



# CONSTITUTIONAL AMENDMENT BILLS IN MYANMAR, 27 JANUARY 2020

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## Executive summary

This report examines two constitutional amendment bills in Myanmar, which were submitted to parliament, on 27 January 2020, following approval by the Joint Parliamentary Committee on Constitutional Amendment (JPCCA). It also examines five other bills for constitutional change separately submitted to the Union Parliament, and three by members of the Union Solidarity and Development Party (USDP) and two from the military (Tatmadaw). These five proposals bypassed the JPCCA process.

This report follows International IDEA's July 2019 Interim Analysis entitled *Proposals for Constitutional Change in Myanmar from the Joint Parliamentary Committee on Constitutional Amendment*.<sup>1</sup> That report examined the positions of all political parties who submitted proposals to the JPCCA during the earlier consultation process. **Notably, only those proposals presented by the National League for Democracy (NLD) were approved by the JPCCA and submitted to Parliament for review.** The JPCCA dissolved upon submission of its proposals.

Following review by the Joint Bills Committee, the bills are submitted for consideration by the Union Parliament. The JPCCA organized its submission into two bills, following the two distinct amendment procedures provided for in article 436(a) and article 436(b) of the 2008 Constitution. Amendments to the constitutional provisions listed in article 436(a) require a 75 per cent approval by the Union parliament followed by a referendum (see Annex 1). The provisions listed in article 436(b) also require a 75 per cent voting threshold in Parliament for approval of amendments, but do not require a referendum. The high threshold for parliamentary approval provides the Tatmadaw a de facto veto over any proposed amendment, as they currently hold more than 25 per cent of seats in the Union parliament (note that not all elected seats are currently filled).

### ***Compatibility and approaches to the amendment proposals***

The proposals ultimately approved by the JPCCA are the same as those originally proposed by the NLD in mid-2019. This continuity indicates that, in the final review process, the approved amendment proposals did not incorporate suggestions submitted by other parties. Many of the proposals submitted by ethnic political parties in July 2019 related to federalism and autonomy, recognition of identity, and state accountability. These were not approved to be part of the amendment bills submitted by the JPCCA. Tatmadaw proposals were not submitted to the JPCCA for consideration.

If there is any underlying strategic compromise between NLD and the military in their proposals—which, as discussed above, would be necessary for the amendments to pass in Parliament—this is not self-evident. The proposals generally focus on different parts of the Constitution—the **NLD concentrates primarily on civilianization** (with the limited, staged reduction of the military's role in the legislative and executive branches of government and the assertion of civilian authority), **while military and USDP bills mainly focus on federalization** (principally, through changing the method of appointment of the chief ministers and state/regional cabinets). If these proposals were approved together—with some adjustments to align differing positions on the composition and powers of the National Defence and

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<sup>1</sup> International IDEA, *Proposals for Constitutional Change in Myanmar from the Joint Parliamentary Committee on Constitutional Amendment: International IDEA Interim Analysis* (Stockholm: International IDEA, 2019), <<http://constitutionnet.org/vl/item/proposals-constitutional-change-myanmar-joint-parliamentary-committee-constitutional>>, accessed 14 February 2020

Security Council (NDSC), particularly with regard to the NLD's proposed constitutionalization of the civilian decision-making power over the NDSC—they could be aligned into a fairly coherent set of constitutional changes. These changes would provide a moderate 'next step' towards becoming a federal democratic state in accordance with agreements made in the 21st-century Panglong process. However, the fact that the proposals are not inherently contradictory on the face of it does not prevent underlying political debates over key issues, such as the proportion of military members in Union and sub-state parliaments, which the NLD would reduce. For example, how acceptable the Tatmadaw and USDP proposals on reforming the appointment and authorities of chief ministers are to the NLD must be balanced against NLD calls to reduce the political role of the military. Given this, the proposals taken as a whole may instead be seen as a starting point for negotiations rather than as a functionally compatible whole.

From a comparative perspective, it is fairly common for parties in power at the centre to seek to centralize control, while those out of power at the centre seek to decentralize power to create enclaves of power and patronage at the sub-state level. The USDP proposal for the election of chief ministers by state/regional legislatures, for example, can perhaps be seen in this light. On the other hand, the USDP also proposes to grant the president decision-making authority over key recommendations of the NDSC, and this proposal is more surprising.

#### ***Overview of proposals approved by the JPCCA (submitted by the NLD)***

The proposals approved by the JPCCA include only those submitted by the NLD. In general, **they retain the overall structure of the current Constitution and system of government, focusing primarily on civilianization of governance institutions and decision-making processes.** The NLD does not propose any significant changes to the current system of decentralization, ethnic autonomy or federalism, despite the critical importance of these issues in the peace process, or the fact that these issues were prioritized in amendment proposals submitted to the JPCCA by ethnic and other parties in July 2019.

Other than the staged reduction in the number of military members discussed below, **the NLD proposals would make no change to the composition of the two Houses of Parliament in terms of ethnic or sub-state representation.** Moreover, the NLD proposals do not strengthen or add any elements of federalism to the current structure, other than through the symbolic gesture of adding the word 'federal' to the definition of Myanmar's political system.

Regarding civilianization, **the NLD proposes to gradually reduce—but not eliminate—the percentage of Tatmadaw-appointed seats in all legislatures over the next three electoral cycles, from the current maximum of 25 per cent to 15 per cent, then to 10 per cent and finally to 5 per cent. The NLD would also alter current provisions on constitutional amendment rules.** They would retain the referendum requirement for the specified provisions listed in article 436(a) (see Annex 1), but reduce the approval threshold from three-quarters to two-thirds of members of the Union parliament. If the current 75 per cent parliamentary approval threshold for constitutional amendments were to be maintained, the NLD's proposed reduction in military representation in parliament would mean that the military would lose its effective veto on amendments. If, on the other hand, military representation were maintained at current levels, a reduction in the approval threshold for constitutional amendments would similarly eliminate the effective military veto.

The NLD proposals would also alter the composition of the Cabinet. The Tatmadaw would 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 deemed to have resigned from the military upon taking up their Cabinet positions. Additionally, **the NLD proposes to alter the composition of the NDSC to give civilian representatives a majority on the council.**

This incremental approach to reducing military representation in Parliament is similar to the Indonesian and Chilean experiences, with several key differences. First, both the Indonesian and Chilean processes resulted in a full withdrawal of the military from politics. For Indonesia, this took a decade of staged withdrawals; for Chile, reform took around 20 years and in some ways remains ongoing. Second, both the Indonesian and Chilean withdrawals were coupled with security sector reform that supported modernization and professionalization within the military’s redefined role. To varying degrees, these incremental but comprehensive approaches helped to ensure the sustainability of the reforms over the long term.

With regard to the assumption of authority and exercise of military power during **states of emergency**, the NLD proposes significant amendments to provisions in articles 40b and 40c and Chapter XI. These changes would bring the process of declaring an emergency, the exercise of governance roles during a state of emergency, and the scope of responses to emergencies exclusively **under the control of civilian authorities and political institutions.**

Regarding democratization, several proposals are noteworthy. For example, the **NLD would lift the current ban on partisan political activities for civil service personnel** as well as for ministers and deputy Union ministers. Most countries protect individual rights to political affiliation. This extends, in a regulated manner, to the protection of civil service personnel, as individuals, from discrimination on the grounds of their private political views. To balance this, it is also common for constitutions to mandate the independence and neutrality of public service commissions to ensure that the civil service as a whole is not captured or influenced by party politics regardless of the individual views of personnel. In South Africa, for example, the Constitution prohibits favouring or prejudicing any public service employee for supporting a particular political party or cause and thus protects the individual right to political affiliation. The South African Constitution also mandates, however, that the Public Service Commission as an institution must be independent and impartial and must exercise its powers and perform its functions without fear, favour or prejudice. This construction seeks a balance between individual political rights and the necessary neutrality and independence of the civil service as an entity. Myanmar’s Union Civil Service Board, in contrast, does not enjoy constitutionalized protection of its independence. Without such normative and practical guidance established in the Myanmar Constitution (or, minimally, in legislation) to ensure that the civil service operates in a neutral way, the potential effect of this change could be to transform a nominally neutral state entity into a partisan institution in its operations and functions.

#### ***Overview of proposals submitted to Parliament by Tatmadaw and USDP***

**Tatmadaw and USDP proposals are narrow in scope and focus primarily on decentralization and enhanced autonomy at the state/regional level.** This could potentially be interpreted as a tactical approach to the strong likelihood that the NLD will win a country-level majority in the upcoming elections and retain its control over power at the centre. For the Tatmadaw and USDP, decentralization and enhanced autonomy at the state/regional level could allow them to carve out enclaves wherein USDP and Tatmadaw can ally to form a plurality at the sub-state level.

**USDP proposes to reform the current appointment process for chief ministers and to insert a consultation requirement for presidential appointments of state/regional cabinets and ministry specification.** Contrary to the current system, chief ministers would be elected by state/regional Hluttaws with the president able to refuse based only on qualifications. While, on its face, the proposal appears to enhance state/regional autonomy over its executive branch, USDP would **also retain and expand article 264, which empowers the president to direct the resignation of a chief minister (or a minister of a state/region) ‘who cannot discharge his duties efficiently’** by adding grounds of ‘fail[ing] to safeguard the Constitution’. This broad power undercuts state/region executive autonomy and undermines executive–legislative relations. The case of South Sudan is instructive on this point: there, the state governors, although popularly elected, can be removed from office by the president, who is then empowered to appoint an interim governor pending an election. By the simple expedient of dismissing all of the elected governors and then not holding new elections, the president has in effect taken control of state governments. At the same time, the Tatmadaw proposal would amend articles 262 and 264 to grant to the chief ministers the power to decide on the number of state/region ministries and to appoint state/region ministers. The proposal would also make ministers accountable to the chief minister rather than the president—although the president retains broad leeway to dismiss both chief ministers and state/region ministers.

Additionally, **the Tatmadaw would amend articles on the appointment of Union ministers and chief ministers of states/regions to apply the so-called ‘ASSK’ exclusion** by requiring that candidates, their parents, spouses, any legitimate children and their spouses not owe allegiance to a foreign power. This would extend the restrictions currently applied to the presidency to all Cabinet positions and the executives of states/regions.

Regarding the influence of the military at the Union level, **USDP would create a set of constitutional duties for the NDSC.** These include making recommendations to the president on matters of national security and defence, as well as advising the president on whether to dissolve Parliament in situations where ‘checks and balances between the legislative and executive branches are undermined’ or where ‘one-third or more of [Parliament’s] seats become vacant for various reasons’. Such a political mechanism to dissolve Parliament does not exist in the 2008 Constitution; this can only occur under certain circumstances during a declared state of emergency. Neither this proposed amendment nor any other provides an express presidential authority to dissolve Parliament. As such, it is unclear whether a parliamentary dissolution through this mechanism would be judicially interpreted as legal. It is likely, though, that USDP intended this recommendation provision to imply a presidential authority to dissolve Parliament. **Decision-making within the NDSC would rest exclusively with the president, giving ‘due regard’ to the views of council members.** It is also unclear whether a presidential power to dissolve Parliament, if exercisable, would be undertaken as an act of the NDSC or an act of the office of the president. In other countries where presidents have discretion to dissolve Parliament, it is rarely exercised on the authority of the NDSC.<sup>2</sup>

Perhaps relatedly, **USDP would grant authority to the Constitutional Tribunal to interpret whether the actions of the ‘parliaments . . . and the Union-level institutions’ conform with the Constitution.** USDP

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<sup>2</sup> Bulmer, W. E., *Dissolution of Parliament*, International IDEA Constitution-Building Primer 16 (Stockholm: International IDEA, 2016), <<https://www.idea.int/sites/default/files/publications/dissolution-of-parliament-primer.pdf>>, accessed 11 February 2020

would also make the decisions by the Union Election Commission—which are currently final and conclusive—appealable to the Supreme Court.

## 1 Scope of this report

This report examines two constitutional amendment bills in Myanmar, which were submitted to the Union Parliament (Pyidaungsu Hluttaw) on 27 January 2020, following approval by the Joint Parliamentary Committee on Constitutional Amendment (JPCCA or informally Charter Change Committee). It also examines five other bills for constitutional change separately submitted to the Union Parliament, three by members of the Union Solidarity and Development Party (USDP) and two from the military (Tatmadaw). These five proposals bypassed the JPCCA process.

This report follows International IDEA's July 2019 Interim Analysis entitled *Proposals for Constitutional Change in Myanmar from the Joint Parliamentary Committee on Constitutional Amendment*.<sup>3</sup> That report examined the positions of all political parties who submitted proposals to the JPCCA during the earlier consultation and internal review process. Notably, only those proposals presented by the National League for Democracy (NLD) during the July process were ultimately approved by the JPCCA and submitted to Parliament for review. The JPCCA has since dissolved, upon submission of its proposals.

The structure of this report replicates that of the previous Interim Analysis, which organized proposals into four areas of reform: (a) civilianization and security sector reform; (b) democratization; (c) federalism and plurinationalism; and (d) liberalization (judiciary, rule of law and human rights). There is also a short final section detailing proposed reforms of a minor, technical or miscellaneous nature that do not fit elsewhere.

## 2 Political background

On 29 January 2019, Myanmar's Union Parliament voted to establish a joint committee to review the Constitution and receive proposals for amendments—the JPCCA. This so-called Charter Change Committee consisted of 45 members, with decision-making largely dominated by the NLD through its plurality of 18 members. The USDP were offered two seats, and the Tatmadaw eight seats, reflecting their shares of seats in Parliament. However, the Tatmadaw expressed challenges to the committee's constitutionality and, although present, apparently refrained from active participation in committee meetings, and therefore had limited or no influence upon the decision-making. In September 2019, two members of the Arakan National Party (ANP) and one member of the National Unity Party (NUD) resigned in protest. In December, the two USDP members also withdrew in protest against NLD domination and

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<sup>3</sup> International IDEA, *Proposals for Constitutional Change in Myanmar from the Joint Parliamentary Committee on Constitutional Amendment: International IDEA Interim Analysis* (Stockholm: International IDEA, 2019), <<http://constitutionnet.org/vl/item/proposals-constitutional-change-myanmar-joint-parliamentary-committee-constitutional>>, accessed 14 February 2020

the decision-making rules of the committee.<sup>4</sup> As the JPCCA completed its work, only those proposals put forward by the NLD have been approved.

The amendment proposals adopted by the JPCCA, as well as those separately proposed by USDP and Tatmadaw, will now go to a legal committee for comment, before being voted on by the two Houses of the Pyidaungsu Hluttaw in a joint session. The JPCCA organized its submission, which includes 114 proposed amendments, into two bills: (a) one dealing with amendments to which article 436(a) applies, and which need to be approved by referendum; and (b) one dealing with amendments to which article 436(b) applies and which do not need a referendum. The two sets of amendments are identified in the Annex to this report.

Regardless of whether a referendum is required, all changes to the Constitution require a 75 per cent majority vote in a joint session of both Houses. Since the military have 25 per cent of the seats, and the NLD have only 54 per cent of the seats, any proposed amendment would have to be accepted by both the military and the NLD in order to be passed.

### **3 Civilianization and security sector reform**

#### **3.1 General comments**

**The NLD proposals, taken cumulatively, would reduce—although not entirely eliminate—the role of the military in politics while asserting civilian decision-making. This is done through several measures that establish, *inter alia*, civilian control of political institutions, civilian decision-making over the appointment and removal of Cabinet ministers, unilateral presidential authority over granting amnesty, and the maintenance of civilian governance during states of emergency.** USDP and Tatmadaw proposals, in contrast, generally retain current provisions on the role and authorities of the military across institutions and circumstances, with a notable and important exception: USDP would amend article 201 to specify that decision-making within the National Defence and Security Council (NDSC) rests with the president with ‘due regard’ to the recommendations of the NDSC (of which the president is also, of course, a member). Currently, the Constitution does not specify any decision rule for the NDSC. It is unclear if this proposal would merely codify current *de facto* practice, or if it would indeed alter the balance of power within the NDSC towards civilian leadership.

Note that discussion of reforms to state of emergency provisions may be found in the Liberalization section below.

#### **3.2 Praetorian role of military**

**The NLD seeks to reduce military representation in political institutions and the scope of governance authority that may be exercised by the commander-in-chief and military-affiliated members of the Cabinet.** Currently, the Basic Principles of the Constitution establish, as an objective of the Union, the enabling of defence services to participate in the ‘National political leadership role of the State’ (article 6(f)). The NLD would add the limitation ‘in accordance with the desire of the people’. The NLD would retain, however, article 20(f), which renders defence services ‘mainly responsible for safeguarding the

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<sup>4</sup> See Yamin Aung, S., ‘Myanmar: Myanmar’s main opposition party quits Charter Amendment Committee’, ASEAN Interparliamentary Assembly, 20 December 2019, < <https://aipasecretariat.org/myanmar-myanmars-main-opposition-party-quits-charter-amendment-committee/>>, accessed 5 February 2020



Constitution'. In addition, the NLD would alter provisions on qualifications of the president and vice president under article 59(d) to remove required acquaintance with 'military' affairs, replacing it with 'security' affairs. All of these proposals require 75 per cent approval by the Union parliament followed by a referendum.

### ***3.3 Reform of military and the role of the commander-in-chief***

**Contrary to the proposals of some ethnic political parties in the July 2019 process, none of the current proposals would reform the composition, structure or symbolic duties of the military vis-à-vis the Constitution or the aim of maintaining national unity and stability.** However, the NLD would alter the chain of command by removing article 20(c), which currently establishes the commander-in-chief as the supreme commander of all armed forces. The proposal does not, however, explicitly call for civilian oversight of defence services.

To harmonize this adjustment, the NLD would also remove articles 338 and 339 which, respectively, place the armed forces under the command of the defence services, and assert that the defence services shall lead the safeguarding of the Union against internal and external threats. No civilian command or leadership is alternatively proposed.

### ***3.4 Military members of Cabinet***

**The NLD proposes to remove from the Basic Principles section the right of defence services to be included in the executive at all levels of government to undertake responsibilities related to defence, security and border administration (article 17(b)).**

The NLD would retain, however, article 232(b)(ii), which grants the commander-in-chief the authority to nominate candidates for the Ministries of Defence, Home Affairs and Border Affairs. The retention of military-affiliated Cabinet positions is balanced against two additional proposals: first, that nominated defence personnel appointed to these ministries at all levels of government should be deemed to have retired from the defence services from the day of appointment (articles 232(j)ii, 262(n)ii and 285(f)); and second, by removing articles which currently require the president to coordinate with the commander-in-chief regarding the resignation or removal of defence personnel serving as ministers or deputy ministers at the Union or state/regional level and in the Nay Pyi Taw Council (articles 235(c)(ii), 262(n)ii and 286(a)(iii)).

### ***3.5 Military members of Parliament***

**The NLD proposal would reduce—but not remove—the presence of the military in all Houses of Parliament at the Union and state/regional level through a staged reduction over three successive elections, from the current 25 per cent to 15 per cent, then to 10 per cent, and finally to 5 per cent (articles 109(b), 141(b) and 161(d)).** Such a gradual reduction in military membership has superficial similarities to other transitions from military rule—notably Indonesia (1999–2009) and Chile (1988–2005). One key difference, however, is that the NLD's current proposals do not envisage the complete removal of the military from Parliament, whereas Indonesia and Chile both eventually removed all military members.

The Indonesian process was geared towards a full withdrawal of the military from politics over a 10-year period, beginning with a reduction from 20 per cent to 10 per cent in the 1999 elections, followed by a 2000 law requiring full withdrawal by 2009. This was coupled with institutional reforms of the Indonesian

military, including, for example, closing military-run intelligence units that monitored the political opposition and vetted candidates, eliminating posts that directed the military's operations in civilian government, and separating the police from the armed forces. Military personnel directly affected by the civilianization of governmental offices were generally offered the option to retire, resign their commissions or leave their civilian posts and return to the military. In exchange, members of the military were able to retain many of their business and financial interests.

In Chile, by comparison, the civilianization process was meticulously slow and methodical and took place in parallel with broader security sector reform through a combination of constitutional change and statutory revision, beginning with steps in the 1980 Constitution and continuing as recently as 2005. The slow pacing allowed space for the consolidation of civilian democracy, gradual shifts in popular approval and support for the military and the evolution of the military's own understanding of its role and its realm, while preserving the military's sphere of autonomy over its budget, personnel and administration. Observers note that the slow pace also supported the changes to be more robust, comprehensive and sustainable than may otherwise have been possible through rapid reform.

Unlike with Cabinet appointments, there is no NLD proposal requiring that defence personnel retire from the military upon taking parliamentary office.

Additionally, the NLD would eliminate provisions that currently enable both Houses of Parliament at the Union and state/regional level to form Defence and Security Committees (articles 115(b) and 147(b)). It is unclear whether the removal of these provisions would wholly debar parliament from forming committees on defence and security matters.

### **3.6 National Defence and Security Council (NDSC)**

USDP and NLD take different approaches to reforming the NDSC (article 201). The NLD would alter its composition to increase civilian parliamentary representation relative to defence-affiliated membership by removing the (currently military) membership of the Minister for Border Affairs and adding the Deputy Speakers of both Houses of Parliament. This would increase the council's size from 11 to 12 members, with civilians holding seven seats compared with six seats representing defence-affiliated posts. This change would require 75 per cent approval by the Union parliament followed by a referendum. Additionally, the NLD 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 USDP proposal by U Sai Than Naing, in contrast, would retain the current membership and civilian–military balance while delineating the duties of the council under article 201. The proposed change would also specify that decision-making of the NDSC rests with the president with 'due regard' to member views.** Notably, the list of NDSC duties includes recommending to the president to dissolve Parliament under two broad circumstances: (a) when 'checks and balances between the legislative and executive branches are undermined'; and (b) when 'one-third or more of its seats become vacant for various reasons'. Although the drafting is imprecise, and the implication may be contested, the amendment proposal cannot be reasonably understood without intending to confer upon the president a corresponding authority to dissolve Parliament as a political matter, outside a state of emergency declaration. In terms of the practical implications of such a dissolution, the USDP proposal provides no guidance on what happens next—whether a caretaker Parliament would be established or legislative authority transferred, nor on procedures or timelines for new elections.

Further, the proposed USDP amendment would require council meetings every two months and special meetings at the request of at least five council members. In both composition constructions, the military would be able to meet this threshold. The council has not been convened in the three and a half years that the ruling NLD has held power.<sup>5</sup> Interestingly, **the decision-making rule proposed by USDP for council decisions favours the party in power by granting final authority to the president with ‘due regard’ to the views of council members.**

## 4 Democratization

### 4.1 *Myanmar’s definition of democracy*

The current Constitution (article 6(d)) defines one of the ‘consistent objectives’ of the Union to be the ‘flourishing of a genuine, disciplined multi-party democratic system’. The NLD proposes removing the word ‘disciplined’, leaving the objective as ‘a genuine multi-party democratic system’. Likewise, the NLD proposes that article 7 also be amended to remove the word ‘disciplined’, so that it reads, ‘The Union practises genuine multi-party democratic system’.

This is mainly a symbolic gesture. A ‘disciplined democracy’—like other terms such as ‘guided democracy’ previously used in Indonesia—implies some restriction or qualification of democracy. Removing it symbolizes a less conditional democracy.

### 4.2 *Qualifications of the president and ministers*

The NLD proposes several 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)); 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’ (article 59(d)). The change to article 59(d) has already been passed by the Union Parliament (in 2015) but the required referendum was never held.

These changes are politically important, since they—especially article 59(f)—have been used to prevent NLD leader Aung San Suu Kyi from running for president. If these amendments are passed, she could in principle become president, rather than continuing in the (constitutionally unrecognized) position of ‘state counsellor’. In contrast, a military proposal in the name of Col. Mg Mg would extend the prohibition on foreign allegiances of family members to Union ministers (article 232)—which would prohibit Aung San Suu Kyi from holding office as Minister of Foreign Affairs and Minister of the Office of the President.

### 4.3 *Political parties*

The current Constitution (Chapter X, articles 404–409) regulates political parties in a way that constrains their activities, especially the activities of any ethnic political 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 disciplined

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<sup>5</sup> Myanmar Peace Monitor, ‘USDP, Tatmadaw jointly try to make law that can dissolve parliament’, 23 September 2019, <<https://www.bnionline.net/en/news/usdp-tatmadaw-jointly-try-make-law-can-dissolve-parliament>>, accessed 3 February 2020

flourishing multi-party democratic system’ (articles 404 and 405). The NLD proposes amending article 405(a) to remove the word ‘disciplined’. This amendment does not fall under article 436(a) (entrenched provisions) and does not require a referendum.

The NLD would lift the ban on ministers and deputy Union ministers taking part in partisan political activities (article 232(k)). 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.

Because civil service neutrality and impartiality usually contributes to democracy and good governance, a more questionable proposal by the NLD is to remove the prohibition (article 26(a)) on the political activities of civil servants.

#### **4.4 Union Election Commission**

The Union Election Commission at present consists of members appointed by the president appointed in the same way as Union ministers (article 398): constitutionally, there is little to ensure that it is inclusive of Myanmar society or that it is sufficiently independent. The NLD proposes that members of the Union Election Commission be appointed by the president, but subject to the approval of the Pyidaungsu Hluttaw. While providing a degree of parliamentary oversight, this proposal would not alone ensure inclusive appointment procedures or the genuine independence of the Union Election Commission. This is because, with the president being elected by the Pyidaungsu Hluttaw, it is highly likely that the president will have a partisan majority in that body; there is no opposition inclusion in the appointment process, and therefore no need, in reasonably foreseeable circumstances, to appoint impartial or compromise candidates who will not be solely dependent upon, or aligned with, the governing majority.

#### **4.5 Constitutional amendment rules**

The Constitution of Myanmar currently has a comparatively high amendment threshold. There are two levels of constitutional rigidity. As noted above, article 436(a) currently provides for amendment of certain specified provisions (see Annex 1) by a 75 per cent vote in a joint session of both Houses of Parliament, followed by approval by an absolute majority of those eligible to vote in a Myanmar-wide referendum. According to article 436(b), other provisions of the Constitution can be amended by a 75 per cent majority vote in a joint session of both Houses of Parliament, without the need for a referendum. The NLD’s proposal is that the threshold be reduced, in both article 436(a) and article 436(b), to two-thirds of the members voting in a joint session of both Houses. The distinction between those provisions falling under article 436(a) and so needing a referendum, and those falling under article 436(b) and not needing a referendum, would be unchanged.

At present, the amendment rule gives the military (with 25 per cent of the seats in each House) an effective veto on constitutional change. If the NLD’s amendment bill is passed, the military would immediately lose this absolute veto, even though the reduction in military members is staged and gradual. Once the military veto is removed, it would be at least theoretically possible—even if still politically risky—for civilian leaders to push ahead with further reforms.

#### **4.6 Dissolution of Parliament and state/regional legislatures**

As noted above, USDP proposals in the name of U Sai Than Naing would specify the functions of the NDSC under article 201. In addition to duties such as making recommendations on national security, defence

and peace matters, the council would also have a duty to advise the president to dissolve state/regional parliaments and the national Parliament on loosely defined grounds. These include situations ‘when checks and balances between the legislative and executive branches are undermined’ and when ‘one-third or more of its seats become vacant for various reasons’. Currently, no general presidential power to dissolve Parliament exists (although under article 418(a) the president can transfer legislative powers to the commander-in-chief, thereby suspending Parliament, when a state of emergency is declared under article 417). The proposal presents substantial risks to the capacity of Parliament to check the executive, especially because of: (a) Myanmar’s Assembly-independent system, in which the president is not accountable to Parliament following his or her election by that body; and (b) the lack of clarity on the exact grounds for dissolution and the need for judicial interpretation to clarify whether there are limits to this power, and if so where those limits lie. It should be noted that, while a related USDP proposal would grant the Constitutional Tribunal the power of judicial review over parliamentary actions and ‘Union-level bodies’, judicial independence is weak.

The decision-rule applied to dissolution decisions is solely by the president ‘with due regard given to the views of all council members’.

## **5 Federalism and plurinationalism**

### ***5.1 Symbolic identity and recognition***

The NLD proposes to amend article 8 of the Constitution, changing ‘The Union is constituted by the Union system’ to ‘The Union is constituted by the Democratic Federal Union system’. This amendment falls under article 436(a) and would require approval by referendum. Of course, simply calling a political system ‘federal’ or ‘democratic’ does not make it so. Nevertheless, constitutions are powerful symbolic instruments which define the community to which they apply and reflect the polity’s sense of self to the wider world. Giving formal, constitutional recognition to the principles of federal democracy may be seen, therefore, as symbolically important, even if their practical consequences are minimal.

Another symbolic element—reflecting inclusion in the political community—is the flag. The NLD proposes to change the national flag of Myanmar to one resembling the old flag of Burma, although with one large star in the canton, surrounded by 14 smaller stars. This presumably symbolizes national unity and the 14 states and regions.

### ***5.2 Appointment of chief minister and state/regional ministers***

In the existing system, the president appoints the chief minister of each state and region subject to the approval of the state/regional legislature, but the legislature can only refuse the president’s choice on extremely limited grounds. This is an impediment to full federalism, which generally requires that the state/regional governments are responsible to their own people (not imposed by the national level). The NLD makes no proposals to change this arrangement.

The USDP proposal (in the name of U Thein Tun) inverts the mechanisms for the appointment and removal of chief ministers: the president would, under this proposal, appoint the chief minister on the basis of an election by the state/regional legislature (article 261(c)). The president would only be able to refuse the appointment based on qualifications, rather than political choice (article 261(d)).

Similarly, the Tatmadaw proposal envisages a shift in the method of appointing and removing the state or regional ministers—with amendments to articles 262(e) and 262(l) enabling the chief ministers to hire and fire state and regional ministers (rather than the current situation, in which the president is involved in such appointments).

These apparent gains in the political autonomy of sub-state units are offset, however, by a USDP proposal to amend article 264 to expand the already broad grounds on which the Chief Ministers can be removed by the president. Additional grounds for removal would include ‘failure to safeguard the Constitution of the Republic’. This can be seen as a measure that enables states/regions to carve out increased spheres of autonomy, subject, however, to the ultimate controlling power of the centre over the executive branch at all levels of government. The cases of South Sudan and India are instructive on this point. In India, the president’s power to dismiss state governments has, since 1994, been used sparingly and is subject to judicial review.<sup>6</sup> In South Sudan, by contrast, the 2011 Constitution empowers the president to relieve state governors in cases of insecurity and threats to national sovereignty. The president may appoint a temporary state executive but must hold new elections within 60 days. These limitations, however, have proven ineffective in practice: since 2013, the president has removed 30 of 32 governors by decree and dismissed all en masse in early 2020.<sup>7</sup> Replacement elections have not yet been held. The South Sudan experience highlights the potential for abuse of this authority. For Myanmar, the revisions to articles 261, 262 and 264 do not clearly indicate which path may be taken. The current weakness of the Constitutional Tribunal may undercut the utility of judicial review should a conflict arise.

The extent to which the USDP and TMP proposals can be seen as a coordinated package is unclear. Yet, taken together, they would result in a small but significant step in the direction of federalism. Together with the gradual reduction of military members from the state/regional legislatures proposed by the NLD, the result would be that the chief ministers and ministers of the states/regions would be more genuinely representative of the legislature of each state/region. However, the mechanism of appointment alone is not the only relevant consideration. The power to dismiss is perhaps even more decisive. As long as this power is vested in the president—and is not subject to narrow constitutional restraints upon its exercise—the president will still be in a commanding position in relation to the state and regional governments.

### **5.3 Distribution of powers**

The NLD proposes to amend articles 188 and 196, which currently authorize state/regional parliaments and self-administered areas to enact laws related to matters prescribed in Schedule 2 (the Region or State Legislative List) and Schedule 3 (the List of Legislation of the Leading Body of Self-Administered Division or Self-Administered Area) respectively. **The amendments would expand the law-making authority of state/regional parliaments to also include matters listed in Schedules 3 (for self-administered areas) and 5 (on taxes collected by states/regions), and also expand the authority of self-administered areas over matters in Schedule 5.** As far as can be determined, this approach creates concurrent law-making and taxing powers among states/regions and self-administered areas over matters listed in Schedules 3 and 5 but does not devolve any law-making or taxing authority from the Union to subnational units.

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<sup>6</sup> S.R. Bommai v. Union of India [1994] 2 SCR 644.

<sup>7</sup> See: *Sudan Tribune*, ‘South Sudan President dismisses four state governors’, 17 August 2015, <[sudantribune.com/spip.php?article56074](http://sudantribune.com/spip.php?article56074)>, accessed 12 March 2020; *Al Jazeera*, ‘South Sudan’s Machar rejects President Kiir’s peace offer’, 16 February 2020, <<https://www.aljazeera.com/news/2020/02/south-sudan-machar-rejects-president-kiir-peace-offer-200216090638473.html>>, accessed 12 March 2020

Rather, it redistributes existing powers among the units themselves. To address potential conflicts, the NLD establishes primacy of Union law over state/regional law, and of state/regional law over self-administered area law through proposed amendments to article 198(b) and (d).

Amendments to article 198 resolve any conflict between laws enacted by state/regional parliaments and the Union (except those enacted under Schedule 3), and between self-administered areas and state/regional parliaments (except those enacted under Schedule 5), in favour of the Union Parliament and state/regional parliaments respectively. **There are no proposed alterations to the content of the schedules themselves.** It should be noted that Schedules 2 and 5 were amended in 2015. The 2015 amendments primarily related to the authority of sub-state units over investment, taxing and revenue generation, as well as responsibility to implement key services and protect rights in accordance with laws enacted at the Union level.

## **6 Liberalization (judiciary, rule of law, human rights)**

### **6.1 Constitutional Tribunal**

The **USDP proposal** from Dr. Mg Thin would alter article 322's provision on constitutional review of promulgated legislation to instead establish **power of constitutional interpretation** over 'actions undertaken by the Hluttaws . . . and the Union-level institutions'. This proposal would broaden and potentially clarify the review power of the Constitutional Tribunal.

The NLD would remove presidential discretion in determining whether a nominee to the Constitutional Tribunal is, 'in the opinion of the President, an eminent jurist' (article 333(d)(iv)).

### **6.2 Supreme Court**

**NLD proposals would assert the hierarchy of the Supreme Court by removing a clause in article 294 that currently preserves the powers of the Constitutional Tribunal and Courts-Martial in establishing the Supreme Court as the highest court in the Union.** The rationale for such a change is unclear, as are implications for the practical exercise of jurisdiction by the Constitutional Tribunal and Courts-Martial. This would require 75 per cent approval by the Union parliament followed by a referendum. The NLD would also remove presidential discretion in determining whether a nominee to the Supreme Court or a state/regional High Court is 'an eminent jurist' (articles 301(d)(iv) and 310(d)(iii)). The USDP proposal from Dr. Mg Thin would amend article 402 to render decisions of the Union Election Commission—which are currently final and conclusive—appealable to the Supreme Court. No proposals would alter the appointment process to either the Union Election Commission or the Supreme Court.

### **6.3 Courts-Martial**

In addition to removing the clause preserving the power of the Courts-Martial vis-à-vis the Supreme Court, the NLD would also adjust article 319 to specify that the Courts-Martial shall be constituted in accord with the Constitution and 'military law' rather than 'other law' as currently constructed. No other reforms as to oversight of the Courts-Martial, its status or jurisdiction are contemplated.

### **6.4 Judicial independence**

Other than removing presidential discretion in defining an 'eminent jurist' during judicial appointments (article 301(d)(iv)), no other proposed amendments would alter judicial appointments, administration,

removal or impeachment of judges, tenures, duties or powers. In essence, this restricts Supreme Court appointments to existing senior judges with at least five years' service as a member of a state/regional High Court, persons who have served as a judicial officer/law officer for at least 10 years, or those who have been practising advocates for at least 20 years; academic jurists are excluded.

### **6.5 Appointment of the attorney general and deputy**

As with the courts, the NLD would remove the discretion of the president to consider 'an eminent jurist' for appointment to the office of the Union attorney general and his/her deputy (articles 237(a)(iv) (dd) and 239(a)(iv)(dd)).

### **6.6 Human rights, limitations and derogation**

No proposals alter the substance or scope of rights provisions and virtually all remain limitable 'by law'. The NLD would prohibit hard labour as well as forced labour under article 359 as punishment for a crime duly convicted. The NLD would also remove qualifying provisions in article 376 on the duration of detention without being remanded in custody by a competent magistrate, thus limiting current exceptions at the discretion of authorities related to security, prevalence of law and order, peace and tranquillity, and other matters permitted by law.

Importantly, the NLD would also remove article 420, which currently enables the commander-in-chief to restrict or suspend 'one or more fundamental rights of the citizens' in areas under a state of emergency. Under current proposed amendments, the president and not the commander-in-chief would have full emergency powers. However, there are no proposed alternative provisions to provide the president with similar power to suspend or restrict rights beyond limitation that otherwise exist by law. Given the practical implications, this may be taken as a civilianization (rather than a liberalization) approach. This change requires 75 per cent approval by the Union parliament followed by a referendum. There is no proposed alteration to article 296(b), which suspends applications to the Supreme Court to issue writs in areas where a state of emergency is declared.

### **6.7 Emergency powers**

**The NLD proposes significant amendments to Chapter XI on states of emergency as well as to related Basic Principles.** Under article 40(b), the NLD would add a role for the president in military interventions in states/regions and self-administered areas under emergency situations. The proposal retains the 'right' of defence services to intervene, but subjects this right to orders or tasks assigned by the president. Relatedly, NLD would remove the right of the commander-in-chief to assume sovereign power in emergencies under article 40(c), reserving this to the president upon a resolution of the Union Parliament.

Under Chapter XI, the NLD proposes to eliminate articles 412 and 413. Article 412 relates to declaring emergencies where there is risk to lives, shelter and property of the public and requires the president to coordinate with the national security council. Article 413 enables local authorities to directly request assistance from defence services and allows the president to declare a military administrative order in affected areas that would grant executive and judicial authority to the commander-in-chief. It is unclear how the elimination of articles 412 and 413 would impact Union capacity to respond to natural disasters in states/regions and self-administered areas, or if such situations would be interpreted to be covered under article 410.



The NLD would retain, but amend, articles 410 and 411 on declaration of emergency and the exercise of executive power in situations wherein local administrators are unable to carry out their functions under the Constitution. The NLD would also amend articles 417 and 418, which cover situations threatening the disintegration of the Union, national solidarity or loss of sovereignty as well as the mandatory transfer of executive, legislative and judicial power to the commander-in-chief.

Proposed amendments to articles 410 and 417 would remove the president's current obligation to coordinate with the NDSC before declaring a state of emergency, vesting the initiative in the president alone or, under article 410, 'in accordance of the Pyidaungsu [Union] Hluttaw'. Under 417, an amendment would enable the president to 'implement a programme approved by the [Union] parliament'. The NLD would also add a provision to article 411 allowing the president, local administrators and the civil service to assign tasks to defence services as needed—potentially to address the elimination of this capacity through the removal of article 413. Article 418 would also be amended to remove the president's obligation, under article 417 emergencies, to transfer legislative, executive and judicial powers of the Union to the commander-in-chief. Related articles 419, 421, 422, 425, 426 and 431—which address the transfer of sovereign power to and authorities of the commander-in-chief and the NDSC in situations of emergency, as well as processes for extensions, annulments and reconstituting the government—would also be removed. Articles 427, 428, 429 and 432 would accordingly be amended to eliminate the role of the commander-in-chief and NDSC, exclusively vesting legislative, executive and judicial powers in the president under a programme approved by the Union parliament and legitimating their exercise, including organizing and holding elections to reconstitute the Parliament. A proposed amendment to article 423 would, similarly, alter the triggering event to revoke suspension of Parliament by eliminating the role of the commander-in-chief and instead consider the status of implementation of the Union-approved programme.

## **7 Miscellaneous**

In addition to the above proposed amendments, the NLD proposes a series of reforms to remove spent provisions. This includes, for example, removing a series of transitory provisions from Chapter XIV. Other minor technical revisions include adjustments to word choice in Myanmar language for references related to, for example, persons with disabilities, elderly persons and the like.

## Annex 1

<b>Constitutional provisions to which article 436(a) apply</b>
<u>Chapter I</u> 1 to 48 – Basic Principles of the Union
<u>Chapter II</u> 49 to 56 – State Structure
<u>Chapter III</u> 59 – Qualifications of President and Vice-Presidents 60 – Election of the President
<u>Chapter IV</u> 74 – Formation of the Pyidaungsu Hluttaw 109 – Formation of the Pyithu Hluttaw 141 – Formation of the Amyotha Hluttaw 161 – Formation of the Region Hluttaw or the State Hluttaw
<u>Chapter V</u> 200 – Formation of the Union Government 201 – Formation of the National Defence and Security Council 248 – Formation of the Region Government or State Government 276 – Formation of Leading Bodies of the Self-Administered Division and the Self-Administered Zone
<u>Chapter VI</u> 293 – Formation of Courts 294 – Constitution of the Supreme Court of the Union 305 – Formation of High Courts of the Region or High Courts of the State 314 – Courts under the Supervision of the High Court of the Region or the High Court of the State 320 – Number of members of the Constitutional Tribunal (but not appointment mechanism)
<u>Chapter XI</u> 410 to 432 – Provisions on State of Emergency
<u>Chapter XII</u> 436 – Constitutional amendment rules