



## PROPOSALS FOR CONSTITUTIONAL CHANGE IN MYANMAR FROM THE JOINT PARLIAMENTARY COMMITTEE ON CONSTITUTIONAL AMENDMENT

### INTERNATIONAL IDEA INTERIM ANALYSIS

#### 1. Background, Purpose and Scope of this Report:

On 29 January Myanmar's Parliament voted to establish a committee to review the constitution and receive proposals for amendments. On July 15 a report containing a catalogue of each of these proposals was circulated in the Pyidaungsu Hluttaw (Union Legislature). This International IDEA analysis contains an overview and initial assessment of the content of these proposals.

From the outset, the Tatmadaw (as well as the Union Solidarity and Development Party - USDP) has objected to this process of constitutional review,<sup>i</sup> and unless that opposition changes it would mean that the constitutional review process will not be able to proceed much further. Passing a constitutional amendment requires a 75% supermajority in the Union Legislature, which gives the military an effective veto as they have 25% of the seats.<sup>1</sup> Nevertheless, the report provides the first official public record of proposed amendments from different political parties, and with it a set of interesting insights into the areas of possible consensus and divergence in future constitutional reform. The importance of this record is amplified by the direct connection of many of the subjects proposed for amendment to the Panglong Peace Process agenda.

Thus far, the analyses of this report available publicly have merely counted the number of proposals from each party, and sorted them according to which chapter of the constitution they pertain to. But simply counting proposals does nothing to reveal what changes are sought, and can be misleading – depending on its content, amending one significant article may bring about more actual change than amending fifty other articles.

Although the committee's report is structured by constitutional chapters, that format is difficult to digest. This analysis therefore adopts a thematic structure, explaining the proposed changes as they apply across four main overarching areas:

**Civilianisation:** reducing the role of the military in politics and bringing the military under civilian control;

---

<sup>1</sup> To be noted is the fact that in the summary of proposals the Committee has included proposals coming from the USDP, while the USDP made these proposals directly to the Union Parliament, that is, outside this particular process of constitutional amendment.

**Democratization**: deepening democracy through reforms to create better functioning representative institutions and processes;

**Federalization and plurinationalism**: decentralizing powers and control of resources / giving equal recognition and voice to the ethnic minorities of Myanmar through a federal system;

**Liberalization**: strengthening judicial independence, human rights and the rule of law.

Following the thematic analyses, the report also summarizes the main proposals from the National League for Democracy (NLD), and concludes with some brief reflections on how these proposals relate to the peace process.

For an overview of the political parties and the acronyms used in this report, please see Annex 1.

## 2. CIVILIANISATION

### General Comment

Parties are split on the role of the military (Tatmadaw). The NLD seeks a staged reduction in the military's role over time, with diminished (but retained) presence in the legislature and the civilianization of the cabinet. The Arakan National Party (ANP), Shan National League for Democracy (SNLD), Ta'ang (Palaung) National Party (TNP), Kachin State Democracy Party (KSDP), Mon National Party (MNP) and National United Democratic Party (NUDP) broadly agree on reduction of the military's political role and on bringing the military under civilian control, though with some exceptions and inconsistencies. The Pa'O National Organisation (PNO) broadly seeks to retain the status quo, while emphasizing stronger self-determination protections. It should be noted that the military themselves have not submitted proposals – it is assumed (but not certain) that they favour the status quo or something close to it.

### Praetorian Role of Military

Many of the proposed reforms concern the role of the military in politics. Art. 6(f), which currently assigns to the military a leadership role in politics, is a particular target for change. Many of the ethnic parties, including the ANP, SNLD, KSDP and MNP wish to remove that provision. The NLD, in contrast, proposes a revised wording of the provision, according to which the political role of the military would continue, 'in accordance with the desire of the people', while the PNO propose that the military's political role be permitted only 'in accordance with the law'. There is less consensus on the role of the Defence Services in safeguarding the Constitution: the SNLP and the ANP also wish to remove the reference to this role (Art. 20(f)), while PNO, KSDP, and MNP, seek to retain it. Military guardianship of the constitution has, in many other contexts, often been used as a pretext to avoid civilian, political oversight.

### Reform of the Military

A distinction may be made between two self-understandings of the military's role: is it a distinct elite caste, with an honour-bound vocation to ensure national unity and stability, or is it a profession, with a legal duty to perform defence-related tasks under civilian leadership? There are signs that the parties are addressing this issue in rhetorical, but highly symbolic, ways: instead of the Defence Services being the 'sole patriotic defence force' (with the word 'patriotic' hinting at a self-understanding of the military as a

honour-bound vocation-driven elite caste), the TNP proposes that the Defence Services be described simply as “the sole Union defence force”; the MNP proposes ‘sole defence force’ (Art. 20(a)). Moreover, the MNP proposes that the Defence Services should be ‘under civilian administration’ (Art. 20(b)). Only the SNLD propose that the Defence Services should be ‘composed of diverse ethnic nationalities’ – transforming it, in principle at least, from an instrument of Bamar nationalism (or national unity on Bamar terms) into a reflection of the multi-ethnic nature of Myanmar society. It should be noted, however, that constitutional change alone does not overnight change the military’s self-perception: removing the military from political power is one thing, achieving internal reform of the military so that it acts as a professional force in the service of a democratic state under civilian leaders, quite another.

#### Role of Commander-in-Chief

There is a broad consensus for transferring command over the armed forces from the (military) Commander-in-Chief to the (civilian) President (Art. 20(c)). The NLD proposal is to remove reference to the supremacy of the Commander-in-Chief, without, however, explicitly calling for civilian oversight of the military or fully clarifying the respective roles of the President and the Commander in Chief. The NUDDP, MNP and the SNLP would go further, proposing that the President be explicitly declared as Commander-in-Chief (ending the distinction between the offices of President and Commander-in-Chief that is such a feature of the current constitution). The ANP and TNP support retaining the office of Commander-in-Chief, but subordinating that office to the presidency, with the president as ‘supreme commander’.

#### Military Members in Cabinet

The NLD, ANP, SNLD, MNP and NUDDP are in favour of removing the right of nomination of the ministers of Defence, Home Affairs and Border Affairs from the military Commander-in-Chief and giving that authority to the President (art. 17(b)). The NLD and the NUDDP propose introducing a requirement that military personnel appointed to these offices are deemed to have resigned from the military from the date of their ministerial appointments (232(j)(ii)). The TNP and the KSDP would introduce a similar rule, but only for Home Affairs and Border Affairs, while the Lisu National development Party (LNDDP) would extend the rule only to Home Affairs. Clearly there is a difference of detail over how far civilianization of these posts should extend.

#### Military Members in Parliament

Many of the ethnic parties (including ANP, SNLD and MNP, together with the NUDDP, favour the complete removal of military members from Parliament (under the current constitution they have up to 25% of the seats in all legislative institutions). The TNP favours (unspecified) time limitations for the military presence. In contrast the NLD favours a staged reduction over successive Parliaments: to 15%, then 10%, then 5%. The PNO proposes retaining number of military members at one-fourth of the total (arts. 109(b)).

#### National Defence and Security Council

There is mixed support amongst the participants for reform of the National Defence and Security Council (art. 201). The NLD and the NUDDP propose a minor reform that would increase civilian parliamentary representation by two while removing the (currently military) Minister for Border Affairs, thereby balancing the numbers of civilian and military members. The SNLD would remove one of the Vice-Presidents and adding a Prime Minister. The TNP, ZCD, and KSDP, propose adding the Ethnic Affairs Minister to the National Defence and Security Council, but would retain the military majority. Most parties

favour a reduction in the powers and functions of the National Defence and Security Council, to the advantage of the President. The NLD, with the agreement of the ZCD, would remove the requirement for the President to 'act in accord with the recommendation of the National Defence and Security Council' when granting amnesties (art. 204). The ANP appears to favour removing the National Defence and Security Council from the constitution altogether.

### 3. DEMOCRATISATION

#### Myanmar's Definition of Democracy

There is general support for removing the word 'disciplined' as a qualifying description of democracy in Art. 6(d) and Art. 7. The NLD propose instead, "flourishing of a genuine multi-party democratic system", while the ANP, SNLD, and MNP, propose "flourishing of multiparty democracy; the TNP, PNO, KDUP favour definitions including the word 'federal democracy' or 'democratic federalism'. Further, positions on provisions related to structure of the state institutions emphasize separation of power and checks and balances. ANP, SNLD, PNO, MNP, and TNP suggest removing the phrase 'to the extent possible' in provisions on the separation of power among the executive, legislative and judicial branches.

#### System of Government

Myanmar has an unusual system of government, technically known as an 'Assembly-Independent' system, according to which the executive is elected by the Parliament, but not politically responsible to Parliament. No proposals have been put forward to replace the Assembly-Independent system with a more conventional system. The SNLD is the only party to propose a radical change to the system of government, with a two-headed executive in which powers would be divided between a President elected by the Upper House and a Prime Minister elected by the Lower House, each with specific functions (the President having the predominant role in foreign affairs and defence, and the Prime Minister in domestic policy) and each being responsible to their respective Houses. This would be a novel solution, untried anywhere else in comparative constitutional practice.

#### Qualifications of the President

The NLD propose only minor changes to the qualifications of the president. These include: (a) a reduction in the age threshold for presidential candidates from 45 to 40 (art. 59(c)); (b) removing the rules prohibiting persons with foreign spouses or children from being elected as President (59(f), which has hitherto prevented Aung San Sul Kyi from running for president); and (c) changing the list of subjects with which a president must be acquainted from 'political, administrative, economic and military' to the softer 'political, administrative, economic and security'. A similar change was already passed by parliament in 2015, but never voted on at referendum. The first of these is broadly-supported by the ANP, SNLD, TNP, MNP, NUDP. The second is supported by the SNLD and the NUDP, although the TNP and the ZCD support – with various modifications of detail – retention of similar rules. Parties have different proposed formulations of the third, but mostly they are quibbles over wording (e.g. the ANP, TNP, ZCD, and LNDP would require that a president be 'well acquainted with the affairs of the Union such as political, administrative, economic and defence'.

### Election of the President

Most of the other parties support a variation on the current theme, with the two Houses acting as an electoral college (although for the ANP, MNP and NUDDP, this would not include military representatives). The TNP and the ZCD appear to support keeping the role of the military members in the electoral college.

### Composition of Parliament (Lower House)

The SNLD and the TNP propose that elections to the Lower House be ‘on the basis of township or population’ (rather than solely on the basis of townships, which can vary considerably in size), but there are no proposals from any party for a major change in the electoral system (for example, to a system of proportional representation). It is a source of consternation to many foreign observers that reform of the lower house constituencies – which vary in population by up to a factor of 100 – is such a non-issue in Myanmar. This was an ideal opportunity for raising the issue, but it just seems to have no Myanmar champions. No party proposes any change to the existing five-year term for the Lower House, except for the SNLD, which proposes a four year term (art. 119).

### Composition of Parliament (Upper House)

Proposals for reform of the Upper House must be seen in the wider context of the renegotiation of federalism. Except on the issue of military members, there is general consensus on the institutional design of the Upper House: namely, that it should consist of twelve members from each constituent unit of the Union. However, this consensus on the formal composition of the Upper House masks a much deeper lack of consensus on the nature of the Upper House and the nature of federalism and pluri-national identity in Myanmar. Those (such as the NLD) who favour a 14-unit Union of States and Regions (see section on federalization for more details) are proposing an Upper House in which, in principle, the Bamar and non-Bamar representatives are equally weighted. Those (such as the SNLD) who favour an 8-unit federation of equal states (including one large Bamar-majority State, and seven non-Bamar majority States), are in effect proposing a radical restructuring of the Upper House so that the Bamar-majority areas are represented by just one-eighth of the total membership, while seven-eighths are elected by the non-Burmese areas. This distinction gets to the heart of the nature of the Union, with origins traceable back to the original Panglong Agreement of 1947: are the Bamar to be the recognized majority, sharing power with other nationalities to a limited degree but from a superior position, or are they only to be recognized as one of many, differently sized but equally important, ethnic communities in Myanmar?

### Joint Sessions (Pyidaungsu Hluttaw)

The current use of joint sessions of both Houses of Parliament is so common that the legislature becomes, in effect, unicameral for much of the time, and the equal representation of the States and Regions in the Upper House is diluted by the larger number of members in the Lower House. The SNLD wish to abolish joint sessions of Parliament (art. 80). The ANP and the MNP would limit joint sessions to hearing formally addresses by the President) (art. 80). The effect of abolishing or so limiting joint sessions may be two-fold: (i) to strengthen the Upper House as an institution of genuine bicameralism in an overall system of checks and balances, and (ii) depending on the composition of the Upper House, thereby to strengthen the voice of the non-Bamar states in the legislative process.

## Legislative Process

The SNLD and the MNP propose a new dispute resolution mechanism in case legislation is approved by one House and rejected by the other (art. 95): a joint committee with an equal number of members from each House is appointed to review and negotiate the bill, but after the conference committee's review, the bill is passed only if both Houses approve it – giving the Upper House (which under the SNLD's proposals would have 7/8 non-Bamar membership) a veto over all legislation.

## Constitutional Amendment Rules

The constitution of Myanmar currently has a high amendment threshold (75% vote in both Houses of Parliament; followed in the case of the certain provisions by an absolute majority vote in a referendum). At present, this gives the military (with 25% of the seats in each House) a veto on constitutional change. The PNO supports the status quo, but all other proposals support lowering the threshold of amendment, making future changes easier to achieve – although to varying degrees. The NLD, the TNP, the MNP and the KSDP support a reduction of the required majority from 75% to two-thirds in both Houses, while keeping the referendum for the specially entrenched provisions. The ANP supports a reduction in the parliamentary threshold for entrenched provisions to two-thirds and the abolition of the referendum requirement, while other provisions could be amended by an absolute majority in both Houses. The NUDP support keeping the referendum requirement but reducing the threshold required in the two Houses of Parliament to an absolute majority. The SNLD would keep the current thresholds at 75% in both Houses, but would remove the requirement for a referendum from many of the provisions.

## Political Parties

The current Constitution (Chapter X; Arts. 404-409) regulates political parties in a way that constrains their activities, especially the activities of any ethnic party considering secession. A political party must 'set the objective of non-disintegration of the Union, non-disintegration of national solidarity and perpetuation of sovereignty', 'be loyal to the State', and 'accept and practise a genuine and discipline-flourishing multi-party democratic system'. The parties recommend only minor changes to these provisions, with the removal of the word 'disciplined' proposed by many parties including the NLD. The SNLD seek to remove certain provisions enabling parties to be dissolved for 'directly or indirectly contacting or abetting the insurgent group launching armed rebellion against the Union' or for 'directly or indirectly receiving and expending financial, material and other assistance from a foreign government, a religious association, other association or a person from a foreign country'.

The NLD would lift the ban on Ministers and Deputy Union Ministers taking part in partisan political activities. The effect of this would be to overtly transform the Government from a nominally neutral state entity into the central institution of party-political leadership in the country – a step towards the normalization of partisan democracy. The SNLD agree, but the other parties are silent on this point.

A proposal by the NLD and the SNLD to remove the prohibition (art. 26(a)) on the political activities of civil servants is difficult to assess; it could be read as an attempt to extend partisan patronage networks into the civil service, or to free civil servants from excessive restrictions on their private political views.

## Union Electoral Commission

The Union Election Commission at present consists of members appointed by the President appointed in the same way as Union Ministers (art. 398): constitutionally, there is little to ensure that it is inclusive of Myanmar society or that it is sufficiently independent. The Shan National League for Democracy propose that the Union Election Commission should be appointed in the same way, but should consist of ‘one member from each state’ (i.e., in the SNLD’s proposals, eight members) – an approach that would ensure geographic, if not necessarily partisan, inclusivity. The NUDP propose that the members of the Union Electoral Commission be appointed by the president, but subject to the approval of the Pyidaungsu Hluttaw. Although limited in extent, the general trust of these proposals is to make the Union Electoral Commission more representative and to provide more political accountability for appointments. There were no proposals dealing with the more fundamental problem of the UEC being appointed by the sitting government, with the same term of service as that government.

## 4. FEDERALISM AND PLURINATIONALISM

### General Comments

Federalism, or some other form of increased territorial autonomy for ethnic states, is at the heart of the peace process agenda, and has been central to the civil conflict since its inception. Indeed, many of the current demands hark back to claims made at the country’s founding in 1947.

In the proposals there is a consistent distinction between, on the one hand, the positions of the NLD and the PNO, who have few to no substantial comments on the existing degree of federalization and decentralization (except, in the case of the PNO, for the powers of Self-Administered Zones – Pa’O is currently one of seven such zones) and, on the other hand, the parties associated with the ethnic states. The latter, even if they differ in detail, have a general consensus around both symbolic and functional recognition of ethnic equality and expanded autonomy/self-determination.

### Number and Structure of States

The NUDP would retain the fourteen-unit structure, but with all units designated equally as states (instead of the current terminology of states and regions). The ANP supports ‘ethnic based national states of equal status’, although it is unclear whether this explicitly refers to an eight-state structure. The SNLD favours eight states (with one Bamar state), while the MNP favours eight ‘national states’ and four ‘multi-national states’, plus union territories. Some other ethnic political parties, including the PNO, TNP, and MNP, leave open the possibility to create new Regions, States, and Self-Administered Districts. This is an issue over which there is still continuing disagreement between the NLD and some of the ethnic parties; it is a disagreement over the basis of the Union itself – is it a federation of territorial units or of ethnic communities? There are competing claims of what was agreed in the original Panglong Agreement which preceded the unification and founding of Myanmar (Burma at the time) which continue to be contested in the current peace process. Practically, this has implications for the composition of the Amoytha Hluttaw, in which each state has equal representation: an eight-state structure gives the non-Bamar states seven-eighths of the (civilian) seats in that House.

### Symbolic Identity and Recognition

Constitutions are powerful symbolic instruments that define the community to which they apply and reflect the polity's sense of self, both internally and to the wider world. Regardless of the distribution of substantive powers in a federal system, symbolic provisions such as those defining the flag, anthem, and name of the state, can be strongly contested. The NLD, SNLD, ZCD and the NUDP all propose changes to the national flag. Some of the smaller parties also seek to change the formal long-form of Myanmar's name. The ANP, TNP and UNDP favour "Democratic Federal Republic of the Union of Myanmar". The SNLD favour "Federal Democratic Union of Myanmar."

### Secession

The provision on prohibition of secession has been a critical point of impasse in the peace negotiations. Again, there is historical significance here. In the original 1947 constitution, the founding ethnic states were given a right to secede after ten years, but this was then taken out of subsequent constitutions. Five parties (ANP, SNLD, TNP, KSDP, and MNP) would remove the provision prohibiting secession completely while other parties are silent. The position of some parties (SNLD, TNP, and KSDP) are somewhat inconsistent on the secession issue vis-à-vis other provisions on safeguarding the non-disintegration of the Union, which they would maintain. For example, NLD, NUDP and ANP would generally retain provisions wherein situations that threaten disintegration of the Union or national solidarity constitute a state of emergency and authorize the assertion of Union authority over sub-state constituent units (Article 40; see also Article 20).

### Distribution of Powers

The current constitution of Myanmar divides legislative powers between the Union and the States/Regions by means of two legislative lists: the 'Union List' (Schedule 1) and the 'State List' (Schedule 2). Residual power (anything not mentioned explicitly on either list) belongs to the Union level (art. 98). The SNLD, MNP and KSDP would transfer residual power to the State-level (and, in the case of the KSDP, also to the Self Administered Zones) (art. 11b)

There are also proposed changes to two-list structure. The MNP would abolish the State List: since residual power, in their proposal, would be with the States, this would give the States competence over everything not on the Union List (similar to the division of powers in the USA and Australia). The SNLD, in contrast, favours a three-list division, adding a 'concurrent list' where both the Union and the states would be able to legislate on certain matters (similar to the division of powers in India)

A full breakdown of the specific powers proposed to be reallocated by each party is too long for this paper. The proposals of the SNLD are the most ambitious. These would remove many powers from the Union list and transfer them to the (new) concurrent list, including: atomic energy; income tax, commercial tax, stamp duty, customs duty; gems and pearls; petroleum, natural gas; minerals, mines, safety of mine workers; major ports; shipbuilding, land transport; posts, telegraphs, telephones, internet, intranet, television, satellite communication, transmission and reception; housing and buildings; universities, degree colleges, institutes and other institutions of higher education; social welfare; registration of births and deaths; prisons; development of border areas; census; citizenship and naturalization. Other powers would be transferred to, or added to, the states list, including: co-operatives; hotels and lodging houses; tourism; corporations, boards, enterprises, companies and partnerships; reclamation of vacant, fallow

and virgin land; registration of documents; agricultural research; marine fisheries; environmental conservation and restoration including wildlife, natural plants and natural areas that the State has the right to administer; narcotic and psychedelic drugs; and security force of the State and State Police Force. Together, this marks a major commitment to decentralization that goes further than many other federations; it would be unusual (although not impossible), for example, for citizenship and naturalization to be anything other than a federal matter.

### State Level Constitutions

The ability of states to adopt their own constitutions has been a longstanding demand of the ethnic parties, with several states having already drafted their own (legally unrecognized) constitutions. The question of whether the existing Myanmar constitution allows states to adopt their own state-level constitutions is undecided, but if indeed they can, the space available to do so is limited. The SNLD proposes an amendment to Art. 9(a) allowing states “the right to freely draft and adopt State Constitutions in accord with the desire of the people living in the respective States.”

The ANP and the MNP propose amendments to Art. 56(f) enabling States to adopt their own constitutions, while the TNP proposes to achieve the same end by means of an additions to Art. 161 providing that “The Region/State Constitutions shall be adopted in line with the Constitution of the Federal Union.” This desire for states to frame their own constitutions is reflected in proposed amendments to the provisions regulating in the institutions of government at the State level: the SNLD, ANP and the MNP propose removing provisions concerning the composition of State Hluttaw (art. 161-187) and appointment of the Chief Minister (e.g. arts. 248, 261).

### Appointment of Chief Minister

In the existing system the President appoints the Chief Minister subject to the approval of the State or Regional Legislature, but the legislature can only refuse the President’s choice on extremely limited grounds. Other parties propose that Chief Ministers have a mandate from their own state/region. The SNLD, in keeping with the desire for states to be able to frame their own constitutions, proposes two models from which states can choose: either a ‘Chief Minister system’ (essentially parliamentary, with the Chief Minister chosen by the State legislature) and a ‘Governor system’ (essentially presidential, with a popularly elected ‘State President’) (Art. 261(a)-(c)). The TNP, the ZCD, and the PNO propose the election of the Chief Minister by the State-level Legislature – subject to approval by the President (with the proviso that the President cannot refuse the appointment except on the grounds that the proposed Chief Minister does not meet the constitutionally prescribed qualifications).

### Self-Administered Areas/Zones

The ANP, SNLD and MNP would remove provisions relating to the self-administered areas. This is consistent with their position, discussed above, in favour of removing the structure of state-level institutions from the constitution and allowing states to establish their own constitutions. The PNO and the TNP would retain (with only minor modifications) existing provisions on the structure and composition of the Leading Bodies of Self-Administered Areas, but propose adding substantially to their powers through an additional schedule that would give them almost the same powers as the state over subjects like agriculture, energy, tourism and transport, as well as control over land revenue, property tax, residential tax, water tax, and some ability (to the extent permitted by the state or Union) to levy income

taxes and commercial taxes, and to deal directly with foreign aid donors. The PNO also proposes (art. 229(b)) that the Chairpersons of the Leading Bodies of Self-Administered Areas should be entitled to sit on the Finance Commission. Both the PNO and the TNP currently govern self-administered zones in Shan State.

## 5. LIBERALISATION (JUDICIARY, RULE OF LAW, HUMAN RIGHTS)

### Constitutional Tribunal

Article 46 of Basic Principles establishes a Constitutional Tribunal to interpret the Constitution, scrutinize the constitutionality of Union, Region and State laws and executive functions at all levels, and decide constitutional disputes among and between the Union and sub-national units. The most sweeping recommendation is presented by ANP, which would eliminate the Constitutional Tribunal and expand the jurisdiction of the Supreme Court to resolve 'constitutional problems' and other disputes between and among the Union and state governments. SNLD would convert the body to a Constitutional Court composed of one judge from each state, appointed by the President on the proposal of the Upper House, and electing a Chairperson from among themselves (arts. 320-321). The appointment process would presumably involve the state submitting recommendations to the Union Upper house for approval, with the Union President making appointments. TNP, in contrast, would reduce the current panel from nine judges to three, while generally retaining current appointment processes. Notably, NLD and NUDP join ANP in removing a clause under Article 294 that preserves the powers of the Constitutional Tribunal and Courts Martial in establishing the Supreme Court as the Highest Court of the Union, though neither NLD nor NUDP recommend eliminating the Constitutional Tribunal.

### Supreme Court

ANP proposes the most sweeping changes for the Supreme Court, including vesting it with the power of constitutional review in lieu of a Constitutional Tribunal. Beyond this, ANP would remove from the Court the authority to submit its budget to Government and to periodically report to parliament, instead vesting the power to submit the court's budget in the Minister of Justice. ANP would also eliminate a provision calling the Head of the Supreme Court the Chief Justice, and remove the minimum number of sitting judges (retaining only the maximum of 11). Qualification requirements for the Supreme Court remain broadly the same. ANP would reduce the number of years one must have practiced as an advocate from 20 to 15 years, while NLD, TNP, MNP and NUDP would remove the provision requiring the person to be, 'in the opinion of the President, an eminent jurist' (Article 301).

Notably, MNP proposes removing the existing appellate jurisdiction of the Supreme Court over judgments passed by the High Courts of sub-national constituent units and 'other courts' (Article 295(d)).

### Judicial Appointments and Administration

Most proposals retain the executive nomination followed by parliamentary approval process with minor adjustments. For appointment of the Chief Justice (art. 2999), ANP would unusually vest nomination authority in the Minister of Justice, submitted to the President for approval by the Upper House. TNP would vest selection, nomination and approval with the Union Parliament; while TNP comments are somewhat unclear, it appears that parliament would then submit to the President for final approval. SNLD

and MNP, in contrast, would vest nominations in the Union Prime Minister. In the latter case, SNLD would require Upper House approval followed by Presidential approval, while MNP would retain Union parliament approval and bypass the President. ANP, SNLD and MNP would preserve the limitation on parliament's right to refuse the nomination barring that it can 'clearly be proved that the persons do not meet' constitutional qualifications. TNP would carry this limitation to the President as the final check following parliamentary action. NUDP suggests removing Article 299(c)(ii) limiting parliament's power to refuse the nomination. Recommendations follow similar and consistent lines regarding appointment of other justices.

#### Removal and Impeachment of Judges

Consistent with recommendations on the nomination process for the Supreme Court, SNLD would grant the Prime Minister, along with the Upper and Lower Houses of parliament, authority to impeach the Chief Justice of other judges of the Supreme Court, thus replacing the current role of the President with that of the Prime Minister. Both ANP and SNLD would require the President (or Prime Minister) to submit impeachment charges to the Upper House rather than the Union parliament as currently prescribed, and have the Upper House lead subsequent proceedings. MNP would retain referral to the joint body, but remove the provision requiring the investigative committee to include equal representation of both houses. Neither ANP nor SNLD contest the composition of the investigative committee. Relatedly, ANP and SNLD would require a resolution substantiating the charges be passed by two-thirds of the Upper House, while MNP would retain two-thirds approval the Union parliament.

#### Tenure, Duties and Powers of Judges

Only NUDP seeks to substantially alter judicial tenure for the Supreme Court by establishing 'the same 5-year term as the President's'. All other parties retain the maximum age requirement of 70 years. Duties, powers and rights of justices of the Supreme Court remain prescribed by law.

#### State Judiciaries / Federalization of the Judiciary

ANP would remove all provisions related to establishing High Courts of sub-state constituent units; this is consistent with ANP recommendations for sub-state constitutions. These sub-state constitutions would presumably address the structure and authorities of state judiciaries, creating separate, parallel, judicial hierarchies. SNLD and NUDP, however, would broadly retain existing structures of sub-national judiciaries (in a manner consistent with their recommendations for eight ethnic-based states rather than 14 states and regions).

Regarding appointments, suggestions differ slightly. SNLD would vest nomination and approval in the State Chief Minister or State President with approval by the State Hluttaw, while PNO and NUDP would run the process through the Union Chief Justice in coordination with the State Chief Minister followed by State Hluttaw approval. For qualifications, both MNP and SNLD would remove practitioner requirements (currently 15 years); while NLD, MNP and NUDP would remove requirements that the President find the nominee to be an eminent jurist. MNP would remove, and SNLD would amend (unspecified), the prohibition on judges being members of political parties. Procedures for impeachment remain largely unchanged save recommendations by SNLD, PNO and NUDP to vest the referral authority in the State Chief Minister or State President rather than the Union President. Finally, judicial tenure follows the recommendations for the Union Supreme Court, with NUDP recommending a 5-year term aligned with

the Chief Minister of the State. Among parties retaining the current judicial structure, jurisdictional reach remains unchanged.

### General Rights Provisions

Combined, suggested amendments on rights provisions, including foundational rights addressed in Basic Principles, are quite limited. None seek to alter the current limitation of protection to citizens only, nor to expand the 'core' of rights and liberties delineated in Chapter VIII. Notably, virtually all rights remain limitable 'by law' and none are specifically recommended to be non-derogable. Regarding socio-economic rights, there are no suggestions regarding Union or sub-state obligations for *progressive realization* or other resource allocation mandates.

### Citizenship, Coverage, Non-Discrimination and Equality

The current Constitution limits rights to citizens with citizenship determined by law (Article 346). No party suggests extending fundamental rights to non-citizens, nationals, or persons within the territory. Only SNLD proposes extending citizenship to persons 'born of parents both of whom are nationals' of Myanmar (Article 345). Currently, the sole provision addressing fundamental rights for non-citizens is Article 353, which prohibits acts detrimental to the life and personal freedom of 'any person' – 'except in accord with existing laws.' SNLD would remove this article; NUDP would add a requirement for 'legal guarantees.' Prohibition on discrimination similarly remains limited to citizens and only on the basis of birth, religion, official position, status, culture, sex, and wealth. ZCD proposes adding a provision that a law shall be enacted to address violations of the prohibition on discrimination.

Regarding equality, there are minimal suggestions. SNLD proposes rephrasing Article 347 so that citizens 'enjoy' equal rights rather than the Union 'guarantee' equality. SNLD calls to amend Article 351, which currently provides equal rights to mothers, children and expectant mothers, to instead call for 'special rights' to be legislated, potentially seeking to align the Constitution with Myanmar's international obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Relatedly, SNLD and ZCD propose removing a clause in Article 352 on civil service appointments that currently recognizes positions as 'suitable for men only.' SNLD would remove the clause but retain non-discrimination based on limited criteria, while ZCD would apply a blanket non-discrimination clause.

### Civil and Political Rights

Regarding political rights, SNLD would amend Article 369 to state that 'every citizen has the right to elect and be elected to any Hluttaw.' All others would retain the limitation 'subject to this constitution and relevant laws.' No parties object to limitations on voting rights as currently constructed in Article 392. NUDP would add the restriction to Defense Services personnel.

NUDP would extend provisions on citizen equal opportunities beyond economic rights currently listed in Article 349 to also include rights to association, including forming political parties and farmers, labour and social unions. Relatedly, Article 354 currently protects citizen liberties related to expression, association, assembly and language 'if not contrary to the laws enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality.' SNLD would remove the limitation clause, while ZCD retains it but requires enacting legislation to secure protection of liberties indicated. NLD would prohibit hard labor as well as forced labor (Article 359).

Regarding religion, SNLD proposes removing Article 360, which prohibits economic, financial, political or other secular activities associated with religious activities. SNLD would also remove the ‘special position’ clause in reference to Buddhism as the majority religion; remove ‘Union recognition’ of Christianity, Islam, Hinduism and Animism as existing religions; and retain (along with PNO) Union assistance to religions ‘it recognizes’. ZMD, in contrast, would remove the article on Buddhism and replace the recognition of specified other religions with a right for each citizen to profess his or her faith. KSDP would remove the article on Union assistance to recognized religions.

Regarding due process, ANP and SNLD would remove the prohibition on retroactivity of penal law (Article 43); they do not comment, however, on the related provision in Article 373. Both SNLD and NLD would remove qualifying provisions in Article 376 on duration of detention without remand that currently allow for circumvention at Union discretion.

### Socioeconomic and Cultural Rights

No recommendations clarify permissible limitations on rights to develop history, literature, culture, arts, customs and traditions. These remain limitable by law and must ‘avoid any act detrimental to national solidarity.’ Similarly with education, only KSDP and SNLD propose a right to basic education in ethnic languages or the mother tongue, though comments are not consistent throughout (see Articles 28 and 366). Both NUDP and TNP suggest increasing free compulsory education to middle school and high school respectively (Article 28).

### Citizen Duties

Articles 383 – 390 address citizen duties. Only SNLD provided comments to these provisions, including a suggestion for compulsory military service for every citizen. Notably, SNLD would remove Article 383 obligating citizens to uphold the non-disintegration of the Union, national solidarity and perpetuation of sovereignty. This is somewhat inconsistent with SNLD’s suggestions on related Article 20(e): SNLD, TNP, PNO, and KSDP would retain Article 20(e), although only PNO and KSDP would vest responsibility in the Tatmadaw. SNLD and TNP would charge ‘citizens’ with this role. SNLD would also remove the duty ‘for the emergence of a modern developed nation.’

### Emergency Powers: Emergency Powers

Broadly speaking, parties propose limited changes to both the legal processes under which a state of emergency may be declared in response to delineated threats or risks, and to the suspension of civil liberties and human rights – with some exceptions. While some suggested amendments would alter requirements for consultation as part of the declaration *process*, no party provides judicial oversight as to whether the proposed process was in fact followed. Similarly, there are virtually no proposals seeking to strengthen substantive checks on the *exercise of emergency power as relates to suspension of rights*.

Under Article 40(b) in Basic Principles, NLD and MNP would add a role for the President in military interventions in Regions, States and Self-Administered areas. Both proposals retain the ‘right’ of the Defense Services to intervene, but subject this right to orders or tasks assigned by the President. SNLD, in contrast, would eliminate the article. Relatedly, NLD would remove the right of the Commander in Chief to assume sovereign power in emergencies under Article 40(b), reserving this to the President upon resolution of the Union Parliament. ANP and NUDP would also require parliamentary approval, but ANP

does not specify to whom power may be transferred, while NUDP retains the role for the Commander in Chief.

NLD also proposes to eliminate Articles 412 and 413 on declaration of emergency in situations threatening life, shelter or property in sub-state units and the related authority to declare a military administrative order. NLD retains but amends Articles 410 and 411 on declaration in situations wherein local administrators are unable to carry out their functions under the Constitution, and Article 417 and 418, which cover situations threatening disintegration of the union, national solidarity, or loss of sovereignty. Similarly, SNLD would remove Articles 417 and 418 entirely, while retaining Articles 410, 411, 412 and 413 with amendments.

Suggested amendments on provisions related to declaration of emergency mainly focus on eliminating requirements for the President to coordinate with the National Defense and Security Services – though SNLD, KSDP, and NUDP would generally retain the requirement. SNLD would add approval of the Pyidaungsu Hluttaw in situations where all members of the National Defense and Security Council cannot meet with the President; where an emergency arises in a sub-state unit, SNLD also suggests that only the State President or Chief Minister can declare and may seek assistance from the Union. ANP would require that coordination be between the President the Ministers of Defense and Home Affairs in all cases. NLD also suggests an alternative coordinating body: under Article 417, NLD would require Pyidaungsu Hluttaw approval, while allowing the President to unilaterally declare under Article 410 with the addition ‘or in accordance with a resolution of the Pyidaungsu Hluttaw.’ Only SNLD opposes the transference of legislative, executive and judicial authority to the Commander in Chief under Article 418. There is generally no consensus around extensions of a state of emergency and their durations. NLD proposes removing some provisions on extensions, (e.g. Articles 421 and 425), as does SNLD (Article 416), while NUDP would limit an Article 417 emergency extension to a maximum of 6 months.

Regarding protection of fundamental rights during emergencies, no party suggests amending articles suspending due process, application for court relief for violations of fundamental rights, or issuance of writs under a state of emergency (Article 296). SNLD, KSDP and NUDP, however, suggest amendments to Article 413(b) that would bar the Union from restricting fundamental rights of citizens in areas under a state of emergency. Similarly, NLD, SNLD, and KSDP would eliminate Article 420 allowing the Commander in Chief to restrict or suspend fundamental rights in a state of emergency. No group suggests a list of non-derogable or otherwise fundamental rights. Current construction of the article allows restriction or suspension of fundamental rights ‘as required’.

## 6. SUMMARY OF NLD PROPOSALS

Generally speaking, the NLD Proposal retains the overall structure of the current constitution and is not as far-reaching as most of the other proposals.

The NLD Proposal is as interesting for what it does *not* say, as for what it does say. It reduces, but does not remove, the role of the military in politics; but perhaps most significantly the NLD Proposal proposes no significant changes to the system of decentralization/ethnic autonomy/federalism – an issue of critical import to the peace process.

On the role of the military, the proposal seeks to gradually reduce the percentage of Tatmadaw-appointed seats in all legislatures over the next three elections – from the current maximum of 25% to 15%, then 10% and finally 5%. The Tatmadaw would also continue to appoint selected Ministers – Security and Border Affairs in the States/Regions, and Defence, Home Affairs and Border Affairs at Union Level – but these Ministers would be mandatorily resigned upon taking up their positions.

With regard to military power, the NLD proposes amendments to the provisions on states of emergency (40b and 40c), which brings the responses to emergencies under the control of the political institutions, rather than under the Tatmadaw.

On the issue of state structure and decentralization, very little is considered for amendment. To give one prominent example, Chief Ministers (the chief executive at region/state level) are currently appointed by the President and this has been one of the most common demands for change from ethnic groups, who would like local communities to be given more political autonomy to select their own government. A list of 10 parties – including the USDP – propose some form of change in this regard, but the name of the NLD is conspicuous by its absence. As the NLD currently controls the presidency, and likely feels they have strong chance to retain the presidency in the next elections, this could be interpreted as unwillingness to cede control and power. But when taken together with the absence of decentralization/state structure amendments anywhere in the NLD proposal, it perhaps also indicates that federalism is not currently high on the NLD's reform agenda.

Lastly, the NLD proposes the threshold for passing a constitutional amendment in the legislature should be lowered to two-thirds, from the current three-fourths. This, of course, would remove any military veto from constitutional change; and naturally is unlikely to meet with approval from the military.

## 7. CONCLUDING COMMENTS

These proposals represent the first detailed public statement of constitutional reform by the NLD and some of the major ethnic parties in this administration. It must be emphasized once again that the Tatmadaw and the USDP have not submitted any proposals. That might be interpreted as satisfaction with and desire to maintain the existing constitution without amendment; it may also be a rejection of this particular amendment process, as they have repeatedly asserted.

Finally, these proposals must be understood in relation with the ongoing peace process. Constitution-building and peace-making often go hand-in-hand, since conflict is so often predicated on issues of distribution of power and resources, the resolution of which requires constitutional change. However, it is not yet clear how the specific constitutional reform proposals suggested to the Constitutional Review Committee will cohere with political agreements arising from the 21<sup>st</sup> Century Panglong process. Or the extent to and way in which this constitutional review process may be sequenced with decisions taken as part of the peace process. For instance, does the NLD's focus on the political role of the military support or preclude further talks on decentralization/federalization of Myanmar? Given the difficulties arising from competing demands and expectations, it is unlikely that this current round of review, even if it does lead to changes to the constitutional text, will be the end of the process.

## APPENDIX 1 – Overview of Political Actors

| PARTY NAME                              | ACRONYM | PARLIAMENTARY SIZE                              | COMMENTS  |
|---|---------|---|---|
| <i>National Parties</i>                 |         |   |   |
| National League for Democracy           | NLD     | 135 Upper House seats,<br>255 Lower House seats | Major national governing party.   |
| Union Solidary and Development Party    | USDP    | 11 Upper House seats,<br>30 Lower House seats.  | National party allied with military; did not submit proposals to this process.  |
| National United Democratic Party        | NUDP    | No seats  | New reformist national political party formed in 2018.  |
| <i>Ethnic Parties</i>                   |         |   |   |
| Arakan National Party                   | ANP     | 10 Upper House seats,<br>12 Lower House seats.  | Advocacy of ethnic Arakanese Buddhists in a region of mixed ethnic composition that includes Rohingya Muslims                     |
| Shan Nationalities League for Democracy | SNLD    | 3 Upper House seats,<br>12 Lower House seats.   | Main ethnic party of the Shan.  |
| Ta'ang (Palaung) National Party         | TNP     | 2 Upper House seats,<br>3 Lower House seats.    | Seeks to represent the Ta'ang people (also known as the Palaung).   |
| Pa'O National Organization              | PNO     | 1 Upper House seat,<br>3 Lower House seats      | Informal alliance with USDP and backed by the military; represents Pa'O ethnicity (mostly in Shan state).                         |
| Zomi Congress for Democracy             | ZCD     | 2 Upper House seats,<br>2 Lower House seats.    | Ethnic party of the Zomi (Chin) people. Primary support from the Chin state.  |
| Mon National party                      | MNP     | 1 Upper House seat.                             | Ethnic party of the Mon people.   |
| Lisu National Development Party         | LNDP    | 2 Lower House seats.                            | Ethnic party of the Lisu people. Because of wide spread of Lisu people, the LNDP fields candidates in several states and regions. |
| Kachin State Democracy Party            | KSDP    | 1 Lower House seat                              | Merged into Kachin State Party in 2018.   |
| Kokang Democracy and Unity Party        | KDUP    | 1 Upper House seat,<br>1 Lower House seat.      | Represent Kokang people (Mandarin-speaking Han Chinese in Kokang Self-Administered Zone).   |

<sup>i</sup> Htoo Thant (2019) 'More negotiations on composition of charter change committee needed', *Myanmar Times* (11 Feb 2019): <https://www.mmtimes.com/news/more-negotiations-composition-charter-change-committee-needed.html>