendum only with the votes of more than half of those eligible to vote."

**s. 436(b)** "Provisions other than those mentioned in subsection (a) shall be amended only by a vote of more than 75% of all the representatives of the Pyidaungsu Hluttaw."

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A three-stage process

**s. 433, 434 & 435** [A suggested amendment must be submitted to the Pyidaungsu Hluttaw by 20% of its members.]

- It must have the support of more than 75% of its members to be approved (s. 436).
- When 25% of both houses military appointees (s. 109(b) and 141(b).
- Amendments to certain parts of the Constitution must also be approved by a majority those eligible to vote in a nationwide referendum (s. 436(a)).

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Stage 1: more than 75%

- 177/189 Constitutions require a majority
- Most constitutions require a majority of two thirds
- Only 3 others require a majority of more than 75%
  - Azerbaijan: unicameral rather than bicameral (and no appointed element in either chamber)
  - Burundi: only in National Assembly not Senate (where small co-opted element to fill ethnic/gender quotas)
  - Eritrea: unicameral (where 50-50 split and only after initial 75% vote)
Slide 7

Stage 2: 25% military appointees

• Military specifically:
  • Several prohibit a political role for the military (Malawi, Macedonia, Togo, Turkey and Venezuela)
  • Indonesia: reduced from 100 members
  • Uganda: 10/332 members at present

Slide 8

Stage 2: 25% military appointees

• Appointees generally:
  • Not uncommon
  • But generally unable to veto constitutional change:
    - too small (Bhutan, India, Nepal, Uganda)
    - can be bypassed (Burkina Faso)
    - has no power
  • However Belize, Canada, Kiribati: issue-based
  • South Sudan: temporally limited
  • Bahrain, Jordan, Malaysia, Rwanda, Saudi Arabia

Slide 9

Stage 3: the referendum

• 1/189 more than 75% plus referendum (Azerbaijan)
• Majority referendum with 2/3 Parliamentary approval
• 11 others referendum with 75% (incl. Maldives, Rwanda, Taiwan, the Yemen)
  • 5 of these are unicameral
  • 1 is in a joint session
  • The others require 75% not more than
Assessment
• Is the process stable or rigid?
• Changes to the Constitution are currently difficult to pass (75% + 1).
• They can be defeated by the unelected Defence Services if they vote together.
• Half of those eligible to vote must accept key changes to the Constitution.
• It is important to weigh the ease of amending the Constitution against an attack on its credibility if it is amended too often.

Part II
Breakout Sessions

Part III
How Might Reform Be Achieved?
Alex Goodman
Slide 13

3 Legitimate Options for Reform?

- Amend the Constitution According to the procedure set out in section 436.
  - Compare Indonesia 1999-2014
- Replace the existing constitution with a new one through broad consensus.
  - Compare South Africa 1990-1997
- Retain the existing constitution but amend aspects of it without following section 436.
  - Compare France 1962

Slide 14

Amending the Constitution According to Section 436.

- Veto currently to USDP and Military. Other parties too?
- Current requirement: Near consensus between all political parties plus agreement of military.
- Possibility: Consensual agreement in parliament on amending the section followed by referendum which the section requires.
- Before 1999 Indonesia was in a similar position: the military enjoying seats in the legislature and many more seats being appointed by the President.
- Military supported political reforms in Indonesia in return for control over the military, its budget and the reform of its own power structure.

Slide 15

Advantages and Disadvantages

Possible Disadvantages:
- Too slow
- If consensus cannot be achieved: Deadlock and stasis.

Possible Advantages:
- Stability: minimises the prospect of popular revolt or military assumption of power.
- Perceived legitimacy of democratic transition.
- Effective constitution requires the people and the institutions of a state to recognise and abide by it.
Option 2: Complete Replacement of Constitution
South Africa 1990-1997
- South Africa’s 1983 Constitution required amendments be approved by all three houses.
- From 1990-1997 South Africa transitioned from Apartheid to constitutional democracy.
- National Party argued that all amendments to the 1983 constitution should be approved according to the provisions of the 1983 constitution. The African National Congress would not agree this.
- Compromise involving interim and final constitution; conforming to 34 constitutional principles important to NP. Tricameral Parliament approved its own demise.
- New constitution forged peacefully and legitimately without abiding by an old constitution.

Option 3: Amend Part of the Constitution without Complying with the Amendment Process:
France 1962 (1)
Background
- France had 16 constitutions between 1789 and 1958.
- Current Constitution - Constitution of the Fifth Republic adopted in 1958 which replaced the 1946 constitution of the Fourth Republic.
- Further amended 17 times since 1958.
- Normal procedure is amendment must be adopted in identical terms by both houses of Parliament then must be either adopted by a simple majority in a referendum, or by 3/5 of a joint session of both houses of Parliament (the French Congress) (article 89).

President Charles de Gaulle proposed direct election of President (replacing electoral college).
- Held referendum without the approval of both Chambers of Parliament as required by 1958 constitution.
- Amendment was approved by referendum.
- Constitutional Court declined jurisdiction to adjudicate on the legality of the amendment.
- Amendment founded on principle of Popular Sovereignty: Does a prior constitutional provision override the will of the expressed will of the people?
- See section 4 of the Myanmar Constitution “The Sovereign power of the Union is derived from the citizens and is in force in the entire country.”
One Possible Route to Reform

- Pass resolution through Parliament, for example:
  - There shall be a popular Referendum on the following proposal:
    1. Section 436 is deleted from the constitution.
    2. From 2016-2020 constitutional amendments may be made in Parliament by simple (or qualified) majority without referendum (as in Indonesia or UK).
    3. Before the end of 2020 a referendum must be held to ratify all the amendments to the constitution proposed or passed by Parliament in the period 2015-2020.
    4. If the amendments are rejected by the public, further proposals for reform must be put to referendum until approved.

- Resolution to hold Referendum does not require 75% + 1 of Parliament to agree.
- Effect of such a referendum without 75% + 1 approval?

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Constitutional Support
Bingham Centre for the Rule of Law

Section 436 and Options for Amendment

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Bingham Centre Myanmar Project: Executive Power in Myanmar

Bingham Centre for the Rule of Law
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INTRODUCTION

1. Democratic constitutionalism requires that the powers of the executive be exercised in accordance with the principle of the separation of powers within the state, and the rule of law. The principle of the separation of powers ensures a division between law-making and law-application. The principle of the rule of law requires that all persons within the state, including the three branches of government, act in accordance with the law.¹ As such, it is critically important that the judiciary remains independent from the other branches of government in order to ensure that these legal limits are respected.

2. Of the three organs of state power, the legislature is responsible for making, amending and repealing the law. In addition, it is usually charged with overseeing government policy and holding the executive accountable. The judiciary, on the other hand, is tasked with interpreting and applying the law. It should be composed of independent judges.

3. The executive branch is responsible for the planning and promotion of government policy. It is also charged with the execution and enforcement of laws as enacted by the legislature and interpreted by the judiciary. In addition, it plays a role in proposing new legislation and, in most constitutions, in supervising state bodies such as the civil service and the military. The executive will in most cases be composed of government ministers and led by a president or prime minister.

4. The head of the executive may have further specific powers including the power to appoint members of the executive and the power to refuse or delay legislation, enter into international treaties and the power to make war or declare peace. The duties of the executive will usually include managing the day-to-day running of the key departments of government, including control of policy areas such as energy, transport, security and defence. However, the key principle of the rule of law requires that the powers of the executive should not be exercised arbitrarily. In practice, this requires a high degree of transparency in relation to executive decision-making, thus allowing the other branches of government, as well as the general public, to scrutinise the political leadership.²

¹ As Tom Bingham points out in his work The Rule of Law, the concept of the rule of law also contains other elements, such as that laws be accessible and certain; that they be applied equally to all persons; and that there be access to justice through a fair trial and independent judiciary. The principle of the rule of law is recognized and applied by a large majority of states around the world, and is embedded in the Charter of the United Nations and the Universal Declaration on Human Rights.

² Most countries commit the courts to be the ultimate interpreters of the scope of both legislative and executive power.
5. The Myanmar Constitution (the “2008 Constitution”) enshrines the principle of the separation of powers, and establishes the Executive of the Union (the “Executive”) as one of the three branches of government responsible for wielding the state’s sovereign power (Article 11). The Executive comprises a number of governmental bodies, including the Union Government, the National Defence and Security Council, and the Financial Commission [Note: this is based on the fact that these bodies are included in Chapter 5 of the Constitution, which deals with the Executive]. The President is the head of the Executive (Article 16).

6. The executive power of the Union is distributed among the Union, Regions and States, and to some extent, among Self-Administered Areas (Article 199(a),(b)). At the same time, the 2008 Constitution does not provide for the establishment of local self-government below the Region and State level, neither in rural nor urban areas. Districts and townships remain, according to the 2008 Constitution, administrative levels of government managed by civil servants.

A. Composition and formation of the Union Government

7. The Union Government is composed of the President, two Vice-Presidents, the Ministers of the Union, and the Attorney General of the Union (Article 200). The President is the head of the Union (Article 199). The President is elected by the Presidential Electoral College, following the procedure set out in Article 60. The Presidential Electoral College is made up of three separate groups: two groups of elected representatives from the Pyidaungsu Hluttaw, and a third group drawn from Hluttaw representatives of the Defence Services, as nominated by the Commander-in-Chief (Article 60(b)). Three Vice-Presidents are then chosen by each of these groups, respectively. The Vice-Presidents are scrutinised by the Pyidaungsu Hluttaw (Article 60(d)) according to the criteria set out in Article 59, before the Presidential Electoral College decides which is to become President (Article 60(e)). The remaining two candidates retain their positions as Vice-Presidents during the President’s term of office.

8. Under the Presidential qualification criteria established by Article 59, the President must be a citizen of the Union of Myanmar (59(b)), of a minimum age of 45 years (59(c)), and well acquainted with the affairs of the Union including the military (59(d)). Moreover, the President must have resided in the Union for at least 20 years prior to his or her election (59(e)), and must not have a spouse who is a citizen or subject of a foreign country. This citizenship requirement extends to the President’s parents, and to his or her legitimate children and their spouses (Article 59(f)). The President may be removed from office under the terms of Article 71, for a number of reasons, including high treason, misconduct and breach of the provisions of the Constitution. However, a complex impeachment mechanism must be observed. Notably, the charge against the President must be signed by at least a quarter of the Hluttaw that presents it, and supported by two thirds of the same Hluttaw. [Note: 25% is equal to the proportion of seats reserved for the military] The charge is then investigated by the other Hluttaw, which may ultimately pass an impeachment resolution if this is agreed upon by at least two thirds of the members (Article 71(f)).

9. The President, with the approval of the Pyidaungsu Hluttaw, may (i) designate the Ministries of the Union Government as necessary, and may make changes and additions to the Ministries, and (ii) designate the number of Union Ministers as necessary, and may increase or decrease that number (Article 202). Importantly, the President is responsible for the appointment of Ministers in accordance with Article 232. Candidates for the position of
Minister of the Union must satisfy the qualification criteria set out in Article 232(a). In relation to the Ministers for the Ministries of Defence, Home Affairs and Border Affairs, the President must choose from a list of candidates submitted to him by the Commander-in-Chief (Article 232(b)(iii)). The President must then submit the list of selected persons, along with the list of Defence Services personnel nominated by the Commander-in-Chief, to the Pyidaungsu Hluttaw for approval (Article 232(c)). Such approval may not be refused unless it can be proved that the person in question does not meet the relevant qualification criteria (Article 232(d)). Similarly, the President is responsible for appointing the Attorney General, with the approval of the Pyidaungsu Hluttaw (Article 237).

### B. Powers of the President

10. Under Article 217, the executive power of the Union is vested in the President. This implies that all executive actions of the Union Government shall be taken as action in the name of, and are ultimately attributable to, the President. In this regard, the President is not accountable to the legislature for the use of his powers (Article 215). Aside from the appointment of Ministers, as discussed above, the President has a range of other powers under the 2008 Constitution. These powers include the ability to grant pardons or amnesties, with the recommendation of the NDSC (Article 204), start or end relationships with other states (Article 206), make a speech to the Pyidaungsu Hluttaw, Amyotha Hluttaw, or the whole country (Article 210), call an emergency session of the legislature (Article 211), put into effect an urgent law when the legislature is not assembled (Article 212), take military action in the case of aggression against the Union in agreement with the NSDC (Article 213), and decide on non-constitutional disagreements at the state, region and self-administered zone level with the help of the government (Article 226).

11. Importantly, the President also has the power to declare a state of emergency in accordance with the provisions contained in Chapter XI of the 2008 Constitution. Chapter XI sets out three types of emergency procedure, each triggered by a separate provision. The first type of emergency arises where the President deems that it is impossible to carry out the executive functions in any part of the country in accordance with the Constitution (Article 410). In this situation, the executive powers of the area in question transfer to the President (Article 411(a)). In addition, the President is granted legislative powers in that area (Article 411(b)).

12. The President also controls the appointment of the members of the Union Election Commission (Article 398), which is the body responsible for holding and supervising elections to the Hluttaw (Article 399). In addition, the President has the power to appoint and remove the Chief Ministers of the Regions and States (Articles 261(a),(b) and 263(a)). As a result, the President can effectively control the administration of the Regions and States. Finally, the President controls the appointment and removal of the judges of the Supreme Court (Articles 299 and 302), and the Chief Justices of the High Courts of the Regions and States (Article 308(b)). The President also selects a third of the judges of the Constitutional Tribunal (Article 321).
C. Composition and formation of the National Defence and Security Council

13. The National Defence and Security Council ("NDSC") is made up of 11 individuals (Article 201). Of these, six are directly appointed from within the Defence Services:

a. The Commander-in-Chief (appointed by the President with the approval of the NDSC (Article 342)).

b. The Deputy Commander-in-Chief (the appointment process for the Deputy Commander-in-Chief is not set out in the 2008 Constitution, but in practice he is nominated from within the Defence Services).

c. The Minister of Defence (nominated by the Commander-in-Chief pursuant to Article 232(b)(ii)).

d. The Minister for Home Affairs (nominated by the Commander-in-Chief pursuant to Article 232(b)(ii)).

e. The Minister for Border Affairs (nominated by the Commander-in-Chief pursuant to Article 232(b)(ii)).

f. One of the two Vice-Presidents (also nominated by the Commander-in-Chief following the procedure in Article 60(b)).

14. The functions of the NDSC are not exhaustively set out in the constitution. However, the constitution establishes that the NDSC has an important role in executive decision-making relating to foreign affairs (Article 206) and military action (Articles 213 and 340). Furthermore, the NDSC has a prominent role in any decision to declare a state of emergency (Article 410), and assumes key functions in the event of such a declaration (see Chapter XI).

D. Composition and formation of the Financial Commission

15. The Financial Commission is composed of seven groups of individuals. The President is the Chairman of the Financial Commission (Article 229(a)(i)) and has control over its composition and formation (Article 229(b)). The Financial Commission is responsible for submitting the Union budget to the Pyidaungsu Hluttaw and for advising on financial matters (Article 230(c)).

ANALYSIS

A. Presidential Elections

16. Under the current electoral system, as discussed above, the President is chosen by the Presidential Electoral College, two thirds of which is composed of elected members of the legislature. As such, the President is elected directly by the legislature, in collaboration with the Defence Services, but indirectly by the population at large, which decides the composition of 75% of legislature via national elections. The wider electorate in Myanmar is therefore one step removed from the Presidential appointment process. Direct election of a president by contrast secures greater participation of the electorate in the formation of the executive and what might be seen as a correspondingly stronger democratic mandate.

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3 These individuals are: the President; the Vice-Presidents; the Speaker of the Pyithu Hluttaw; the Speaker of the Amyotha Hluttaw; the Commander-in-Chief of the Defence Services; the Deputy Commander-in-Chief of the Defence Services; the Minister for Defence; the Minister for Foreign Affairs; the Minister for Home Affairs; and the Minister for Border Affairs.

4 These individuals or groups are: the President; the Vice-Presidents; the Attorney-General; the Auditor-General; the Chief Ministers of the Regions and States; the Nay Pyi Taw Council Chairperson; the Minister of Finance.
EXAMPLE: Direct elections

17. Prior to the constitutional reforms of 1999-2002, Indonesia retained a system of presidential appointment by way of the legislative body (the People’s Consultative Assembly). However, this was seen as undermining the participation of the general public in the selection of the executive leadership, and as reducing executive accountability. The reforms introduced a new system whereby both the President and Vice-President are elected directly as a pair. Political parties participating in general elections propose presidential and vice-presidential candidates in advance of general elections. Similarly, constitutional reform in Argentina in 1994 replaced a system of indirect presidential appointment via Electoral College with direct presidential elections.

EXAMPLE: Indirect elections

18. In certain countries, a parliamentary rather than a presidential system is adopted. Under parliamentary systems, the head of government is usually separate from the head of state, and is accountable to the legislature, not the electorate directly. In such systems some democratic accountability is safeguarded in practice by each party proposing a candidate for leadership in advance of general elections, and by that head of government having less executive power than a head of state. In the United Kingdom, for example, a Prime Ministerial candidate is proposed as head of government by each party in advance of general elections and the Prime Minister holds none of the individual executive authority of most presidents: he cannot for example veto legislation.

B. Presidential Qualifications

19. Most constitutions around the world contain provisions relating to presidential qualifications. These usually set out certain minimum requirements for an individual’s eligibility to stand for President, including minimum age, citizenship and residency requirements. The latter are inserted into constitutions in order to ensure that candidates have a substantial and legitimate interest in the relevant state, and are suitably committed to its wellbeing and prosperity. Nationality requirements also act as a safeguard against the possibility of a candidate owing allegiance to a foreign state, or succumbing in some other way to foreign influence.

20. Under the 2008 Constitution, the citizenship requirement is extended to cover the Presidential or Vice-Presidential candidate’s spouse, parents and children, as well as their respective spouses. This is an unusually far-reaching standard, which effectively prohibits a candidate, or his or her children, from marrying a foreign national. [Note: the military’s first candidate for the vice-presidential post, Yangon Chief Minister U Myint Swe, failed eligibility criteria in the constitution because his son-in-law is an Australian citizen] One issue to consider is whether the nationality of a candidate’s relatives is relevant to the key issue of his or her competence for the role of President or Vice-President, particularly taking into account the increasingly international nature of travel and communication. International practice regards a qualification of the kind set out in Article 59(f) as too remote to relate to the competence of the President. It would therefore be considered a disproportionate restriction on the freedom of the people to elect a qualified candidate of their choice. In addition, the criteria set out in Article 59 generally appear especially restrictive when viewed in contrast to

5 See the Third Amendment of the Indonesian Constitution, Article 6A.
6 See Article 21(3) of the Universal Declaration of Human Rights (“The will of the people shall be the basis of the authority of government”), and Article 25 of the International Covenant on Civil and Political Rights (“Every citizen shall have the right and the opportunity […] to take part in the conduct of public affairs, directly or through freely chosen representatives”).
the more permissive qualification criteria set out for elected members of the Pyithu Hluttaw (Article 120).

C. The Military and the Executive

21. The Defence Services have played a prominent role in the recent history of Myanmar, not least by providing a large measure of internal stability and security during politically turbulent times. Moreover, the military has succeeded in preserving the territorial integrity of Myanmar, which has been threatened on numerous occasions during the twentieth century. The military also played a prominent part in the drafting and implementation of the 2008 Constitution. In relation to the Executive, it is notable that the military continues to exert significant control, mainly via the Presidential Electoral College and the National Defence and Security Council. This control is reinforced by the role of the Defence Services in selecting the Ministers for the Ministries of Defence, Home Affairs and Border Affairs. Moreover, under Article 20(b) of the 2008 Constitution, the Defence Services act independently of the civilian branches of government.

22. In most democracies, the military is subject to civilian oversight and control. This subordinates the military to civilian governance, thus ensuring that the use of force by the state is subject to a clear and structured democratic process. Moreover, the role of the military tends to be established by the constitution, and is usually limited to defending the country against external armed aggression. This transparency acts as a safeguard against the arbitrary use of military power, and also ensures that military force is only ever resorted to in the best interests of the population as a whole. However, civilian control is not intended to weaken the capacity of the military to perform its functions, and ideally democratic civilian governance will co-exist with the support of a strong military. It is notable, for example, that the military was responsible for instigating democratic reform in Portugal and Brazil in the latter stages of the twentieth century. Similarly, much of the political momentum for reform of the military in Indonesia came from within the ranks of the military itself.

EXAMPLE: Military reform in Indonesia, 1999-2002

23. Prior to the constitutional reforms of 1999-2002, Indonesia upheld a ‘dual function’ system (known as the Dwifungsi doctrine) whereby the military acted both as an agent of defence, and as an important social and political force. The resignation of President Suharto in 1998, however, triggered a wave of political reform, with many calling for a reduction of military power within the government. As a result, the ‘dual system’ was dismantled and the formal power of the military within the executive was abolished. Furthermore, the amendments to the constitution created a key distinction between control of external defence, which remained the responsibility of the armed forces, and control of internal security, which was passed to a civilian police body under executive control. Importantly, the power and authority of the armed forces is now explicitly subject to the rule of law.

EXAMPLE: Military reform in Turkey, 2001-2005

24. Prior to the reforms, the military wielded considerable influence within the Turkish government. The most important military body in this regard was the National Security Council, established in 1960, which co-existed with the civilian council of ministers at the executive level. However, the reforms initiated by the government in 2001 gradually brought the National Security Council under civilian oversight. In 2003, the Turkish parliament passed laws which set limits on the authority of the Council and made the secretary general

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7 See Article 30, Second Amendment to the Indonesian Constitution.
8 Article 30(5), Second Amendment to the Indonesian Constitution.
answerable to the prime minister.\textsuperscript{9} In 2004, a non-military individual was appointed as general secretary of the National Security Council for the first time.

**Potential areas for reform in Myanmar**

25. In light of the above, there are several areas of reform that might usefully be considered in view of the current relationship between the military and the Executive.

26. Firstly, the role or function of the military could be clarified within the constitution, including the role of the NDSC, and limited to defending the state from external threats.\textsuperscript{10} To this extent, a new civilian police force could be formed to oversee internal security.\textsuperscript{11}

27. Secondly, the military could be made formally subordinate to civilian government, with the Defence Services accountable to the Executive for their actions.\textsuperscript{12}

28. Thirdly, civilian branches of government could be given full control over the formation of the government and the selection of Ministers.\textsuperscript{13}

29. Fourthly, the election of the President could be made a purely civilian matter, with the President elected directly by the wider population (see paragraph 1 above).

30. Fifthly, the role of the Commander-in-Chief could be clarified within the constitution, with provisions inserted regarding appointment, term of office and accountability to the President.\textsuperscript{14} In this regard, the Commander-in-Chief could be explicitly subordinated to the civilian authority of the President, with a corresponding reduction of the Commander-in-Chief’s influence over the appointment of Ministers, as referred to above. Moreover, the appointment of the Commander-in-Chief could be made subject to parliamentary approval, as with the appointments to all other significant posts within the state.

**D. Concentration of power in the Executive**

31. Under the 2008 Constitution, the Executive wields considerable power over the formation of government, the selection of the senior judiciary and the enactment of laws. As referred to above, the separation of powers is a key principle of democratic constitutionalism, as incorporated into the Myanmar constitution by Article 11, and requires an effective system of checks and balances in order to function properly. In particular, the actions of the Executive must be subject to the scrutiny of the legislature and the courts. In order for this system to be workable, members of the legislature and the judiciary must feel that they are independent from the Executive, and can voice criticism without fear of losing their positions.

\textsuperscript{9} See the “seventh reform package” adopted by the Turkish Grand National Assembly in July 2003.

\textsuperscript{10} For example, a new Article 201A could be inserted after Article 201 setting out the “Powers and Functions of the NDSC”. This article could establish that the NDSC’s influence and control is limited to military affairs. Furthermore, numerous amendments could be made, for example, to Articles 204 and 206, removing the influence of the NDSC in relation to foreign affairs and the grant of amnesties. Similarly, Article 342 could be amended to curtail the influence of the NDSC in relation to the appointment of the Commander-in-Chief.

\textsuperscript{11} This might involve the amendment of Article 17(b) to restrict the duties and responsibilities of the Defence Services for internal security. A new provision could also be inserted establishing a civilian police force with oversight of internal security.

\textsuperscript{12} A new provision could be inserted clarifying that the NDSC and Defence Services shall be answerable to the President.

\textsuperscript{13} This might include the amendment of Article 232 to remove the power of the Commander-in-Chief to nominate candidates for the Ministers of Defence, Home Affairs and Border Affairs.

\textsuperscript{14} These provisions might be inserted into Chapter VII (Defence Services).
EXAMPLE: Reduction of Executive power in Indonesia, 1999-2002

32. The reform process in Indonesia at the turn of the 21st century looked specifically at the issue of executive power and concluded that it needed to be curtailed. As such, numerous changes were made to the structure of government. These included (i) the transfer of legislative power from the President to the legislature (the People’s Representative Assembly),\(^{15}\) (ii) the limitation of presidential powers in relation to the granting of amnesties and pardons,\(^ {16}\) (iii) the prohibition of the dissolution of the legislative body by the President,\(^ {17}\) and (iv) the clarification of the procedure for the impeachment of the President.\(^ {18}\)

EXAMPLE: Semi-Presidentialism in Egypt, Tunisia and France

33. Recent reforms in Egypt and Tunisia have introduced systems of government based on dual executive structures. This model is intended to benefit from the advantages of both presidential and parliamentary systems. In particular, semi-presidentialism is aimed at mitigating the perceived risk of the consolidation of power by populist parties, which would frustrate the principle of representative government. In Tunisia, for example, the head of state (president) is separate from the head of government (prime minister). Although the government is accountable only to the legislature, not the president, the latter does have the power to ask the legislature to renew its confidence in the government a maximum of two times during the presidential mandate.\(^ {19}\) It should be noted that France adopts a similar system of semi-presidentialism whereby the office of the president is kept separate from the office of the prime minister. As such, it is often the case that the president and prime minister come from different political parties.

Potential areas for reform in Myanmar

34. For Myanmar, there are a number of reforms that could be carried out in relation to Executive power, some of which are discussed in greater detail below. However, a general readjustment to the 2008 Constitution could be made in order to ensure that the powers of the Executive are kept in check by the legislature and the judiciary. In particular, Article 204 could be amended to curtail the President’s power in relation to pardons and amnesties. Moreover, the impeachment mechanism in Article 71 could be reformulated to provide more clarity and transparency in relation to the legislature’s power to remove the President in certain situations.

E. The relationship between the Executive and the Judiciary

35. It is absolutely fundamental to the rule of law that the people be able to challenge decisions, including decisions by all levels of government, with a reasonable chance of success. This requires an independent judiciary. In this regard, it should be noted that Executive control of the appointment and removal of judges could be viewed as curtailing judicial independence.

\(^{15}\) Articles 5, 20 and 21, First Amendment to the Indonesian Constitution.
\(^{16}\) Article 14(2), First Amendment to the Indonesian Constitution.
\(^{17}\) Article 7C, Third Amendment to the Indonesian Constitution.
\(^{18}\) Article 7A, Third Amendment to the Indonesian Constitution.
\(^{19}\) Article 19, Tunisian Constitution of 2014.
36. The process for the appointment and removal of judges from their positions might, therefore, benefit from being carried out by an independent body, rather than by the Executive. This would make it considerably easier for the judiciary to challenge the actions of the Executive where such actions appear to be in breach of the constitution or other domestic legislation. Moreover, an independent body would provide a guarantee that judicial appointments are made purely based on merit. The trend internationally is to move from the executive appointment of judges to appointment by independent commission. In the United Kingdom, for example, the Judicial Appointments Commission, established in 2005, is now the independent body responsible for the appointment of judges, whereas previously judicial appointments were made by the executive. Similarly, the Judicial Service Committee and Judicial Conduct Committee were set up to oversee the judicial appointment process in South Africa, and to investigate complaints relating to judges. Senior judges could also be afforded security of tenure in order to ensure that their decision-making is not influenced by the will of the Executive.

37. In many countries in transition, there is a problem about the independence and competence of the judiciary. There are different ways to overcome this, such as in South Africa, where a new Constitutional Court was established with a much broader membership than any other court. Secondly, parallel institutions could be established such as independent ombudsmen and other tribunals. Some countries even import foreign judges at the highest level, at least for a period of time (e.g. Hong Kong, Bosnia and the Courts of Appeal of a number of Caribbean countries).

F. Other Executive powers that might need reform

i. Accountability of Executive

38. In most constitutions, the executive is answerable to the executive. Legislative oversight can take many forms, but often includes the power of the legislature to force the resignation of the executive. In India, for example, a motion of no confidence may be entered by the lower house of parliament (Lok Sabah). If passed, such a motion forces the incumbent government to leave office. Similarly, section 55(2) of the South African Constitution states that “The National Assembly must provide for mechanisms (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b) to maintain oversight of (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.” In relation to the 2008 Constitution, reform in this area would require amendment of Article 215.

ii. Appointment of cabinet

39. At present, the 2008 Constitution only allows the legislature to reject the appointment of a minister where it considers that the individual in question does not meet certain specified qualifications (see Article 232(d)). This provision could be relaxed in order to make it possible for the Pyidaungsu Hluttaw to challenge the appointment of ministers in a wider range of circumstances.

iii. Appointment of local ministers

40. In addition, the President’s authority in relation to the appointment and removal of Chief Ministers and other ministers of the Regions and States could be diluted. As an alternative,
local elections could be held closer to the regional and state level. This might help to increase the accountability of Chief Ministers to their respective Regions and States, as opposed to the Executive and central government. This, in turn, could be seen as strengthening the democratic legitimacy of the local administrations.

iv. Influence in elections

41. Given the central importance of free elections in any democracy, it is crucial that the Executive should not be afforded any influence in relation to the holding and supervision of the election process. As such, the current provisions governing the formation of the Union Election Commission in Article 398 of the 2008 Constitution could be amended to remove the President’s power to appoint members of the Commission. To this extent, an independent body could be established to hold and supervise elections. Independent electoral commissions are now used around the world, including in the United Kingdom, Australia, Canada, India, Indonesia, Nigeria, Pakistan, Poland, Romania, South Africa and Thailand.

v. Declarations of state of emergency

42. Another part of the 2008 Constitution that might benefit from considerable reform is Chapter XI and the provisions surrounding the declaration of a state of emergency. In particular, the circumstances in which emergencies can be declared by the President could be narrowed and clarified. This might add a level of objectivity to declarations of emergency, thereby ensuring that the transfer of emergency powers to the President and Commander-in-Chief does not occur purely at the discretion of the Executive leadership.

vi. President’s power to pass laws

43. In relation to the enactment of laws, this is reserved to the legislature in almost all situations in constitutions. As such, the current procedure allowing for the President to pass laws “that need immediate action” under Article 212 might be reconsidered. In particular, it is unclear which laws will need immediate action, and as such this wording could be extended to cover an extremely wide range of legislation. An alternative procedure for the passing of emergency law between parliamentary sessions might involve the recalling of the Pyidaungsu Hluttaw.
Slide 2

Structure of the Session

• Introduction to key concepts and overview of the relevant parts of the 2008 Constitution (15 mins)
• Overview of some of the main issues relating to executive power in Myanmar (20 mins)
• Breakout session to consider key questions (15 mins)
• Conclusion (10 mins)

Slide 3

Part I

Introduction to key concepts and overview of the relevant parts of the 2008 Constitution
Slide 4

Key concepts

- The separation of powers (executive, legislature and judiciary)
- The rule of law
- Transparency
- Accountability
- Duties and powers of the executive

Slide 5

The Myanmar Constitution of 2008 – The President

- The Constitution enshrines the principle of the separation of powers (Article 11)
- The executive power of the Union is vested in the President (Article 217)
- The President is elected by the Presidential Electoral College (Article 60)
- Presidential qualifications (Article 59)
- Appointment of the Union Government (Article 202)
- President not accountable to the legislature (Article 215)
- Extensive Presidential powers (see Articles 204, 206, 210, 211, 212, 213, 299, 302, 398)

Slide 6

The Myanmar Constitution of 2008 – other executive bodies

National Defence and Security Council (NDSC)
- Composition: 11 individuals (Article 201) – 6 directly appointed by the military
- Functions not fully set out in the Constitution
- Financial Commission
- Composition: 7 individuals (Article 229)
- Responsible for submitting the Union budget to the Pyidaungsu Hluttaw and for advising on financial matters (Article 230)
Part 2

Overview of some of the main issues relating to executive power in Myanmar

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Slide 8

(1) Presidential Elections

- General public currently one step removed from Presidential appointment process
- Would direct elections secure a stronger democratic mandate?

EXAMPLES
(i) Direct elections – see reforms in Indonesia, Argentina, and France
(ii) Indirect elections – see UK system (but leader of each party announced in advance of elections)

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Slide 9

(2) Presidential Qualifications

- Why are presidential qualifications useful in practice?
- How extensive should qualifications be?

Note that far-reaching qualifications can have the effect of limiting the freedom of the people to elect a Presidential candidate of their choice
Slide 10
(3) The Military and the Executive

- Why should the military be subject to civilian oversight?
- Could the role of the military and the NDSC be clarified within the Constitution?
- The role of the military is usually restricted to defence against external armed aggression
- Examples of recent military reform: Indonesia, Turkey

Slide 11
(4) Concentration of power in the Executive

- Why should the Executive be subject to the scrutiny of the legislature and the courts?
- Legislative power should be held exclusively by the legislature
- The judiciary should exercise its powers as an independent branch of government (see next slide)
- Recent examples of reform: Indonesia, Egypt, Tunisia

Slide 12
(5) The relationship between the Executive and the Judiciary

- Why should decisions of the Executive be open to challenge?
- Why should the judiciary remain independent at all times?
- Should the judiciary be appointed by an independent body?
(6) Other Executive powers that might need reform

- Accountability of Executive
- Appointment of cabinet
- Appointment of local ministers
- Influence of Executive in elections
- Declarations of state of emergency
- President’s power to pass laws
Bingham Centre Myanmar Project: Constitutional Transitions and the Role of the Military

Bingham Centre for the Rule of Law
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www.binghamcentre.biicl.org
INTRODUCTION

1. It is now common to isolate two separate phases of large-scale constitutional and political reforms whose ultimate goal is the establishment of a stable system of democracy. The first phase – the transition – is said to be complete when:

   a. agreement about political procedures produces an elected government;
   b. a government assumes power as a direct result of a free and popular election;
   c. the government so elected has actual – and not merely legal – authority to generate new policies; and
   d. the executive, legislative and judicial power established by the new democracy as a matter of law does not have to share power with other bodies.

The second phase – the consolidation – relies on politicians and citizens applying the new rules to other issues and thereby adjust the democratic structure.

2. In this paper, I focus on the role constitutions and constitutional reform can play in transitions to democracy which involve the military. I aim to explore the experiences of selected other countries who have undergone transitions to democracy and to offer some insights for Myanmar’s current phase of reform. There is no doubt that Myanmar is in the transition phase of its reforms. When that transition began is debatable – it can be placed anywhere between the grant of local governance through the Government of Burma Act 1935 and the announcement in March 2013 of the formation of a parliamentary committee to review the constitution – but ultimately a point of scholarly and historical rather than practical interest. I do not seek to make recommendations here or to interfere in what is and must remain a domestic process. Rather, I hope to assist Myanmar’s leaders and its citizens to make informed choices. I feel able to do so because I note from the public statements of the government, the ruling Union Development and Solidarity Party, the Tatmadaw, the major political parties and many of the ethnic nationalities groups that a stable democratic system is a shared goal, though the precise shape of that system is still under discussion.

THE NATURE OF TRANSITIONS AND THE ROLE OF CONSTITUTIONS

3. Past experience and careful study of transitions has indicated some recurrent themes. Small groups of leaders play a disproportionately large role in the decision-making process leading to the completion of the transition. A widespread fear that civil war or other forms of internal strife are likely makes gradual changes appear more attractive than radical and rapid ones. Political consensus – an act of explicit agreement in which
political leaders accept the existence of diversity in unity and consent to forming the basic structures and procedures of a democracy – is essential to make serious progress.

4. While there is now a rich body of scholarship on democratic transitions there has been relatively little study of transitions involving the military. There is even less that focuses on the role of constitutions and constitutional reform in such cases. This is despite many countries completing democratic transitions where militaries have previously held sovereign power or played a significant political role. Such countries are not limited to particular regions or cultures and (to take a random sample from the past 50 years or so) include Algeria, Turkey, Pakistan, Portugal, Egypt, Spain, Chile, Indonesia, South Korea, Nigeria, Ghana and Venezuela.

5. Some initial remarks are therefore warranted to provide context to the role of constitutional reform in these transitions. Some of the points that follow apply to all constitutional transitions but they are particularly apt for transitions in which the military plays an outsize role. First, there is a tendency to misunderstand the nature and potential impact of constitutional change on its own. Constitutions often come to be seen as the solution (or at least part of the solution) for every issue or conflict that arises in relation to the transition. This overplays their resolutive power and underplays the importance of other forms of law (statutes passed by parliaments, decisions issued by judges). From a legal perspective, successful transitions to a new constitutional order are achieved through a combination of constitutional alterations, new laws and a judiciary whose decisions command public confidence.

6. Secondly, constitutional reform is often mistakenly viewed as a purely technical and legal process. The mistake lies in considering that alterations to the text of a constitution by themselves can achieve lasting progress. Politics and political agreements are as important, and sometimes more important, than perfecting the text of a constitution. Meaningful constitutional renewal relies on three propositions:

a. All political stakeholders consider the new constitution to be the highest law according to which power will be wielded. The text of the constitution cannot be a sham: its terms and its practice must be to the same effect.

b. Building a culture of constitutionalism – the recognition across all major facets of society that the constitution ought to be followed and interpreted in accordance with its spirit and that political actors should be held to account where they do not – is a process that must operate in tandem with drafting constitutional amendments.

c. The constitution is a facultative instrument that sets basic parameters and minimum standards but leaves room for change and informal arrangements. Offering too great a degree of specification – and here Zimbabwe’s current constitution, adopted in 2013, is a good example – ensures that the first two propositions will be broken. This will do serious long-term damage, as it will undermine any trust or confidence that political actors and the public at large may place in a constitution or constitution making. Agreeing a set of minimum standards for the most important aspects of political governance with an understanding that other changes may be agreed without being reflected immediately in the written constitution can be a helpful tool towards compromise.

7. Finally, there are two significant risks for the long-term stability of constitutional transitions where a significant portion of governmental power is held by military. The first is that, at the conclusion of the transition, the military retains reserve domains of policymaking or protective powers to intervene in the affairs of state for the safeguarding of some higher
purpose. An example of the former is found in Chile, where the military directly controls the national copper industry and retains 10 per cent of its revenue. The Portuguese Constitution adopted in 1976 offers an example of the latter: it established a non-elected Revolutionary Council, controlled by the military and separate from the executive and the legislature, with the power to veto legislation and oversee the armed forces. The second is that civilian politicians prioritise negative consolidation (the removal of existing powers or privileges possessed by the military) at the expense of positive consolidation (the incorporation of the military into the goals and institutions of the new democratic system). Both are equally important. A failure to plan and undertake meaningful positive consolidation through successful constitutional design will reduce the likelihood of stable constitutional government.

THE RELEVANT PARTS OF MYANMAR’S CONSTITUTION

8. Myanmar’s current constitution reflects the fact it represents a transition from a system of government led by the military. The Tatmadaw is guaranteed a role in national political leadership of the country by section 6(f) and section 20 makes it the principal safeguarding force for the constitution. These features and others are common to institutions developed during the course of transitions involving the military. In describing these provisions, I pass no comment on their merits and legitimacy. I intend simply to state how the current constitution distributes power with respect to Tatmadaw personnel.

A. Nominations and positions of significance

9. The constitution guarantees, in section 17(a) and (b) of the Basic Principles, that military personnel will play a significant role in the operation of both the executive and legislative branches of government at the Union and sub-Union levels. This is reflected across several provisions. The nomination of one quarter of all positions in all legislatures – at both Union and state or regional level – is vested in the Commander in Chief (sections 74, 109, 141, 276(i)). In addition to the legislative influence this grants, the bloc provides an effective veto-power to military personnel on any proposed changes to the constitution (section 436). The Commander in Chief is also given the power to nominate the ministers of defence, home affairs and border affairs (section 232(b)(ii) and (iii)). The nomination is entirely discretionary and cannot be refused: sections 232(d), (j)(ii), 234(b), 235(c)(ii). The ministry of home affairs is particularly important: the Head of the General Administration Department for a region or state, who ultimately reports to the minister of home affairs, is deemed to be secretary of the region or state government (section 260). As a result, the minister for home affairs, and through him the military, has a significant role in state and regional government administration in addition to the powers granted to appoint state and region ministers (sections 262(a)(ii), (n)(ii), 276(d)(ii)). The military have representation on the Nay Pyi Taw Council (section 285(b)(iii) and (f)) and the military personnel who serve in the Union legislature are, in effect, granted the nomination of one of the vice-presidents by section 60(b)(iii).

10. Chapter V of the constitution creates the executive of the Union and establishes as part of the executive the National Defence and Security Council (section 201). The full powers or scope of responsibilities of this council are not specified in the constitution. However, the Council has the authority to abolish the three branches of government and transfer sovereign power for up to two years to the Commander in Chief in the case of a state of emergency. It also proposes and advises the President on the appointment of the
Commander in Chief. The Council comprises 11 members, six of whom are serving military personnel or nominated by the military.

11. In all the cases described here, nominated personnel (except the vice-president) remain serving members of the Tatmadaw and, at least in theory, are subject to the line of command.

B. Domains of autonomous influence and control

12. The text of the constitution grants significant autonomy to the military in the conduct of its own affairs. This is confirmed in section 20(b), which vests the right to independently administer and adjudicate all affairs of the armed forces. The further effect of sections 337, 338 and 339 is to make all potential threats to stability affairs of the armed forces, whether they originate inside or outside Myanmar, and to give power to the Tatmadaw to address them.

13. A consequence of the right vested by section 20 of the constitution is that military justice operates separately to all other parts of the judiciary. Military personnel are subject to military laws, even if they may assume other positions within government (section 291). Decisions on matters of military law are ultimately for the Commander in Chief and his decision is final and binding: section 343. The legislature retains power to pass laws with respect to defence and the operation of the Tatmadaw (see section 96 and Schedule One, item 1(a)) but there would appear to be no way for such legislative regulation to be enforced. In effect, this means that there is very limited scope for the civilian branches of government to engage in a meaningful way with the Tatmadaw.

AREAS OF MODERNIZATION IN CONSTITUTIONAL TRANSITIONS INVOLVING THE MILITARY

14. To achieve a traditional democratic system of governance, the goal of the transition must be to shift the constitutional conception of the military from an institution in and of itself – effectively a fourth and separate branch of government – to a body that exists as an integrated part of the state. It will not be above politics or any branch of government but rather it will form an integral element of the body politic. Experience with military transitions in other countries indicates that two key areas must be addressed to create a stable and effective relationship between civilian democratic institutions and the military. To explore these areas, I will draw on the developments in two countries that have successfully attempted a transition from military government.

15. Indonesia’s transition was triggered by the forced resignation of President Suharto in 1998 following protests and riots. The military withdrew the support it had previously and consistently provided to the president and forced the installation of a new president. The constitutional transition proceeded without any particular planning or design. The 1945 constitution was amended in four stages by an assembly chosen in direct popular elections. Between November 1999 and May 2000, two parliamentary committees conducted public and private hearings and study tours and prepared reports that were debated in stages between 2000 and 2002. The reform exercise used the existing constitution as a starting point but amended it to such a degree that only about 11 per cent of the original remains.
16. In Spain, the death of General Francisco Franco in 1975 brought to power a king, Juan Carlos, who oversaw the process of total power transfer from the military to a civilian government between 1975 and 1982. General elections were held in 1977 to form a constituent assembly tasked with drafting a new constitution. The product was approved at a general referendum in 1978 and the first democratic elections under it were held in 1982. This new constitution, the first since the 1930s, remains in force with only two amendments.

THE MILITARY AND POLITICS

17. In Spain, this relied on a leader within the military who was committed to the gradual transfer of all political power persuading the military to relinquish all power and form an integral part of the body politic. The Spanish constitution had never guaranteed seats for the military in the parliament but in the first constituent assembly following the 1977 elections there was direct representation of the military and several parties sympathetic to its concerns. The military also had autonomy over the conduct of its own affairs, though there was no defence minister as such. The drafting of the 1978 constitution, which was led by civilians not aligned with the military, involved a gradual separation of the military and politics. It sought to do this, first, by distinguishing between the armed forces and forces of public order (such as the police or border guards) in the preliminary section of the new constitution. Amending existing phrases and drawing on historical language, the new text excluded forces of public order from the mission of being guarantors of the constitution. Secondly, the drafters ensured that provisions about the internal organisation of the military, and in particular its governing organs, were not established by or in the constitution. This was important for future developments: by leaving out such organs it enabled them to evolve, and eventually disband, without the need for constitutional amendment.

18. Indonesia had, since its constitution of 1945, allowed for representation in the main legislative body from the military and police. This representation was not constitutionally entrenched. Rather, the constitution delegated a power to appoint representations from phase “regional territories and groups as provided for by statutory regulations”. During the of constitutional reform that lasted from 1999-2002, several attempts were made to constitutionalise the practice that had developed of the military and the police holding seats in parliament. These did not succeed. The principal reason for the rejection of military representation was the lack of popular support. The body preparing amendments to the constitution was broadly representative of the people and conducted many public consultations across Indonesia. These features of the reform process offered a chance for public concern about any political role for the military or the police in the future constitutional system. As a result, the military and the police withdrew from politics without being forced to.

19. At present, Myanmar’s constitution guarantees a role for the military in politics. It does so through formal nominations and declarations. It legally separates public order forces (the police and border guards) from its military. However, the forces that are intended to oversee public order are informally connected with the Tatmadaw, reflected in the fact that the minister in charge of these forces is a serving member of the military. The lessons learned from other military transitions suggest that finding a way to disengage forces protecting public order – providing civilian oversight, establishing distinct identities – improve public confidence in government and provide greater stability during transition.
This may be an important first step towards creating a closer and more meaningful engagement between civilian and military leaders.

**MILITARY JUSTICE**

20. It is not uncommon in developed democracies for the military to operate separate tribunals and a separate system of justice to adjudicate military law. A key feature, however, of military justice in democratic systems is the limited scope of the jurisdiction of military courts and the possibility of review on significant cases.

21. A key success of Spain’s military transition was reform of military justice. At the start of and in the early phase of the transition, military courts exercised wide jurisdiction over soldiers and civilians alike and were used as political tools to stymie attempts to reform. There are documented instances of soldiers’ insubordination going unpunished when it was directed towards civilian government or initiatives to reform. The constitution adopted in 1978 stipulated (in art 117) that there would be a unitary system of justice, covering both civilian and military justice, and that this would be implemented through an organic law defining jurisdiction. Such a law was never fully implemented because of the confrontation that such legislation would have represented to the military. Instead, what proved much more powerful was a provision in the constitution that allowed for appeals from the highest court martial to the Spanish Supreme Court. This removed the autonomy of military courts and integrated them into the unified legal system of the state. It allowed a dialogue between military judges and civilian judges that was productive and stabilizing.

22. Indonesia has so far not succeeded in reforming its military justice system from the Suharto era. Though parliament and the executive in theory have the constitutional power to regulate and oversee military tribunals, in practice it has been politically unfeasible to do so. As a result, military tribunals operate with very little transparency or accountability.

**CONCLUSIONS**

23. Myanmar’s constitution preserves significant influence and control for the Tatmadaw in politics and government. To say that is not to criticize the Tatmadaw or the constitution but merely to note the characteristics of the current constitution. If – as public statements of actors on all sides of Myanmar’s transition suggest – a system of democratic governance is desired, gradual changes directed towards a more engaged relation between civilian structures and the military will need to emerge. Existing practice suggests that two areas that will require attention are the system of military justice and the separation of the military from politics and its reintegration as an integral part of the body politic.
Exercising Executive Power in Myanmar: Constitutional Options for Safeguarding the Rule of Law in Public Administration

Bingham Centre for the Rule of Law
November 2014

www.binghamcentre.biicl.org
SUMMARY

1. One of the key roles of constitutions in democratic societies governed by the rule of law is to ensure that executive power is exercised only on the basis of and within the limits of the law, and to provide rights and effective accessible recourse to individuals if their rights have been unduly infringed by administrative decisions or executive acts. In Myanmar, where state power has long been exercised without any constitutional limitation or remedies, the 2008 Constitution has reintroduced some basic elements of governance under the rule of law. These include general commitments to the rule of law, a separation of powers between branches of government and fundamental rights coupled with the procedural rights of judicial review through writ jurisdiction. In practice, complaints about unlawful or unjust administrative action (or inaction) have been reported to be widespread, but effective legal recourse mechanisms have yet to be identified and to be made widely accessible.

2. This paper argues that the approach followed by the existing institutions of Myanmar so far, including the reintroduction of writs, has not led to significant improvements and an effective implementation of constitutional rights and principles. It is suggested that a number of avenues could be pursued to improve the accessibility of administrative justice including: (i) constitutional amendments; (ii) legislative changes; (iii) the creation of new structures and bodies and (iv) reforms to the practice and procedure of the courts and of administrative bodies. The introduction of a specific constitutional right to administrative justice combined with the creation of an effective, dedicated administrative recourse mechanism may hold the potential to address the problem of the current state of affairs. Examples from other developing country contexts with common law backgrounds, where such reforms have recently been introduced, are included for reference. It is recognized that any such reforms would take considerable time to agree on and implement, and require commensurate political will to gradually change the nature of the state-citizen relationship in Myanmar.

1 Marcus Brand has a doctoral degree in Constitutional and International Law from the University of Vienna, Austria (2002), and a Master of Legal Studies in Comparative, European and International Law (LL.M.) from the European University Institute (EUI) in Fiesole, Italy (1997).
THE MYANMAR CONSTITUTION OF 2008

A. Sections of the Constitution Relevant to this Paper

3. In its conclusion this paper suggests the incorporation into the constitution of a new right to administrative legal action. Also relevant to the issues addressed by this paper are sections 11 (separation of powers), ss. 18, 296, 377-381 (powers of Supreme Court to issue writs); s.19 (judicial principles), s.198 and s.224 (regarding supremacy of the constitution), Chapter VI, including ss.293, 294 and 319 (Courts Martial); and ss.299, 308, 321 (judicial appointments); 322-326 (operation and powers of and rights to petition the Constitutional Tribunal); Chapter VIII (fundamental rights), particularly ss.347 (equal rights before the law) and 377-378 (right to seek writs).

B. The Separation and Distribution of Power in Myanmar’s Constitution

4. The 2008 Constitution of Myanmar lays down as one of its basic principles that the “three branches of sovereign power, namely legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves.” This horizontal separation of the three branches of sovereign power is to be replicated in the Union, Regions/States and the Self-Administered Areas, which share this sovereign power (Section 11 of the constitution).

5. The Executive Head of the Union is the President. The President appoints Union Ministers with the approval of the Pyidaungsu Hluttaw and also has the power to appoint Chief Ministers of Regions/States, with the approval of the respective State/Region Hluttaw. The Constitution also prescribes as a basic principle that the judiciary should “administer justice independently according to law” and “to guarantee in all cases the right of defence and the right of appeal under law.” The fact that the executive power retains a degree of control over the judiciary as the President nominates the Chief Justice of the Supreme Court, and a third of the Constitutional Tribunal’s nine members and holds the keys to the financing of Myanmar’s court system is seen by some as evidence that the judiciary cannot be considered fully independent.

6. The 2008 Constitution creates a quasi-federal system, which divides constitutional authority between (primarily) the Union and the 14 States/Regions. The head of the administrative service at the state/regional level is the Secretary of the State/Region, who belongs to the structure of the General Administration Department and therefore formally reports to the Union Ministry of Home Affairs, in addition to the Chief Minister of the respective State/Region. The lower levels of districts and townships are not an elected level of government, but are purely administrative divisions, headed by subordinate officers of the General Administration Department.

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2 Earlier versions of parts of this paper were included in a study conducted by the author for UNDP Myanmar under the title “Democratic Governance in Myanmar: Situation Analysis”, October 2013.
3 The President must “select suitable persons” who have the required qualifications from among the Hluttaw representatives (in which case they must relinquish their seats) or persons who are not Hluttaw representatives.
4 Section 19
6 The Ward and Village Tract Administration Act, amended in 2012, foresees the election of Ward and Village Tract Administrators, as chief administrative officers of the village tract or ward. Their duties and responsibilities include ensuring the security of residents, to
LEGAL RECOURSE AGAINST UNLAWFUL ADMINISTRATIVE DECISIONS

7. The Constitution seems to foresee that administrative action must be based on, authorized and specified by a legal provision, as would be normal to expect in a system based on the rule of law and the legality of public administration. The manner in which this is formulated in the Constitution, however, is less than entirely clear and leaves some room for uncertainty. Section 224 states that

“Ministries of the Union Government shall, in carrying out the functions of their subordinate governmental departments and organizations, manage, guide, supervise and inspect in accord with the provisions of the Constitution and the existing laws.”

8. There is no equivalent provision for authorities of the State/Region Governments. Also, the responsibility for the constitutionality and legality of administrative action seems to lie with the President, given that all executive power is vested in him alone and is exercised in his name. What is missing, however, is an equivalent explicit right of the general public to claim effective remedies against unlawful administrative action. The constitution does not at the moment provide a clear right to lawful administration combined with a concrete possibility of legal recourse. The question whether the existing constitutional right to apply for writs is a sufficient and adequate substitute for such a right is subject to further discussion below.

9. What are the possible ways in which persons can take action against administrative acts, such as individual normative acts through administrative decisions or the direct exercise of command and constraint power by administrative authorities?

10. Following the general model of many jurisdictions in the tradition of English common law, Myanmar law does not distinguish between a body of private law and public law. It therefore also does not distinguish between the administration exercising state power authority (i.e. orders, decisions, executive acts, etc.) from the administration of private economic activities exercised by public administration bodies using the same forms and means of action as all other private individuals (contracts, etc.).

11. The first and foremost possibility to appeal against an administrative decision is to take the case to the next level in the administrative hierarchy, in the hope that a higher-ranking officer would quash or amend the decision of the subordinate. However, in practice such decisions are rare and are often seen as arbitrary and inconsistent, as they do not have to provide reasons and are often not communicated in writing. A number of laws, such as the recently adopted Land Acts\(^7\), foresee recourse to higher instances within the administrative structure, but at the expense of the possibility to take a land-related case to court.\(^8\) The appeal to an independent tribunal that would adjudicate an

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\(^7\) The Farmland Law and the Vacant, Fallow and Virgin Lands Management Law, which were enacted by the Union Legislature on 30 March 2012.

\(^8\) This exclusion of judicial recourse is quite possibly unconstitutional. Art. 198(a) (“Effect of Laws”) explicitly contains provisions that establish a hierarchy of norms, in that it provides that if any provision of the law enacted by the Pyidaungsu Hluttaw [or other legislatures] is inconsistent with any provision of the Constitution, the Constitution shall prevail. Even in common law systems where the legislature has introduced such ‘privative clauses/ouster clauses/finality clauses’ courts have held that constitutional writs override any finality clause. That is, the parliament cannot take away a constitutional right by a simple law, and cases against decisions taken under such acts
administrative matter with the on the basis of laws and the rights enshrined therein and with legally binding force is essentially absent from administrative procedure.

12. In such a situation, the judiciary’s constitutional power to issue writs appears to be the only effective option for a person whose rights have been affected by an administrative decision to seek justice.

13. What is the position of the judiciary in the constitutional framework of Myanmar and what is its relationship vis-à-vis the executive branch, whose decisions it might be called upon by citizens to review and possibly quash? Does a petitioner have to exhaust the internal review of administrative decisions before submitting a case to a court? The current constitutional and legal framework appears to provide a basis for some remedies, such as those included in the Fundamental Rights Chapter in sections 377/378 and 381. Section 377 states that “In order to obtain a right given by this Chapter, application shall be made in accord with the stipulations, to the Supreme Court of the Union.”

14. In principle, the 2008 Constitution provides that prerogative writs are available to claimants and applications can be brought before the Supreme Court. Myanmar has had a brief colonial and post-colonial tradition of Common Law jurisprudence, and writs were actively used until the 1960s. As a result of the British-Indian common law tradition, the first Supreme Court of Burma, created in 1948, thus had the power to issue writs and used it until the late 1960s, when this option was abolished. The tradition has since been demolished, as writs were not restored by the military regime in the 1990s, although some judicial reforms were carried out following the abrogation of the 1974 Constitution. However, writs were again included in very broad and explicit terms in the 2008 Constitution, in the same way as it had been in 1947. This is significant, as it constitutes the primary tool for Supreme Courts in South Asia, in particular India, to promote the effective protection of constitutionally protected fundamental rights, as well as order the government to carry out certain measures if it finds that the Constitution so requires.

15. Therefore, at present, the Supreme Court, as the only administrative court in the country, has exclusive jurisdiction to adjudicate on any recourse filed against a decision, act or omission of any organ, authority or person exercising any executive or administrative authority on the ground that it violates the provisions of the Constitution or any law or it is in excess or in abuse of any power vested in such organ, authority or person. According to the Common Law tradition, the available remedies which a judge can grant by way of judicial review of administrative acts are:

- certiorari, the most commonly sought remedy, i.e. an order declaring the administrative act to be invalid, essentially for excess of jurisdiction or legal error on the face of the record; this does not entail any power, by way of modification, to substitute a different act; that matter normally must go back to the administration;
- prohibition consists of restraining a body from acting unlawfully in excess of jurisdiction;

Can still be brought to court. Whereas this is may be rather clear in law and comparative legal practice, it is a quite different matter whether this would be seen as such by lawyers and judges in Myanmar at the present stage, and it is unclear whether the Supreme Court would anyway accept land-related writ applications on the basis of this argument, or whether the Constitutional Tribunal would declare the relevant sections of the land acts unconstitutional.

Section 378 provides that the Supreme Court of the Union shall have the power to issue the following writs as suitable: (1) Writ of Habeas Corpus; (2) Writ of Mandamus; (3) Writ of Prohibition; (4) Writ of Quo Warranto; (5) Writ of Certiorari. Section 381 provides that citizens have the right to redress by due process of law for grievances entitled under law.

Compare, most importantly Article 32 of the Indian Constitution with Section 378 of the 2008 Myanmar Constitution.
16. One of the biggest problems of governance in Myanmar at the moment is the perception of many citizens that, despite the fundamental rights enshrined in the Constitution and the possibility to apply for writs, they have no effective recourse against administrative actions and decisions that may infringe on their rights. The Courts are not considered by judges, by other state representatives, and by the general public, as an effective instrument in this regard. For the time being, even though there have been a few successful writ applications the courts are not generally seen as a protector of the rights of people vis-à-vis executive power, due to perceived weakness and lack of independence. This may be one of the reasons why so many non-judicial bodies have been receiving complaints from citizens. However, such bodies cannot provide a judicial, i.e. legally binding decision (see below).

17. There are at present no nationwide reliable statistics of people accessing and using the courts, or an analysis for what reasons they do so. Different groups of society may also experience access to justice differently. There is however at present no accessible information on the access to justice of disadvantaged groups, and on the possible reasons for their disadvantage. Also, the effect of protracted conflict in the border areas on access to justice, and questions related to languages used by ethnic minorities would have to be considered in any meaningful analysis. Some INGOs and Think Tank Institutions have taken steps to study access to justice and rule of law in some states and regions. The initial findings of these preliminary field visits show that courts were generally not considered a reliable way of securing justice, in particular against decisions by the executive. Respondents considered legal action to be unduly expensive, and frequently identified alternative avenues of redress, e.g. seeking the assistance of a priest or a monk. What is more, it appears that local government officials and police are considered to be more reliable than the judiciary.

18. What is more, is that the jurisdiction of the Supreme Court arguably does not extend to the decisions and factual actions of the military, to which the Constitution grants the right to independently administer and adjudicate all affairs of the armed forces through "Courts-Martial".

19. Whether more could be made of the existing constitutional provisions to ensure effective remedy largely depends on the ability and the courage of the judiciary to play an effective role of protecting citizens’ rights vis-à-vis the state in this regard, on the ability of lawyers to see and seize such opportunities to help their clients, and on the political will of the executive authorities to submit themselves under the verdict of an independent judiciary setting limits to its discretion and freedom of action.

20. The rule of law debate in Myanmar has already recognized the importance of writs for the protection of fundamental rights. Steps have been made to expand the possibilities for applying this new tool in

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11 The other two writs included in the Constitution, quo warranto and habeas corpus, can be left aside in this discussion. Quo warranto is very rarely used in most other countries, and habeas corpus is mostly related to criminal law and criminal procedure.
12 E.g. the International Bar Association’s Human Rights Institute (IBAHRi) travelled to Yangon, Nay Pyi Taw, Bago and Mandalay. The United States Institute of Peace (USIP) travelled to Mawlamyaing in Mon state, Nyaung Shwe and Taunggyi in Shan state to collect data on access to justice.
14 Anecdotal evidence exists that people have actually brought writ cases against the military, but they have all been unsuccessful.
a more effective manner. In August 2013, the Union legislature began to discuss judicial reform and a writ bill. The aim of these discussions was to draft a Writ Petition Bill to protect the rights of citizens and strengthen the judiciary. One of the main points to be amended was to make the Writ of Certiorari to be taken by more than a single judge, but rather two or three. The background for these discussions was the fact that even after the reintroduction of writs through the 2008 Constitution, most writs filed to the Supreme Court had been rejected almost immediately, and in some cases lawyers had even been deregistered within hours of filing them. After some delay, the new Bill was adopted in June 2014.

21. Melissa Crouch has found that there has been a significant increase in the number of administrative law cases that have been taken to the Supreme Court, putting the number of applications between 2012 and 2013 as high as 300. She has, however, also analyzed that the fate of the constitutional writs in Myanmar is tied to the broader direction of the legal system, which “depends on the release of the judiciary from executive-military control.”

22. As will be argued below, strengthening the applicability of the writs currently provided in the Constitution may not be the only alternative. Another option, chosen by other developing countries in the Common Law tradition, may be to introduce a clear right to good public administration in the constitution, which may be combined with renewed efforts to strengthen the role of the ordinary judiciary in this regard, or, possibly, establish a separate system of independent administrative tribunals to hear and adjudicate cases.

23. Administrative justice and complaints mechanisms should also be understood as part of a wider discussion of mechanisms of accountability that also relate to the overall role of the judiciary in Myanmar’s constitutional framework in general and its responsibility for safeguarding the rule of law in particular. Other important aspects of this discussion, which cannot be addressed here due to the brevity of this paper, are judicial appointments (sections 299, 308 and 321 and the role of the executive in this regard), the role of the Constitutional Tribunal and the court-martial system which so far has been outside the scope of any detailed mapping or critical analysis in the context of the rule of law reform debate.

COMPLAINTS AND COMPLAINT MECHANISMS

24. The political opening over the past three years has encouraged many Myanmar citizens to exercise their rights of expression, communication, and information. This has lead among others things to an increase in citizen complaints to a number of committees, ministerial administrative bodies and statutory bodies, such as the Myanmar National Human Rights Commission (MNHRC), as well as civil society organizations. Most of the complaints received by the NMHRC and the Pyithu Hluttaw’s Rule of Law Committee were in one way or another related to land. This process has been driven by good

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15 In February 2013, a seminar on the prerogative writs was jointly organized by the Union Attorney-General and the International Commission of Jurists.
16 Myanmar Times, Soe Than Lynn, 1 September 2013
17 See the Annex for a summary of key provisions.
18 See a blogpost on 9 July 2013, “Constitutional Writs as Weapons in Myanmar”, at www.melissacrouch.net
20 See fn 10
intentions on behalf of the bodies concerned but also appears muddled and unsustainable.21 The high number of informal complaints submitted to various bodies in the hope of obtaining justice serves to demonstrate the ineffectiveness and inadequacy of the existing legal and formal mechanisms of administrative review and recourse to the judiciary against unlawful administrative decisions.

25. Sending complaints rather randomly to whichever body citizens believe might help them – without much clarity on the terms of reference and adjudicative powers of such institutions – implies the appearance of assisting people. Yet, by their nature these organizations generally have no legal authority as bodies of judicial appeal or to review administrative decisions in view of revising, correcting or annulling them. This means they are dependent on the use of ‘political’ influence with the ministries or territorial administrations to solve anything (which is antithetical to the rule of law as it is arbitrary, unpredictable, opaque and subject to politicization). Eventually it can dampen people’s trust in these institutions/organizations, as they appear unable to solve problems. It also enables the ministries to deflect responsibility and remain unaccountable to citizens while preserving authority over issues and the accompanying budget that could be directed to resolve complaints.22

26. On the positive side, it must be emphasized that the opening of space to criticize and debate maladministration and the abuse of executive powers is a long overdue and welcome development of crucial importance. Most people are no longer afraid to speak about flaws of the authorities or to criticize government decisions. It is an unreservedly positive thing that members of the public are using the political opening to press their rights and voice their grievances. However, the improvised and ad hoc nature of the methods for addressing these grievances means that their effectiveness is limited.

27. As in most cases these bodies have no legal authority to adjudicate the problems, whatever action the respective body takes may be dependent on the political influence and the political leaning of these bodies. Having recourse to such bodies can be a good thing in a democratic system of governance, but it cannot substitute the due process of review of administrative decisions by legally competent and authorized institutions of appeal, as well as a role for the judiciary to protect the rights and entitlements of the people. While the new phenomenon23 of sending letters to complaints commissions and committees is a good indicator of increased openness, it is an untenable solution in the quest for laying foundations for the rule of law.

28. In some cases, newly adopted legislation and newly formed institutions have even led to a deterioration of people’s ability to seek legal recourse through the judiciary, and to obtain a hearing on their rights by an independent, impartial tribunal. For instance, the Farmland Law, which stipulates that land can be legally bought, sold and transferred on a land market with land use certificates (LUCs) legalized a land market without strong safeguards and has been perceived as extremely

21 As people began to feel freer to voice complaints, a number of entities have stepped up to receive complaints, and to try to assist in solving people’s problems – this ranges from the Myanmar National Human Rights Commission, a multitude of committees in both houses of Parliament, as well as citizens initiatives such as the 88 Generation. The Rule of Law and Tranquility Committee alone received more than 2000 letters, complaints and petitions in the first three months of its existence. In 2013, the President’s Office also opened up a “hotline” to receive complaints by citizens on administrative matters.

22 These observations were raised, for the first time, in the Rule of Law Assessment Report of a joint USAID/USG mission to Myanmar in February/March 2013.

23 Some have observed that this phenomenon may actually not be entirely new and that there was already a culture of these, even during the Socialist and military periods. What is new, however, is that a lot more is publicly known about these and that the relevant institutions openly acknowledge how many they have received and in relation to what issues.
problematic.\textsuperscript{24} Titles are registered by the Settlement and Land Records Department (SLRD). The law gives power over the allocation of farmland to the Farmland Administration Bodies (FAB), whose highest level is chaired by the minister of the Ministry of Agriculture and Irrigation (MOAI). Decisions of the FAB are, however, beyond the reach of the judiciary, meaning that aggrieved farmers are deprived of any legal recourse through ordinary courts.\textsuperscript{25} The complaints bodies and structures established in relation to the Farmland Law essentially fall short of providing any meaningful legal recourse and remedies for rights-holders against administrative decisions.\textsuperscript{26}

**OTHER COUNTRIES’ EXPERIENCES IN INTRODUCING ADMINISTRATIVE JUSTICE WITH A COMMON LAW BACKGROUND**

29. Worldwide, there is a large variety of models for administrative justice. Comparative administrative justice is a scientific field in its own right and is understandably highly complex. The brevity of this paper does not allow even a summary of the different traditions, models and ongoing reform debates around this issue. What is included here, are simply a few observations from relevant jurisdictions which may provide ideas for the further debate on this subject in Myanmar, which has admittedly only just begun.

30. Many developing countries with Common Law traditions have recently introduced constitutional provisions which provide for judicial review of administrative action based on constitutional guarantees. Article 33 of South Africa’s Constitution is a significant reference point in this regard:

“Just administrative action: (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal.”

31. These provisions have been given effect by the enactment of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), which contains a long and complicated definition of “administrative action”. One unanticipated result article 33 has been that the concept of “administrative action” has moved to the center stage in South African administrative law. While progress in terms of implementing these reforms has been mixed, and the extent of the legislation itself has been considered as suboptimal, one of the most important impacts of the new legislation was “educating South Africans on administrative law and, more specifically, giving administrators training” on administrative justice.\textsuperscript{27} The training institution of the Department of Justice began holding workshops and courses for administrators shortly after the PAJA was enacted. Initial awareness-raising workshops allowed the trainers to identify problem areas which were then addressed in practical training. The main objectives of the training were to ensure that participants had a clear understanding of the Act and would be

\textsuperscript{24} Transnational Institute, Burma Policy Briefing Nr 11, May 2013, ‘Access Denied - Land Rights and Ethnic Conflict in Burma’
\textsuperscript{25} Whether this also precludes the possibility to bring such cases before the Supreme Court as part of writ applications, is another question. See footnote 5.
\textsuperscript{26} In June 2012 the President established the Land Allocation and Utilization Scrutiny Committee, headed by the minister of the Ministry of Environmental Conservation and Forestry (MOECAF). This committee is to advise the President on land use policy and land laws, and was partly created to offset the MOAI’s monopoly of power over the land laws and land allocation. A Land Investigation Committee, composed of MPs, was also set up but has no decision making power and is only mandated to investigate land grab cases. The committee submits findings to the President.
\textsuperscript{27} Cora Hoexter, Administrative Law in South Africa 2 ed (2012).
able to comply with its provisions in practice; and to motivate participants to implement the Act, which included changing attitudes regarding the way administrative decisions are made. The workshops revealed some quite alarming ignorance, such as the fact that many administrators had never set eyes on the empowering legislation in terms of which they were making decisions.  

32. Similarly, Art. 18 of the 1990 Constitution of Namibia, which is entitled "Administrative Justice" reads:

"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

33. This constitutional provision constituted a firm basis for the development of administrative law in Namibia. It also served as a catalyst for the development of democratic principles and behaviour in that through Art. 18 an individual's right to judicial review and extra-judicial adjudication of administrative action which in almost all of the Commonwealth is a common law right, an ordinary right, has been transformed into a fundamental human right protected by the Constitution. What this means is that an individual aggrieved by administrative action - whether such action affects his constitutionally protected human rights and freedoms or not - may seek redress in 'a competent Court or Tribunal.'

34. In a number of countries, courts now have express powers to review any law, act or conduct of government. The 1994 Constitution of Malawi introduced fundamental changes to Malawi's administrative law, and its conceptual foundation and grounds for judicial review. The new grounds of review are lawfulness, procedural fairness, the giving of reasons and justifiability. These grounds offer litigants more avenues for challenging the exercise of public powers than was the case under the common law. Courts now have express powers to review any law, act or conduct of government. The doctrine of constitutional supremacy, not parliamentary supremacy, guides judicial review and the new grounds of review are lawfulness, procedural fairness, the giving of reasons and justifiability. These grounds offer litigants more avenues for challenging the exercise of public powers than was the case under the Common Law. The source of administrative law is the Constitution itself. The relevance of the Common Law is now limited to informing the interpretation of the constitution. Thus, in order for a person to apply for judicial review, he or she has to rely on section 43 of the constitution and prove that the impugned conduct constitutes administrative action.

35. Kenya's Constitution of 2010 includes a section on "Fair administrative action". Accordingly,
47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall
(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
(b) promote efficient administration.

36. Similarly, the 2013 Constitution of Fiji, adopted to end an extended period of military rule and the transition to democracy, includes a section on “Executive and administrative justice”:

16. (1) Subject to the provisions of this Constitution and such other limitations as may be prescribed by law
(a) every person has the right to executive or administrative action that is lawful, rational, proportionate, procedurally fair, and reasonably prompt;
(b) every person who has been adversely affected by any executive or administrative action has the right to be given written reasons for the action; and
(c) any executive or administrative action may be reviewed by a court, or if appropriate, another independent and impartial tribunal, in accordance with law.

37. Other remedies often found in Common Law jurisdictions are injunctions: as an adjunct to its primary powers, particularly those of certiorari and prohibition, courts may make an order restraining the executive branch body from continuing to act unlawfully or may grant an urgent interim injunction to prevent irreparable damage. Another avenue is through awarding damages (i.e. monetary compensation).

CONCLUSION AND OPTIONS FOR CONSTITUTIONAL REFORM IN MYANMAR

38. Whether it is begun before or after the elections in 2015, constitutional reform in Myanmar offers a number of possibilities for strengthening people’s access to justice and enhancing the relationship between the state and those subjected to its authority. A democratic state exists to serve its citizens. In a democracy ruled by law, and under a government committed to high-quality and responsive public services, simply appealing to government officials’ sense of fairness is not, and has never been, enough. There has to be an avenue for effective redress.

39. One important lesson from countries around the world is that it makes sense to avoid ad hoc-ism, which has however been the common characteristic of efforts to set-up complaints bodies and procedures in Myanmar in recent years. Some basic recommendations are offered here below with the intention to generate further debate, encourage research and begin inclusive consultations involving the different branches of government, as well as the legal community and civil society organisations in efforts to create an effective model of administrative justice for Myanmar.

32 Similar provisions have also been included in the recent constitutions of Zimbabwe and the Cayman Islands.
33 However, although Courts have power to award damages, no right to damages automatically flows from the declaration that an administrative act is invalid. The applicant must show either lack of bona fides on the part of the public body or establish that some other recognized legal wrong (such as trespass or assault) has been committed under the guise of that act.
A. Constitutional Amendment

40. It is suggested that a first step in the process would be for the legislature to signal an intention to strengthen administrative justice at the level of the constitution, as part of any package of reforms that are taken forward.

- Introduce into the Constitution a right to administrative action that is lawful, reasonable and procedurally fair. Every person should be entitled to a fair and public hearing by a court or at least independent, impartial tribunal within a reasonable time.

B. Implementation of that Right

41. Such a right can procedurally either be assured
- Through more effective application of writ jurisdiction by the Supreme Court on cases where constitutionally guaranteed rights have been infringed; or
- Additionally, through the establishment of a separate branch of the judiciary in the form of an Administrative High Court and Administrative Courts/Independent Administrative Tribunals at the State/Region level which would adjudicate cases against unlawful administrative decisions.

C. Implementation Measures without Legislative Change

42. There is much that might be done in Myanmar to strengthen Administrative Justice by way of implementation of the existing provisions of the constitution and Laws, and by strengthening administrative agencies. For example:

- Wherever administrative agencies exercising adjudicatory powers discharge various other administrative and governmental functions, they essentially combine the functions of prosecutor and judge in one. In the interest of justice and for regaining the lost faith of the people in administrative justice some sort of separation of functions might be advisable.

D. Practice and Procedure in the Courts

43. In introducing various forms of administrative justice, due consideration should be given to issues such as preconditions of access to the courts and the right to bring a case before the court; admissibility conditions; time limits to apply to the courts; administrative acts excluded from judicial review; as well as screening procedures, distribution of legal costs and forms of application. The possibility of bringing proceedings via information technologies could also be considered. Other important issues include court fees; compulsory representation; legal aid; and fines for abusive or unjustified applications. Fundamental principles of the main trial should include judicial impartiality, the duty to provide evidence; and rules on the form of the hearing and judicial deliberation and grounds for the judgment. Finally, there should be consistent rules about the public pronouncement and notification of the judgment and a right to the execution of judgment. Recourse against judgments should be provided through an appeal procedure.

44. No administrative acts should be beyond the scope of judicial review. Consideration might also be given to ensuring that administrative authorities and tribunals accord fair and proper hearing and
give sufficiently clear and explicit reasons in support of their orders. This would go some way to ensuring that administrative authorities and tribunals exercising quasi-judicial functions will be able to justify their existence and carry credibility with the people by inspiring confidence in the administrative adjudicatory process.

45. Certainly, introducing an explicit right to administrative justice in the Constitution alone will be no panacea. There is no guarantee that the inclusion of administrative justice in the chapter on fundamental rights in the Constitution would protect administrative justice more fully or more securely than the law does at present. Also in other countries, the constitutionalisation of the right to administrative justice has not always proven to improve matters. It should be noted that the reintroduction of writs in the 2008 Constitution has so far led to very little in terms of actual jurisprudence, and has not yet helped anyone in effectively defending their rights vis-à-vis the state in Myanmar. Much of this is also due to the fact that even those cases that were accepted and those decisions that were made are often unknown or inaccessible to the general public due to inadequacies in law reporting and publishing.

46. However, if it is accompanied with a general concerted drive towards administrative reform and the protection of fundamental rights and freedoms, and serious efforts to change the relationship between state and people in Myanmar, such an insertion into the Constitution could perhaps make a difference. A right to administrative justice, or to good administration, in the bill of fundamental rights might be of symbolic significance - particularly so, if it were to be accompanied with a well-prepared and thought-through introduction of new administrative tribunals that are more accessible and less cumbersome than traditional courts of law. Given the mixed character of Myanmar’s legal system, especially its current constitution, it may be worthwhile borrowing elements from countries following the civil law tradition in addition to drawing from lessons from common law jurisdictions worldwide.
Slide 1

Exercising Executive Power in Myanmar:
Constitutional Options for Safeguarding the Rule of Law in Public Administration

Slide 2

Objectives of the presentation

- Outline the key aspects of safeguarding the rule of law in the exercise of executive power
- Position the problem within the context of the separation of powers and the independence of the judiciary
- Sketch the existing constitutional parameters for the rule of law in public administration in Myanmar
- Provide an overview of current mechanisms of legal recourse (writs, complaints)
- Outline possible options for addressing the shortcomings through constitutional amendments
- Mention options not requiring constitutional amendments

Slide 3

Executive power under the rule of law

One of the key roles of constitutions in democratic societies

- Executive power is exercised only on the basis of and within the limits of the law
- Rights and effective accessible recourse to individuals if their rights have been unduly infringed by administrative decisions or executive acts.

2009 Constitution:
- reintroduced some basic elements of governance under the rule of law
- general commitments to the rule of law
- separation of powers between branches of government
- fundamental rights coupled with the procedural rights of judicial review through writ jurisdiction.

In practice, complaints about unlawful or unjust administrative action (or inaction) have been reported to be widespread, but effective legal recourse mechanisms have yet to be identified and to be made readily accessible.
Separation of powers and independent judiciary
Constitutional basic principles

1. The three branches of sovereign power, namely legislative, executive, and judicial power are separated, to the extent possible, and subject to check and balance among themselves. (Section 11)
2. The judiciary should administer justice independently according to law and "to guarantee in all cases the right of defense and the right of appeal under law." (Section 19)

Court should not be subject to improper influence from the other branches of government, political parties or partisan interests.

Systems of judicial appointments come in four basic types:
1. Appointment by political institution
2. Appointment by the judiciary itself
3. Appointment by a judicial council (which may include non-judicial members)
4. Election

Basic Principles on the Independence of the Judiciary
1. Qualifications of judges and their enrollment and training
2. Appointment of judges
3. Strengths and independence of the judiciary
4. Professional independence
5. Independence of the judiciary

The exercise of executive power
Role of the president
1. The Executive Head of the Union is the President
2. The executive power of the Union is vested in the President
3. All executive actions of the Union Government shall be taken as action in the name of the President
4. The executive power of the Union extends to administrative matters over which the Pyanasan Hlañaw has power to make laws
5. The executive power of the Region or State Government extends to the administrative matters which the Region or State Hlañaw has power to make laws. Moreover, it also extends to the matters which the Region or State Government is permitted to perform accord with any Union Law
The legality of public administration

Constitutional basis principles

- The Constitution seeks to ensure that administrative action must be based on, authorized and justified by legal provision, as well as consistent with the rule of law and the integrity of public administration.
- Section 224: Ministers of the Union Government shall, in exercising the functions of their respective departments, act in accordance with the provisions of the Constitution and the enabling laws.
- There is no equivalent provision for authorities of the State and Regional Governments.
- Also, the responsibility for the constitutionality and legality of administrative action rests with the President, given that all executive power is vested in his name and is exercised in his name.
- Rules on impeachment and censure by the legislature for breaches of the constitution and misconduct.

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The legality of public administration

Constitutional basis principles

- What's missing, however, is an explicit constitutional right to claim effective remedies against unlawful administrative action.
- Public persons take action against administrative acts, such as individual decisions made through administrative decisions or the exercise of executive and administrative power by administrative authorities?
- First and foremost, the possibility to appeal against an administrative decision is to take the case to the next level in the administrative hierarchy, in the hope that a higher-ranking officer would quash or amend the decisions of the subordinate.
- (2) Complaints to non-judicial bodies
- (3) The judiciary's constitutional power to issue writs appears to be the only effective option for a person whose rights have been affected by an administrative decision to seek justice.

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Judicial review of administrative decisions and action

- The current constitutional and legal framework appears to provide a basis for some remedies, such as those included in the Constitutional Rights Chapter in sections 177/178 and 191.
- Section 177 states that a person who has no right to appeal against the final decision of an administrative decision is to take the case to the next level in the administrative hierarchy, in the hope that a higher-ranking officer would quash or modify the decision of the subordinate.
- Section 191 provides that the Supreme Court of the Union shall have the power to issue the following writs to the appropriate writs to the Supreme Court of the Union: (1) Writ of Habeas Corpus; (2) Writ of Mandamus; (3) Writ of Prohibition; (4) Writ of Quo Warranto; (5) Writ of Certiorari.
- Section 191 provides that citizens have the right to redress by the process of law for grievances arising under law.
Slide 10

Judicial review of administrative decisions and action

Wills

- Most wills filed to the Supreme Court had been rejected almost immediately, and in some cases, lawyers had even been deregistered within hours of filing them.
- Courts were generally not considered a reliable way of settling disputes, in particular against decisions by the executive.
- Many common clients consider legal action to be unduly expensive, and frequently identified alternative avenues of redress.
- After much delay, the new Bill was adopted in 2014.

Slide 11

Beyond wills?

Options

1. Strengthen the applicability of the wills currently provided in the Constitution.
2. Introduce an explicit right to good public administration in the Constitution, which may be combined with renewed efforts to strengthen the role of the ordinary judiciary in this regard.
3. Establish a separate system of independent administrative tribunals to hear and adjudicate cases.

Slide 12

Article 33 of South Africa’s Constitution:

“Just administrative action:
1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given an adequate reason.
3. Everyone whose rights are limited to those rights, and must (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal.”
Art. 18 of the 1996 Constitution of Namibia, which is entitled “Administrative Justice” reads:

"Administrative justice and administrative officers shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts or decisions shall have the right to seek redress before a competent Court or Tribunal."

Kenya’s Constitution of 2010 includes a section on “Fair administrative action”. Accordingly:

47. (1) Every person has the right to administrative action that is expeditious, efficient, fair, reasonable and procedurally fair.
(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given adequate information on:
(a) the reasons for the action;
(b) its legal basis;
(c) the procedure for the exercise of the right of appeal or review;
(d) the right to be heard and the consequences of such a hearing;
(e) the right to apply for temporary relief;
(f) any other relevant legal rights.
(3) Parliament shall enact legislation to give effect to the rights in clause (1) and the legislation shall:
(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal, and
(b) promote efficient administration.

1. Administrative High Court
2. Administrative Courts or Independent Administrative Tribunals at the state or regional level which would adjudicate cases against unlawful administrative decisions.
Such an insertion into the Constitution would make a difference.

- Amended and
- General Council Blue towards administrative reform

- Protection of fundamental rights and freedoms

Serious efforts to change the relationship between state and people in Myanmar.

- Rights to administrative justice, in the good administration, in the rat of fundamental rights would be of symbolic significance.

More effective and accountable state in the framework and thought through coordination of administrative relations that are non-predicatable and less comprehensive than traditional courts of law.
INTRODUCTION

1. Asia is witnessing the rise of “identity politics.” People are mobilizing along ethnic, religious, racial and cultural lines, and demanding recognition of their identity, acknowledgement of their legal rights and historic claims, and a commitment to their sharing of power.” (Will Kymlicka and Baogang He (eds) 2005, Multiculturalism in Asia, (Oxford, OUP)

2. Whether one likes it or not, identity based politics is a reality of South Asian and Asian politics. Even in other parts of the world, societies are becoming more plural, heterogeneous and multicultural in character. In this context there is renewed interest in federalism as a constitutional mechanism that responds to the reality of diversity in society. Many scholars and commentators have argued in recent years that a federal constitution may be more appropriate than a unitary constitution in managing multi-ethnicity and a plural society. Many scholars have cited India’s federal constitution as a reason for its success in managing its multi-ethnic and multi religious polity; Pakistan has recently strengthened its constitution’s federal characteristics; Sri Lanka’s best chance for a durable peace with justice between the Sinhalese majority and the Tamil minority was when it explored constitutional reform based on federalism between 1996 and 2004; Nepal, following a decade long conflict that ended with a peace agreement in 2006 is working on the details of a new constitution that will introduce a federal, secular, democratic, republic. The Malaysian and Indonesian constitutions contain federal features while there is discussion in Thailand and the Philippines on federal type reforms to address minority aspirations in these countries.

THE DIFFERENCE BETWEEN UNITARY AND FEDERAL CONSTITUTIONS

3. The term federal is difficult to define and has no fixed meaning. The terms unitary and federal can be considered to cover a range or a spectrum of meaning. However, notwithstanding this, it is possible for the purposes of this paper to develop a working definition by comparing and contrasting the terms, unitary and federal, in order to understand the essence of the federal idea.

4. A unitary constitution is generally defined as one with the habitual exercise of political power by one, central authority. (C.F. Strong, Modern Political Constitutions) (Unus= one in Latin).

5. Power may be decentralized or devolved within a unitary constitution, but this is granted or given by the central authority and therefore can be taken back by that authority unilaterally. The power granted to the decentralized authority is therefore relatively insecure.
6. As Strong has observed

“It does not mean the absence of subsidiary law making bodies, but it does mean that they exist and can be abolished at the discretion of the central authority.”

7. A Federal Constitution, on the other hand, is different, as the powers that are granted to the provinces or states are more secure as they are guaranteed by the constitution, the supreme law of the land.

8. Ronald Watts, a Canadian scholar, provides a useful working definition of a federal constitution which highlights 5 features:

   a. Two tiers of government each acting directly with the people;
   b. A written, supreme Constitution with a clear division of powers and which because it is deemed to be a covenant or contract between the two tiers of government, cannot be changed unilaterally.
   c. Provincial/state representation at the centre;
   d. An umpire to resolve disputes;
   e. Mechanisms to facilitate inter-governmental cooperation.

9. Contrasting these five features of a federal constitution with the definition of a unitary constitution highlights some key differences. In a federal constitution there are more than one tiers of government with powers that cannot be taken away by unilateral action. Whether it actually happened or not, a federal constitution is considered to be like an agreement and as such any changes to such agreement have to be made by the parties to the agreement consenting to such change. The term “federal” comes from the Latin, *foedus*, which means a covenant or compact. The division of powers and competencies is therefore more secure as it is set out in a written constitution that is supreme. Parliament is not supreme, rather it is the constitution that is supreme. A federal constitution is more complex than a unitary one as it involves two, rather than one tier of government with constitutionally guaranteed powers. Since there are bound to be disputes between the tiers of government, an independent, impartial umpire who commands the confidence of both tiers of government, is necessary. In many federal countries the final arbiter/umpire is a Constitutional Court. Watts’ final feature is noteworthy as he suggests that modern federations need to be cooperative rather than competitive and that the two tiers of government have to collaborate and cooperate to make them successful.

10. The essence of a federal constitution is therefore, a combination of shared rule and self-rule. Watts’ third feature, provincial/state representation at the centre is important in appreciating the shared rule dimension of federalism. In most federal countries, the provinces/states are represented at the centre through a second chamber which forms part of a bi-cameral legislature. There are two rationales for a second chamber that provides for the provinces/states to be represented at the centre:

   a. A Protection of the Devolution rationale;
   b. A Protection of the National Unity rationale.
A. The Protection of Devolution rationale

11. In a federal system, the second tier of government or province/state is responsible for certain powers and responsibilities provided in the constitution. However, very often, central legislatures tend to encroach upon the powers granted to the provinces/states. If the provinces have a voice at the centre in a second chamber whether it be a Senate (like in the U.S.) or a Council of Provinces (like in South Africa), the provinces have a mechanism whereby they can raise the alarm or object to any attempt at undermining provincial powers in the central legislature itself. Furthermore such a chamber also provides a forum for provincial concerns and interests to be raised at the central level.

B. The Protection of National Unity rationale

12. Ensuring that the provinces, in addition to enjoying certain powers over subjects and functions that directly affect their people, also have a stake at the centre or in the country as a whole, helps to promote national unity and the territorial integrity of the country. If for example a regional minority such as the Tamils in Sri Lanka who are largely concentrated in the north east of the country are given autonomy to look after some of their own affairs in a federal arrangement, it will be in the long term interests of national unity if they are also given a voice in the affairs of the central government through participation in central institutions in Colombo.

13. Max Frenkel in Federal Theory has described federalism as follows:

“A system for decision making is federalist if it is an entity composed of territorially defined groups, each of which enjoys relatively high autonomy and which together, participate in an ordered and permanent way in the formation of the central entity’s will.”

14. In the 5 features of federalism therefore, there is a combination of the shared and self-rule dimensions of federalism. A federal constitution is not merely focused on promoting autonomy; it is also focused on promoting power sharing and inclusivity at the centre. President Nelson Mandela referred to the new South Africa as a “Rainbow Nation,” where the distinctiveness of each colour of the rainbow was recognized and celebrated, but within the context of one entity. The Federal Idea, which seeks to promote unity in diversity, and the Rainbow Nation concept have a great deal in common.

THE MYANMAR CONSTITUTION 2008

15. When assessed from the working definitions outlined above, the Myanmar Constitution of 2008 can be described as unitary though it contains some quasi-federal features.

16. The constitution provides for legislative, executive and judicial power to be shared between the Union and States, Regions, Self-Administered Divisions and Self-Administered Zones (Article 11(b)). It also provides for the establishment of legislatures at the State and Region level (Article 161) and in Self-Administered Divisions and Self-Administered Zones (Article 196). These legislatures may make laws on certain subjects. However, laws passed by the Pyidaungsu Hluttaw are superior and there are few areas in which Region or State legislatures have exclusive law making powers (Article 198(b)).
17. The Constitution also gives executive power to Region or State governments in areas in which Region or State legislatures can make law (Article 249). However, Chief Ministers of the Region and State are chosen by the President (Article 261 (b)) and are accountable to him. The powers of the Regions, States, Self-Administered Divisions and Self-Administered Zones can be withdrawn in the case of an emergency (Articles 411 and 413).

18. There are courts at the State, Region, Self-Administered Area, township and district level that exercise judicial power. The President chooses the Chief Justices of the High Courts of the Regions and States in consultation with the Chief Justice of the Union (Article 308 (b)).

19. The constitution forbids States, Regions, Self-Administered Divisions and Self-Administered Zones from seceding from the Union (Article 10).

ANALYSIS

20. In Asia there are often myths and misconceptions about federalism that need to be clarified. These include:

a. That a federal state is established only by previously independent states coming together.
b. That a federal constitution must include a right to secession.

21. Constitutional scholars recognise that there are two ways in which a federal constitutional arrangement may be established. The more common method known as Integrative Federalism is where previously independent nation states integrate to form a new political entity. The second method, known as Devolutionary Federalism is where a country that is unitary opts to change to a federal system by introducing constitutionally entrenched devolution of power that corresponds to the five features of federalism discussed above.

22. A federal constitution may or may not include a right to secession. Most federal constitutions do not include a right to secession. In many western countries federalism is often proposed as an alternative to secession or as a strategy to undermine secessionist tendencies. For example in Canada, it could be argued that a federalist response countered the separatists in Quebec. Federal type reforms have been proposed in Spain, the United Kingdom and Belgium, in order to counter the threats of secession by addressing reasonable aspirations for autonomy within a united country. In Asia however, advocates of federal constitutional reforms are often seen as supporters of separation rather than as opponents (which is how they are seen in other parts of the world). In Sri Lanka for example advocates of constitutional reform based on federalism as a solution to the island’s protracted ethnic conflict were often criticised by leaders of the majority Sinhalese community as supporters of secession.

23. Developments in Canada following the referendum on secession in Quebec in 1997 where the “no” vote won narrowly are instructive. The Government of Canada sought an advisory opinion from the Supreme Court of Canada on two questions.

a. If the people of Quebec vote “yes” to secession, are they entitled to secede under the Canadian Constitution?
b. If the people of Quebec vote “yes” to secession, are they entitled to secede under International Law?
24. The Canadian Supreme Court in a unanimous judgement, answered “No” to both questions, but suggested that dialogue and negotiation had to take place in respect of the will expressed by the people of Quebec. With respect to International Law, the court observed:

“In summary, the international right to self-determination generates, at best, a right to external self-determination in situations of former colonies; where people is oppressed... or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.” (Reference re Secession of Quebec, 1998 2 SCR, 217.)

25. The court held that the people of Quebec enjoyed meaningful access to government through the principles of democracy, federalism and the rights protected under the Canadian constitution and therefore did not have the unilateral right to secession.

A. INDIA

26. There is a general consensus that federalism has helped to keep India united, democratic and strong. Soon after India became independent in 1947, it convened a Constituent Assembly to draft and adopt a constitution that would derive its legitimacy from the sovereign people. The Constitution that was adopted in 1950 remains one of the longest and most detailed constitutions in the world.

27. The framers of the Indian Constitution were aware that given India’s size and diversity, they had to construct an encompassing frame or constitutional structure that allowed adequate expression of diversity while at the same time maintaining the unity that was essential for national cohesion and unity. The constitution did not use the term federal, but rather, a “union of states” as initially there was a reluctance to grant too much recognition to diversity or to grant too much power to the states as there were fears that this might lead to disunity. But over the years India has evolved into a federal republic that has successfully managed ethnic, linguistic and religious diversity, dealt with secessionist movements, divided large states into smaller ones and successfully preserved its unity and territorial integrity and democratic traditions. In recent years the Indian Supreme Court has declared federalism to be one of the basic features of the Indian Constitution.

28. India is a federation with a parliamentary system of government. It has 30 states, six “union territories” and a national capital territory. The states derive their powers directly from the Constitution. The Constitution provides for the division of powers between the centre and the states in the form of 3 lists – one for the centre; one for the states; and one list of subjects over which power to legislate is shared (the “Concurrent List”). The central legislature has exclusive powers to legislate on 97 subjects on the union list of competences and concurrent power with the states to legislate on 47 subjects on the Concurrent List. The states have power over 66 subjects spelled out in the state list. In the legislative sphere, India’s central legislature is when compared with other federations, generally quite powerful. In the executive sphere, the Constitution permits executive power to be exercised by the states but in a manner that ensures compliance with the executive power of the union. The governor of each state acts not only as the nominal head of the state but also as the link between the state and the centre. Another mechanism by which the centre exercises control over the states is through the All India Civil Service whose members exercise oversight over the public services in the states.
29. The Indian Constitution provides that sovereignty resides in the people of India, and recognises one citizenship for the whole country. The Constitution protects the provisions dealing with federalism by requiring that amendments to those provisions require the consent of the majority of state legislatures. However today the federal character of the Indian constitution has even greater protection as the Indian Supreme Court has declared federalism to be a basic feature of the Constitution thereby ensuring that it will always be a feature of the Indian Constitution. The other basic features of the constitution include the supremacy of the constitution; the republican and democratic form of government; the secular character of the constitution and the separation of powers. The Indian Constitution does not grant any state the right to secession. There is a single constitution for both the Union and the states.

30. The Indian Constitution recognises the principle of asymmetrical federalism where not all states have the same degree of powers. Where it was felt that a state for various reasons was entitled to some additional powers or distinctive powers, this was provided for in the constitution.

31. Over the years, India’s federal structure has been strengthened and with it the process of democratisation. The 73rd and 74th Amendments to the Constitution that were introduced in 1992, gave constitutional recognition to local government institutions thereby strengthening their role and promoting participatory democracy at the local level. In India and in many Asian countries considering federalism, the relationship between the 3 tiers of government raises difficult issues. The second tier provinces or the states are often worried that the first tier, the centre, will work directly with the third tier of government to undermine its powers. In India and in countries debating federalism such as Sri Lanka and Nepal, often the champions of provincial autonomy have been lukewarm in their support for a strong system of local government. This is unfortunate as the principle of subsidiarity, an important component of the federal idea suggests that there should be a presumption in favour of power being devolved as far as it is possible and effective. As such a strong system of local government can be viewed as an extension of the federal principle. The Amendments in India ensured the extension of the federal idea and participatory democracy to local communities and people.

32. As territorially located communities have begun to participate more effectively in their governance both at the state and national levels, the nation state as a whole has also been transformed into what scholars like Will Kymlicka have described as multi-nation states, thereby promoting unity in diversity.

B. SOUTH AFRICA

33. The South African Constitution of 1996 is considered one of the most progressive constitutions in the world. Not only does the constitution provide for a comprehensive Bill of Rights and impose effective restraints on the wielders of political power, but it also has facilitated the healing of the wounds of the country’s bitter legacy of apartheid.

34. Between 1990 and 1996, following a negotiated political settlement, a new constitution for a new democratic South Africa based on equality, non-racialism and non-sexism was drafted and adopted by an elected and inclusive Constituent Assembly. The new constitution was expected to be an instrument for national reconciliation and a new covenant that bound the peoples of South Africa among themselves and with the newly designed nation state. As President Mandela declared:
"We enter into a covenant that will build a society in which all South Africans, both black and white, will be able to walk, talk without any fear in their hearts, assured of their inalienable right to human dignity, a rainbow nation at peace with itself and the world."

35. The process by which the Constitution of 1996 was adopted was significant and demonstrated the spirit of reconciliation and compromise that pervaded the transfer of power. There was distrust and suspicion both on the side of the National Party that held political power and the African National Congress (ANC) that had led the struggle against apartheid. The National Party wanted to ensure certain constitutional safeguards and the rights of the white minority whereas the ANC wanted the new constitution to be adopted by a democratically elected Constituent Assembly. A compromise was reached whereby an Interim Constitution was adopted in 1993, under which elections to a Constituent Assembly were held; the Interim constitution was described as a bridge between the past and the future and the parties agreed to 34 core constitutional principles that would be binding on the Constituent Assembly when it drafted and adopted the final constitution. When the Constituent Assembly adopted the new constitution in May 1996, the Constitutional Court that had been established under the Interim Constitution, reviewed the draft to ensure compatibility with the 34 principles. It ordered some changes to be made and the final constitution was formally adopted in December 1996.

36. One of the most significant features of the new Constitution is that it enshrines founding provisions that commit South Africa to core values that are justiciable including equality, dignity, accountability, responsiveness and openness. Over the years, the Constitutional Court that is required to be inclusive and reflect South Africa’s diversity has through constitutional interpretation, applied these values and the comprehensive Bill of Rights to facilitate the change that South Africa needed with the end of apartheid.

37. The ANC was initially opposed to the introduction of a federal constitution as it felt that South Africa needed a strong, powerful government to effect radical change to dismantle the legacy of apartheid and that a unitary constitution would enable such a powerful government to be elected. However in a spirit of reconciliation, the ANC abandoned its commitment to a unitary state and the final constitution is federal in all but name.

38. The new constitution established the principle of Cooperative Government (Chapter 3) which provides that the government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. All three spheres of government have constitutional status and have to recognise the other branches of government. The second tier of government consists of 9 provinces with provincial governments, a provincial premier and a provincial executive council exercising executive power at the provincial level and a provincial legislature with a list of exclusive subjects and functions and limited revenue raising powers. Provinces share power with the centre on a number of subjects including education, health, and social welfare. The division of powers in South Africa provides for the national parliament to wield more power than provincial legislatures. The third tier of government consists of municipalities that have specified responsibilities, limited revenue raising powers and which depend on fiscal transfers from the centre.

39. These centralised federal features are mitigated somewhat by an imaginative mechanism to provide for provincial representation at the centre. The South African Constitution instead of opting for a conventional upper house like a U.S. style Senate, introduced a National Council of Provinces (NCOP) which together with the National Assembly (House of Representatives)
comprises the bicameral National Parliament. The Constitution describes the role of the National Council of Provinces as the house that represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. (Article 41 (4)). The NCOP has three main functions: it considers and passes national bills; it balances the interests of the three tiers of government through an oversight/watchdog function that the constitution provides for and it seeks to ensure that government is a partnership in keeping with the principle of cooperative government.

40. Membership of the NCOP is based primarily on provincial representation. Each of the 9 provinces is represented by a 10 member delegation including members from the provincial executive and legislature. There are 6 “permanent” delegates elected by the provincial legislature in proportion to the political parties’ representation in the provincial legislature. The 4 “special” delegates are members of the provincial legislature who can change depending on the subjects/issues to be deliberated upon in the NCOP. The Provincial Premier or his/her nominee heads the provincial delegation. On matters that affect provinces each provincial delegation has one vote thereby compelling the provincial delegation to adopt a common position across party lines to ensure that the interests of the province are upheld when a vote is taken in the NCOP. The design of the second chamber in South Africa ensures that the rationale for a second chamber in a federal constitution: ensuring a provincial voice at the centre/the protection of devolution is effectively realised.

41. The South African Constitution of 1996 with its emphasis on values and principles, a strong Bill of Rights, an inclusive and empathetic Constitutional Court and the principle of cooperative government which is interrelated, has helped to give practical effect to the ideal of the rainbow nation.

C. SRI LANKA

42. Federalism has been part of the political discourse of Ceylon/Sri Lanka for many years. Soon after Ceylon obtained independence from Britain in 1948, the main minority group the Tamils sought a federal constitution to provide for a certain degree of self-government within a united Ceylon in the Tamil majority regions of the north east of the island. The main Tamil political party from the 1950s to the 1970s was the Federal Party which was even willing to accept at various stages devolution of power that fell short of federalism. The main political parties of Ceylon that were dominated by the Sinhalese and Buddhist majority population, rejected federalism which they believed would lead to secession. During this period, successive governments also sought to entrench the language and religion of the majority community at the expense of the Tamil minority. This culminated in the adoption of the first Republican Constitution of 1972 which repealed the independence constitution and its minority safeguards and made the new republic of Sri Lanka a unitary state with a privileged constitutional status for the Sinhala language and Buddhism, the language and religion of the majority. It is not surprising that the moderate, Gandhian and democratic leadership of the Federal Party was rejected by the Tamil youth in particular in the mid-1970s.

43. The Tamil militant movement gained momentum in the following years with a direct demand for a separate state in the northeast of the island, the rise of Tamil nationalism, a violent ethnic conflict and the rise of the Liberation Tigers of Tamil Eelam (LTTE). The LTTE waged a fanatical civil war, eliminating rival Tamil political leaders and groups and successfully resisted both the Indian and Sri Lankan armed forces for many years. In the mid-1980s the main Tamil political
forces including the LTTE adopted the Thimpu Principles as their basic set of political claims and demands. They included recognition of the Tamils of Sri Lanka as a distinct nationality; the recognition of the north and east of the country as a Tamil homeland; the recognition of the inalienable right to self-determination of the Tamil nation and granting equality and fundamental democratic rights to all Tamils. The main political parties in Sri Lanka interpreted the Thimpu Principles as a claim to a separate state and rejected them.

44. By the mid-1990s, the LTTE controlled territory in parts of the north and the east, ran a parallel administration in those regions with its own police, administrative service and judicial system and prevented the writ of the Sri Lankan government from extending over those parts of the country. Between 1995 and 2000, the government of President Chandrika Kumaratunga worked with moderate Tamil parties on a new constitution that sought to introduce greater rights for the Tamils and other minorities and quasi federal devolution of power. The President had to abandon her attempts to introduce the constitution as it was rejected by hardline Sinhalese elements within her own party, a significant section of the Buddhist clergy and also by Tamil political forces who argued that the constitution was “too little too late.”

45. In 2001, Norway began to facilitate negotiations between the LTTE (which had rejected the 1995-2000 constitution reform project from the outset) and a new coalition government of Sri Lanka. The Government of Sri Lanka was committed to maximum devolution of power within a unitary state while the LTTE remained committed to the Thimpu Principles of the Tamil homeland, nationhood and self-determination. In a significant breakthrough in December 2002 in Oslo the LTTE and the Government of Sri Lanka agreed to explore a federal solution based on the principles of internal self-determination, in areas of historical habitation of the Tamil people, within a united Sri Lanka and affirmed that the solution should be acceptable to all communities, a clear indication that the Muslim minority in the Tamil majority regions would also be engaged in developing the political solution. The references to internal self-determination and a united Sri Lanka were crucial in allaying the consistent and perennial fear of the Sinhalese, that federalism was a stepping stone to secession. For the Government of Sri Lanka responding positively to the federal idea and internal self-determination was a significant change that was not too difficult given the groundwork laid by the constitution reform project of 1995-2000.

46. However within a few months opposition to the Oslo agreement grew both within the LTTE which saw it as an unacceptable compromise and also among the Sinhalese Buddhist majority which remained trenchantly opposed to the federal idea. The distrust between the two negotiating parties never abated with each side accusing the other of using the ceasefire and the protracted negotiations as an opportunity to fortify militarily. The promise of Oslo soon disappeared, the negotiations collapsed and with the election of a new President in 2005 a bloody resumption of the conflict followed.

47. While discussions on a federal constitution have figured prominently in Sri Lanka as it has sought to manage tensions between its two largest ethnic groups, a federal constitution has consistently been rejected because of fears that federalism by emphasizing identity and ethnicity, the particular as opposed to the common, will encourage division and ultimately secession. This was accompanied by a majoritarian mindset that rejected any notion of power sharing and meaningful minority rights.
D. NEPAL

48. Nepal experienced a decade long conflict that ended with the signing of a Comprehensive Peace Agreement (CPA) in November 2006. The CPA committed Nepal to a change agenda that included a new constitution for a new Nepal that should be drafted and adopted by an elected and inclusive Constituent Assembly. The CPA also committed Nepal to “an inclusive, democratic and progressive restructuring of the state by ending the centralized, unitary state” and the empowerment of historically excluded ethnic groups, women and people living in backward regions.

49. A 601 member Constituent Assembly was elected in 2008 under the Interim Constitution of 2007 in order to ensure that Nepal’s diverse ethnic, caste and regional groups were represented in the constitution making process. There were 197 women members. The Interim Constitution declared that Nepal would be an inclusive, secular, federal, democratic republic, all characteristics that did not exist in Nepal prior to 2006. The CA had to flesh out the details. The members were divided into various thematic committees that considered the main constitutional issues that confronted the country.

50. The committees on state restructuring and natural resources focused on the federal design of the country. They agreed on a division of powers and functions between the central, provincial and local tiers of government, where like in South Africa, there would be a strong centre. The CA also agreed that the country should be divided into provinces on the basis of identity and viability. But the CA of 2008-12 could not agree on more detail and the issues of the name, the number and the boundaries of the proposed provinces prevented a consensus on the constitution and the CA’s term ended in 2012. After a crisis of constitutionalism and a political stalemate, a political understanding was reached and fresh elections held to elect a second CA in November 2013. The second CA has less representation from excluded groups but has agreed to build on the work of the first CA and accept identity and viability as the bases for the country’s federal structure. At present the options have been narrowed to a federal structure with between 6 and 10 provinces. The second CA hopes to complete the task of constitution making in 2015.

51. There has in the past 8 years been a relatively informed debate on the pros and cons of federalism; how federalism can empower minority groups; how power can be moved away from the Kathmandu based dominant elite; how backward regions can be empowered; and also the strengths and limitations of federalism. Legitimate concerns about federalism have also surfaced in the debate: Does federalism by emphasizing the particular do so at the expense of the common? Does federalism by in effect devolving power to the larger minorities in a province forget about the aspirations and concerns of the smaller minorities within such regions (the minorities within a minority critique of federalism)? Can federalism work in a country that is as diverse as Nepal? Is federalism too complex a system for a poor country that lacks human and financial capacities and resources? As was the case in Sri Lanka, since the champions of federalism were groups that wanted autonomy, there has been insufficient focus on the shared rule dimensions of federalism.

52. There is therefore in Nepal a consensus that Nepal will be a federal state and that identity and viability will be the bases for the demarcation of the provinces. Though the respective weightage to be given to these two criteria has prevented consensus on the details of the federal architecture for the country, it is likely that a compromise will be reached and a centralized federal system adopted in Nepal sometime next year.
CONCLUSION

53. The introduction of a federal constitution to deal with societies that are multi-ethnic and plural in character is an option that has become increasingly popular around the world. It has proved effective in dealing with the rise in the politics of recognition or identity based politics. The reality of politics in Asia suggests that identity and ethnicity cannot be merely wished away; nor can it be suppressed. While federalism may take different forms, the essence of the federal idea, promoting unity in diversity, celebrating difference but within a united whole, is a useful constitutional model that should be considered by constitution makers who have to design a constitution to respond effectively to the political reality of their countries. This paper has attempted to capture many of the issues, challenges and design choices that constitution makers have to confront when exploring federal arrangements particularly in the Asian context.
CONSTITUTIONAL SYMPOSIUM - Naypyitaw  
Access to Laws – Publication of the law  
Gaythri Raman  
Head of Rule of Law & Emerging Markets, Asia Pacific  
3rd November 2014

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Access to Laws  
LAWMAKING  
Who?  
• Parliament - legislation  
• Courts – case law  
What?  
• Clear set of laws that are easily and freely accessible to all  
Why?  
• Benefit the people of Myanmar and the country

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Publication of Law – Why is it critical?  
1. Foreign Investment Law  
• Informs all foreign investors what they can do to invest in Myanmar and how to do so  
2. Company Law  
• Guides local and foreign businesses transactions  
3. Farmland Law  
• Provides for ways in which farmers can register their interest in cultivating land  
Why?  
• Promotes international trade  
• Facilitates in-flow of investment  
• Promotes economic growth  
• Creates small, medium and large business enterprises  
• Increases earning capacity  
• Prevents land disputes  
• Informs the population  
• Reduces confusion
Publication of Laws – How?

Primary Law
- Laws passed in Parliament and decisions in court are made available to all – transparent
- All laws in clear, consumable format
- Those who administer justice will know and understand
- Those who practice law will use and apply
- Every man on the street will know the law

Current
- All revisions and amendments to laws are consolidated
- We know which laws no longer apply and which laws are newly passed
- We know where to find those laws
- We know it is the most up-to-date and current version of the laws
- We have access to all and benefit from technological improvements
- We have a choice of multiple formats

Questions?
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Dr Marcus Brand is a senior legal and democratic governance expert. As a consultant with UNDP’s Asia Pacific Regional Centre (APRC) in Bangkok he has been the lead advisor on Myanmar with regards to rule of law, constitutionalism and justice sector reform. He is also a visiting Lecturer, Fellowship of Open Society Europe – at the University of Yangon. Prior to that, he served as senior constitutional advisor and policy specialist in UNDP’s to Constitution Building Support Programme in Kathmandu, Nepal.

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