



Proposals for Constitutional Change in Myanmar from the Joint Parliamentary Committee on Constitutional Amendment

International IDEA Interim Analysis

1 Background, purpose and scope of the report

On 29 January 2019 Myanmar's Parliament voted to establish a committee to review the constitution and receive proposals for amendments. On 15 July 2019 a report containing a catalogue of each of these proposals was circulated in the Pyidaungsu Hluttaw (union legislature). This International IDEA analysis provides an overview and initial assessment of the content of these proposals.

From the outset, the military (Tatmadaw) and the Union Solidarity and Development Party (USDP) have objected to this process of constitutional review.¹ Unless that opposition changes, the constitutional review process will be unable to proceed much further. Passing a constitutional amendment requires a 75 per cent supermajority in the union legislature, which gives the military an effective veto as they hold 25 per cent of the seats. In the summary of proposals, the Joint Parliamentary Committee on Constitutional Amendment has included proposals from the USDP, while the USDP made these proposals directly to the union Parliament—that is, outside this process of constitutional amendment. Nevertheless, the report from the Joint Parliamentary Committee on Constitutional Amendment provides the first official public record of the proposed amendments from different political parties, and identifies areas of possible consensus and divergence in future constitutional reform. Many of the proposed amendments are directly related to issues included in the Panglong Peace Process agenda.

To date, only the number of proposals from each party has been made public, sorted according to which chapter of the constitution they pertain to. Yet a simple count of proposals does not 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 50 other articles.

The Joint Parliamentary Committee on Constitutional Amendment report is structured by constitutional chapter, which is difficult to digest. The current analysis therefore adopts a thematic structure, explaining the proposed changes as they apply across four overarching areas: (1) *civilianization*: reducing the military's role in politics and bringing it under civilian control; (2) *democratization*: deepening democracy through reforms to create better-functioning representative institutions and processes; (3) *federalization and plurinationalism*: decentralizing powers and control over resources to give equal recognition and voice to Myanmar's ethnic minorities through a federal system and (4) *liberalization*: strengthening judicial independence, human rights and the rule of law.

¹ Thant, H., 'More negotiations on composition of charter change committee needed', *Myanmar Times*, 11 February 2019, <<https://www.mmtimes.com/news/more-negotiations-composition-charter-change-committee-needed.html>>.

Following the thematic analyses, the report summarizes the main proposals of the National League for Democracy (NLD), and concludes with some brief reflections on how these proposals relate to the peace process. The Appendix lists the political parties and acronyms used in this report.

2 Civilianization

Parties are split over the role of the Tatmadaw. The NLD seeks a staged reduction in the military's role over time, with a diminished 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 reducing the military's political role and bringing it under civilian control, though with some exceptions and inconsistencies. The Pa'O National Organization (PNO) broadly seeks to retain the status quo, while emphasizing stronger self-determination protections. It should be noted that the military has not submitted proposals: it is assumed (but not certain) that they favour the status quo or something close to it.

2.1 Praetorian role of military

Many of the proposed reforms concern the role of the military in politics. Article 6(f), which gives the military a leadership role in politics, is a particular target for change. Many of the ethnic-based parties—including the ANP, SNLD, KSDP and MNP—wish to remove that provision. The NLD, by contrast, proposes rewording the provision to stipulate that 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 SNLD and ANP also wish to remove reference to this role from the constitution (article 20(f)), while the 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.

2.2 Reform of the military

The military may perceive its role as either (1) a distinct elite caste, honour bound to ensure national unity and stability or (2) a profession, with a legal duty to perform defence-related tasks under civilian leadership. The parties are deciding which role the military should fulfil by addressing this issue in rhetorical, but highly symbolic, ways: instead of the Defence Services being the 'sole patriotic defence force', which suggests the former role, the TNP proposes that they be described simply as 'the sole union defence force'; the MNP similarly suggests 'sole defence force' (article 20(a)). Moreover, the MNP maintains that the Defence Services should be 'under civilian administration' (article 20(b)). Only the SNLD propose that the military 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. Yet constitutional change alone will not change the military's self-perception overnight: removing the military from political power would be a first step, but many more steps are required to internally reform the military so that it acts as a professional force in the service of a democratic state under civilian leaders.

2.3 Role of commander-in-chief

There is a broad consensus on the need to transfer control of the armed forces from the (military) commander-in-chief to the (civilian) president (article 20(c)). The NLD proposes removing reference to the supremacy of the commander-in-chief from the constitution, but without explicitly calling for civilian oversight of the military or clarifying the roles of the president and commander-in-chief. The NUDP, MNP and SNLP go further, proposing that the president should be explicitly declared the commander-in-chief (ending the current distinction between the offices of the president and commander-in-chief). The ANP and TNP support retaining the office of commander-in-chief, but subordinating it to the presidency, with the president as ‘supreme commander’.

2.4 Military members in the Cabinet

The parties disagree over the extent of civilianization of Cabinet positions. For instance, the NLD, ANP, SNLD, MNP and NUDP favour transferring the right to nominate the ministers of Defence, Home Affairs and Border Affairs from the military commander-in-chief to the president (article 17(b)). The NLD and NUDP 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 appointment (232(j)(ii)). The TNP and KSDP would introduce a similar rule, but only for Home Affairs and Border Affairs, while the Lisu National development Party (LNDP) would extend the rule only to Home Affairs.

2.5 Military members in Parliament

Many of the ethnic-based parties—including the ANP, SNLD, MNP and NUDP—favour removing all military members of Parliament (under the current constitution they are allocated up to 25 per cent of the seats in all legislative institutions). The TNP favours (unspecified) time limits for the military presence. By contrast, the NLD favours a staged reduction over successive Parliaments: to 15 per cent, then 10 per cent, then 5 per cent. The PNO proposes an *increase* in the number of military members, from the current one-fourth to one-third (articles 109(b)).

2.6 National Defence and Security Council

The parties demonstrate mixed support for reforming the National Defence and Security Council (article 201). The NLD and NUDP propose a minor reform that would increase civilian parliamentary representation by two while removing the (currently military) minister for Border Affairs, thereby balancing the number of civilian and military members. The SNLD would remove one of the vice presidents and add 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 reducing the council’s powers and functions, 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 (article 204). The ANP appears to favour removing the council from the constitution altogether.

3 Democratization

3.1 Myanmar’s definition of democracy

There is general support for removing the word ‘disciplined’ as a qualifying description of democracy in articles 6(d) and 7. The NLD propose instead, ‘flourishing of a genuine multiparty democratic system’, while the ANP, SNLD and MNP suggest ‘flourishing of multiparty democracy; the TNP, PNO and KDUP favour definitions including the word “federal democracy” or “democratic federalism”’. Further,

positions on provisions related to the structure of state institutions emphasize the separation of power as well as checks and balances. The ANP, SNLD, PNO, MNP and TNP suggest removing the phrase ‘to the extent possible’ in provisions related to the separation of power among the executive, legislative and judicial branches.

3.2 System of government

Myanmar has an unusual ‘assembly-independent’ system of government, in which the executive is elected by—but is not politically responsible to—Parliament. No proposals have been put forward to replace this system with a more conventional type. The SNLD is the only party to propose a radical change to the system of government—a two-headed executive that divides powers between a president (elected by the Upper House) and a prime minister (elected by the Lower House). Under this plan, the president would have the predominant role in foreign affairs and defence, and the prime minister would take the lead in domestic policy, and each would be responsible to their respective houses. If adopted, this would be the first system of its kind.

3.3 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 (article 59(c)); (b) removing the rules prohibiting persons with foreign spouses or children from being elected president (article 59(f), which has prevented Aung San Sui Kyi from running); 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’. Parliament passed a similar change in 2015, but a referendum was never held. The first of these is broadly supported by the ANP, SNLD, TNP, MNP and NUDP. The second is supported by the SNLD and NUDP, although the TNP and ZCD support similar rules. Parties have different proposed formulations of the third, but they are largely over semantics (e.g. the ANP, TNP, ZCD and LNPD would require the president to be ‘well acquainted with the affairs of the union such as political, administrative, economic and defence’.

3.4 Election of the president

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

3.5 Composition of Parliament (Lower House)

The SNLD and 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 no party has proposed major changes to the electoral system, such as introducing proportional representation. Many foreign observers are frustrated that reform of the Lower House constituencies—which vary in population by up to a factor of 10—is not a priority. Only the SNLD proposes changing the Lower House’s five-year term to four years (article 119).

3.6 Composition of Parliament (Upper House)

Proposals to reform the Upper House must be assessed in the wider context of the country’s 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 12 members from each

constituent unit of the union. However, there is a lack of consensus on the nature of the Upper House and the nature of federalism and plurinational identity in Myanmar. Parties (such as the NLD) that favour a 14-unit union of states and regions (see the 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) that favour an eight-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 to be recognized as one of many—differently sized but equally important—ethnic communities in Myanmar?

3.7 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 (article 80). The ANP and MNP would limit joint sessions to hearing formal addresses by the president (article 80). The effect of abolishing or limiting joint sessions in this way may be twofold: (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, to strengthen the voice of non-Bamar states in the legislative process.

3.8 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 (article 95): a joint committee with an equal number of members from each house would be 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 seven-eighths non-Bamar membership) a veto over all legislation.

3.9 Constitutional amendment rules

The Constitution of Myanmar currently has a high amendment threshold (75 per cent vote in both houses of Parliament; some provisions also require an absolute majority vote in a referendum). This gives the military (which has 25 per cent of the seats in each house) a veto over 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, TNP, MNP and KSDP support a reduction of the required majority from 75 per cent to two-thirds in both houses, while keeping referendums for 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 both houses of Parliament to an absolute majority. The SNLD would keep the current threshold at 75 per cent in both houses, but would remove the requirement for a referendum from many of the provisions.

3.10 Political parties

The current constitution (Chapter X; articles 404–409) constrains political parties' activities, especially those 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. For instance, many parties, including the NLD, proposed removing the word 'disciplined'. The SNLD seek to remove certain provisions that enable parties to be dissolved for 'directly or indirectly contacting or abetting the insurgent group launching armed rebellion against the union' or '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. This change would transform the government from a nominally neutral state entity into the country's central institution of party-political leadership—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 on the political activities of civil servants (article 26(a)) is difficult to assess; it could be read either 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.

3.11 Union Electoral Commission

The Union Election Commission (UEC) consists of members appointed by the president in the same way as union ministers (article 398): constitutionally, there is little to ensure that it is inclusive of different segments of Myanmar society or that it is sufficiently independent. The SNLD propose that the UEC should continue to 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 commission be appointed by the president, but subject to the approval of the Pyidaungsu Hluttaw. Although limited in extent, the general objective of these proposals is to make the UEC 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

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.

The proposals consistently distinguish between, on the one hand, the positions of the NLD and the PNO, which 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 the seven self-administered zones, which include Pa'O) 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.

4.1 Number and structure of states

The NUDP would retain the 14-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. There is continuing disagreement between the NLD and some of the ethnic parties on this issue, which relates to the basis of the union itself—is it a federation of territorial units or of ethnic communities? There are competing claims regarding what was agreed in the original Panglong Agreement that preceded the unification and founding of Myanmar (Burma at the time), which continue to be contested in the current peace process. This has practical 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.

4.2 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 how the substantive powers are distributed 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 NUDP all propose changes to the national flag. Some of the smaller parties also seek to change the formal long form of the country’s name. The ANP, TNP and UNDP favour the ‘Democratic Federal Republic of the Union of Myanmar’, while the SNLD favour the ‘Federal Democratic Union of Myanmar’.

4.3 Secession

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

4.4 Distribution of powers

Myanmar’s current constitution divides legislative powers between the union and the states/regions via 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 (article 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) (article 11b).

There are also proposed changes to two-list structure. The MNP would abolish the State List: since residual power, in their proposal, would reside in the states, this would give 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' of matters on which both the union and the states would be able to legislate (similar to the division of powers in India).

A full breakdown of the specific powers that each party proposes to reallocate is beyond the scope of this paper. It therefore focuses on the SNLD's proposals, which are the most ambitious. These would transfer many powers from the Union List 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 State 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 state security forces and the State Police Force. Combined, these changes would represent 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.

4.5 State-level constitutions

The ability of states to adopt their own constitutions has been a longstanding demand of the ethnic parties; several states have drafted their own (legally unrecognized) constitutions. The question of whether the country's federal constitution allows states to adopt their own state-level constitutions is undecided, but if they can, the space available to do so is limited. The SNLD proposes an amendment to article 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 MNP propose amendments to article 56(f) to enable states to adopt their own constitutions, while the TNP proposes to achieve the same end by expanding article 161 to provide 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 state-level government institutions: the SNLD, ANP and MNP propose removing provisions concerning the composition of the State Hluttaw (articles 161–187) and appointment of the chief minister (e.g. articles 248, 261).

4.6 Appointment of chief minister

The president currently 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) or a 'governor system' (essentially presidential, with a popularly elected 'state president') (article 261(a)–(c)). The TNP, ZCD and 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).

4.7 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 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 that the chairpersons of the leading bodies of self-administered areas should be entitled to sit on the Finance Commission (article 229(b)). Both the PNO and the TNP currently govern self-administered zones in Shan state.

5 Liberalization (judiciary, rule of law, human rights)

5.1 Constitutional Tribunal

Article 46 of the 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 subnational units. The most sweeping recommendation is presented by the 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. The SNLD would convert the body into a Constitutional Court composed of one judge from each state, appointed by the president on the proposal of the Upper House, which would elect a chairperson from among themselves (articles 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. The TNP, by contrast, would reduce the current panel from nine judges to three, while generally retaining the current appointment processes. Notably, the NLD and NUDP would join the 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 the NLD nor NUDP recommend eliminating the Constitutional Tribunal.

5.2 Supreme Court

The 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. The ANP would also remove the court's authority to submit its budget to government and to periodically report to Parliament; the court would instead submit its budget to the minister of justice. The 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. The ANP would reduce the number of years one must have practiced as an advocate from 20 to 15 years, while the 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, the MNP

proposes removing the existing appellate jurisdiction of the Supreme Court over judgments passed by the High Courts of subnational constituent units and 'other courts' (article 295(d)).

5.3 *Judicial appointments and administration*

Most proposals retain the executive nomination, followed by parliamentary approval, process with minor adjustments. For appointment of the chief justice (article 299), the ANP would unusually vest nomination authority in the minister of justice, submitted to the president for approval by the Upper House. The TNP would vest selection, nomination and approval authority with the union Parliament; while the TNP comments are somewhat unclear on this matter, it appears that Parliament would then submit the nomination to the president for final approval. The SNLD and MNP, by contrast, would allow the union prime minister to nominate the chief justice: the SNLD would require Upper House approval followed by presidential approval, while the MNP would retain union Parliament approval and bypass the president. The 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. The TNP would extend this limitation to the president as the final check following parliamentary action. The NUDP suggests removing article 299(c)(ii) limiting Parliament's power to refuse the nomination. Recommendations follow similar and consistent lines regarding the appointment of other justices.

5.4 *Removal and impeachment of judges*

Consistent with recommendations on the nomination process for the Supreme Court, the SNLD would grant the prime minister, along with the Upper and Lower Houses of parliament, the authority to impeach the chief justice or other judges of the Supreme Court, thus replacing the current role of the president with that of the prime minister. Both the 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. The MNP would retain referral to the joint body, but remove the provision requiring the investigative committee to include equal representation of both houses. Neither the ANP nor the SNLD contest the composition of the investigative committee. Relatedly, the ANP and SNLD would require a resolution substantiating the charges to be passed by two-thirds of the Upper House, while the MNP would retain two-thirds approval of the union Parliament.

5.5 *Tenure, duties and powers of judges*

Only the 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. The duties, powers and rights of justices of the Supreme Court remain prescribed by law.

5.6 *State judiciaries/federalization of the judiciary*

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

Regarding appointments, the parties' suggestions differ slightly. The SNLD would vest nomination and approval authority in the state chief minister or state president with approval by the State Hluttaw, while the 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 the MNP and SNLD would remove practitioner requirements (currently 15 years), while the NLD, MNP and NUDP would remove the requirement that the president believes the nominee to be an eminent jurist. The MNP would remove, and the SNLD would amend (in an unspecified manner), the prohibition on judges being members of political parties. Procedures for impeachment remain largely unchanged save recommendations by the 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; the NUDP recommends a 5-year term aligned with the chief minister of the state. Among parties retaining the current judicial structure, jurisdictional reach remains unchanged.

5.7 General rights provisions

The suggested amendments on rights provisions, including the foundational rights addressed in the Basic Principles, are quite limited. None seek to alter the current limitation of protection to citizens only, or 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 substate obligations for *progressive realization* or other resource allocation mandates.

5.8 Citizenship, coverage, non-discrimination and equality

The current constitution limits the stated rights to citizens with citizenship determined by law (article 346). No party suggests extending fundamental rights to non-citizens, nationals or residents of the territory. Only the 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'. The SNLD would remove this article, while the 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. The ZCD proposes adding a provision that a law shall be enacted to address violations of the prohibition on discrimination.

There are minimal suggestions regarding equality. The SNLD proposes rephrasing article 347 so that citizens 'enjoy' equal rights rather than the union 'guarantees' equality. The 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 and the Convention on the Rights of the Child. Relatedly, the SNLD and ZCD propose removing a clause in article 352 on civil service appointments that currently recognizes positions as 'suitable for men only'. The SNLD would remove the clause but retain non-discrimination based on limited criteria, while the ZCD would apply a blanket non-discrimination clause.

5.9 Civil and political rights

Regarding *political* rights, the 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. The NUDP would add the restriction to Defence Services personnel.

The NUDP would also extend provisions on citizen equal opportunities beyond the 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 tranquillity or public order and morality’. The SNLD would remove the limitation clause, while the ZCD would retain it but require enacting legislation to secure the protection of the liberties indicated. The NLD would *prohibit hard labour* as well as forced labour (article 359).

Regarding *religion*, the SNLD proposes removing article 360, which prohibits economic, financial, political or other secular activities associated with religious activities. The SNLD would also remove the ‘special position’ clause that refers to Buddhism as the majority religion; remove ‘union recognition’ of Christianity, Islam, Hinduism and Animisim as existing religions; and retain (along with the PNO) union assistance to religions ‘it recognizes’. The ZMD, by 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. The KSDP would remove the article on union assistance to recognized religions.

Regarding *due process*, the 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 the SNLD and NLD would remove qualifying provisions in article 376 on the duration of detention without remand that currently allow for circumvention at union discretion.

5.10 Socio-economic 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’. Only the KSDP and SNLD propose a right to basic education in ethnic languages or the mother tongue, though their comments are not consistent throughout (see articles 28 and 366). Both the NUDP and TNP suggest increasing free compulsory education to middle school and high school, respectively (article 28).

5.11 Citizen duties

Articles 383–390 address citizen duties. Only the SNLD provided comments to these provisions, including a suggestion for compulsory military service for every citizen. Notably, the 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 the party’s suggestions on related article 20(e): the SNLD, TNP, PNO and KSDP would retain article 20(e), although only the PNO and KSDP would vest responsibility in the Tatmadaw. The SNLD and TNP would charge ‘citizens’ with this role. The SNLD would also remove the duty ‘for the emergence of a modern developed nation’.

5.12 Emergency powers

Broadly speaking, parties propose only 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 the 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, virtually no proposals seek to strengthen substantive checks on the *exercise of emergency power related to the suspension of rights*.

Under article 40(b) of the Basic Principles, the 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 Defence Services to intervene, but subject this right to orders or tasks assigned by the president. The SNLD, in contrast, would eliminate the article. Relatedly, the NLD would remove the commander-in-chief’s right to assume sovereign power in emergencies under article 40(b), reserving this for the president upon a resolution of the union Parliament. The ANP and NUDP would also require parliamentary approval, but the ANP does not specify to whom power may be transferred, while the NUDP retains the role for the commander-in-chief.

The NLD also proposes to eliminate articles 412 and 413 on declaring an emergency in situations threatening life, shelter or property in substate units and the related authority to declare a military administrative order. The NLD retains but amends articles 410 and 411 on such declarations in situations in which local administrators are unable to carry out their functions under the constitution, as well as articles 417 and 418, which cover situations threatening the disintegration of the union, national solidarity or a loss of sovereignty. Similarly, the SNLD would remove articles 417 and 418 entirely, while retaining articles 410, 411, 412 and 413 with amendments.

Suggested amendments to provisions related to declarations of emergency mainly focus on eliminating requirements for the president to coordinate with the national defence and security services—though the SNLD, KSDP and NUDP would generally retain this requirement. The SNLD would add approval of the Pyidaungsu Hluttaw in situations where all members of the National Defence and Security Council cannot meet with the president; where an emergency arises in a substate unit, the SNLD also suggests that only the state president or chief minister can declare and may seek assistance from the union. The ANP would require coordination between the president and the ministers of defence and home affairs in all cases. The NLD also suggests an alternative coordinating body: under article 417, it 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 the SNLD opposes transferring 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 or their duration. The NLD proposes removing some provisions on extensions (e.g. articles 421 and 425), as does the SNLD (article 416), while the NUDP would limit an article 417 emergency extension to a maximum of 6 months.

Regarding the protection of fundamental rights during emergencies, no party suggests amending articles that suspend due process, application for court relief for violations of fundamental rights, or the issuance of writs under a state of emergency (article 296). The SNLD, KSDP and NUDP, however, suggest amendments to article 413(b) that would bar the union from restricting citizens’ fundamental rights in areas under a state of emergency. Similarly, the NLD, SNLD and KSDP would eliminate article 420, which allows 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. The article currently allows the restriction or suspension of fundamental rights ‘as required’.

6 Summary of NLD proposals

The NLD proposal retains the overall structure of the current constitution and is not as far-reaching as most of the others. It 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, it 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 per cent to 15 per cent, then 10 per cent and finally 5 per cent. 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 the union level—but these ministers must resign from the military before taking up their Cabinet positions. With regard to military power, the NLD proposes amendments to the provisions on states of emergency (40b and 40c), which brings responses to emergencies under the control of the political institutions, rather than 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 executives at the region/state level) are currently appointed by the president; this has been one of the most common demands for change from ethnic groups, which would like local communities to be given greater autonomy to select their own government. A list of ten 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 it has a strong chance of retaining the presidency in the next elections, this could be interpreted as an 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 party’s reform agenda.

Lastly, the NLD proposes that the threshold for passing a constitutional amendment in the legislature should be lowered from three-fourths to two-thirds. 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 a desire to maintain) the existing constitution without amendment; it may also be a rejection of the amendment process, as they have repeatedly asserted.

Finally, these proposals must be understood in the context of the ongoing peace process. Constitution-building and peacemaking often go hand in hand, since conflict is 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 21st century Panglong process. Nor is it apparent the extent to which—or how—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? 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—Overview of political actors

Party name	Acronym	Parliamentary size	Comments
<i>National parties (ordered by number of seats held)</i>			
National League for Democracy	NLD	135 Upper House seats, 255 Lower House seats	Major national governing party
Union Solidary and Development Party	USDP	11 Upper House seats, 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 (ordered by number of seats held)</i>			
Arakan National Party	ANP	10 Upper House seats, 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, 12 Lower House seats	Main ethnic party of the Shan
Ta'ang (Palaung) National Party	TNP	2 Upper House seats, 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, 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, 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, who are widely dispersed throughout the country. Therefore 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, 1 Lower House seat	Represent Kokang people (Mandarin-speaking Han Chinese in Kokang self-administered zone)

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