



Constitution Brief

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About the author

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About the series

These briefs are associated with the International Institute for Democracy and Electoral Assistance (International IDEA), Gender Equality Network (GEN) and Triangle Women initiative to contextualize the 2016 Constitution Assessment for Women's Equality (CAWE) tool, which provides comparative examples from around the world for inspiration and information on good practice for anyone who is determined to contribute to gender-inclusive policy and legislative developments in Myanmar.

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About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.

Preventing Gender-Based Violence in Myanmar

Cate Buchanan

Summary

This brief explores how gender-based violence in Myanmar, particularly violence against women and girls, is addressed in the absence of a clear constitutional provision and legal protection. It is part of a three-part series, which also includes Brief No. 1, *A Guide to Being an Effective Advocate for Gender Equality*, and Brief No. 2, *Substantive Equality and Women's Representation in Public Institutions*. These briefs are associated with the International IDEA, Gender Equality Network (GEN) and Triangle Women initiative to contextualize the 2016 Constitution Assessment for Women's Equality (CAWE) tool, which provides comparative examples from around the world for inspiration and information on good practice for anyone who is determined to contribute to gender-inclusive policy and legislative developments in Myanmar.

On the topic of violence towards women and girls, the CAWE asks: 'Is the right of women to be free and protected from violence committed by the state recognized? Is the right of women to be free from violence from non-state actors (such as family members, employers, businesses, private organizations, etc.) recognized?' (Allen 2016: 92). This brief explores how the right of women to be free and protected from these forms of violence is not constitutionally guaranteed in Myanmar and how different actors approach this challenge through concurrent pursuit of justice and legal reforms, service delivery, attitude change, and continuous advocacy about the scale and impacts of this violence and the obligations of duty-bearers to address it.

1. What is gender-based violence?

Gender-based violence (GBV) is any type of violence or threat of violence that is directed towards an individual based on their sex, gender identity or sexual orientation, and can occur in both public and private life (i.e. in the home). This includes, but is not limited to, physical, psychological, sexual, verbal, and economic abuse and violence; and it is rooted in gender inequalities and unequal power dynamics between men and women that disproportionately affect women and girls. Women and girls from ethnic and religious minority groups or lower castes or classes, women living with disability, and sexual and gender minorities are often at a heightened risk of violence due to additional layers of oppression which can have a compound effect.

The term ‘violence against women and girls’ refers specifically to abuse and violence that targets these groups. As GBV is rooted in gender inequality and perpetuated by socio-cultural gender stereotypes and beliefs, it can take many different forms globally, including forced marriages and child marriage, forced pregnancy, female genital mutilation, coercive control, honour killings, sex slavery and trafficking, cybercrime, stalking, workplace harassment, restrictions on movement and access to education and health (including sexual reproductive health), and intimate partner violence—the latter being the leading form of GBV globally (for a comprehensive list of risk factors and consequences of GBV, see WHO 2012). It is estimated that one in three women will experience GBV during their lifetime, which can cause serious and long-term physical, economic, mental and reproductive health consequences (WHO 2013).

Sexual violence is a form of GBV. It is the perpetration or threat of unwanted sexual acts or advances without consent or by coercion that take place in private and public spheres. The lack of consent is the fundamental issue. Sexual violence includes but is not limited to marital rape, workplace harassment and unwanted sexual advances, forced pregnancy or abortion, and denial of access to contraceptives (WHO 2002). Sexual violence is also carried out in conflict situations by armed actors as a systematic and deliberate tactic of war, oppression and genocide, and in opportunistic ways. This is referred to as conflict-related sexual violence (CRSV). It is predicated on unequal power dynamics, the increased presence of armed actors in a region and dysfunctional command and control, among other factors.

In responding to GBV, policymakers, judges, police officers, service providers, media and others can cause further harm to those who have experienced such violence through judgemental attitudes, stigmatization, poor service provision, biased and lenient sentencing, ‘victim blaming’, using informal systems to provide ‘justice’ for survivors and much more. The prevalence of such responses has prompted the development of the concept of the survivor-centred approach, which aims to place the rights, needs and dignity of the survivor at the centre of laws, policies and services. Prioritizing the needs and choices of survivors can reduce revictimization and secondary trauma, and foster a safer and more supportive environment that tackles stigma and negative coping mechanisms, and promotes the capacity of the survivor to regain control over their lives. This approach is built on four guiding principles (GBV AoR 2019):

1. **Safety**—prioritizing the safety of the survivor, their family and those that assist them.
2. **Respect**—supporting the wishes, choices, rights and dignity of the survivor.
3. **Confidentiality**—respecting the survivor’s right to choose whom they inform and not disclosing any information at any time without the informed consent of the survivor.
4. **Non-discrimination**—treating all survivors with fairness and equality, regardless of their religion, ethnicity, nationality, gender, age, sexual orientation or disability.

Figure 1 shows what the survivor-centred approach looks like (left-hand column), compared to a response that does not prioritize the rights, needs and choices of the survivor (right-hand column).

Figure 1. Survivor-centred and stigmatizing responses to gender-based violence



Source: GBV AoR (2019: 15)

2. International law and norms

The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) aims to tackle the root cause of GBV: discrimination against women and girls. Myanmar is a signatory to CEDAW having agreed to implement it without reservations in 1997. In doing so, the state of Myanmar agreed to develop constitutional provisions and laws to implement the Convention without delay (see Box 1). In signing the United Nations Convention on the Rights of the Child in 1991, Myanmar also agreed to end violence against both girls and boys (article 19). The 1993 UN Declaration on the Elimination of Violence Against Women is another significant global standard that Myanmar as a UN member state should adhere to (United Nations General Assembly 1994). These norms were further advanced by the 1995 Beijing Platform for Action, through which states agreed 12 priorities to accelerate progress to implement CEDAW, including a focus on ending GBV. The Committee on the Elimination of Discrimination Against Women also issues General Recommendations periodically to further clarify states' responsibilities in implementing CEDAW. These cover a host of provisions, including eradicating GBV (see in particular General Recommendations 12, 19, 30, 31 and 35). The Committee also calls for exceptional reports outside of the normal reporting cycle. It issued one such report on Myanmar in relation to the situation for women and girls in Rakhine in 2018. Shadow reports have also been released by women's rights organizations. In the course of its work, the Committee has consistently raised the slow progress on legal protection and response to GBV as a pressing concern.

Box 1. CEDAW article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- a. To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- b. To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- c. To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- d. To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- e. To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- f. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- g. To repeal all national penal provisions which constitute discrimination against women.

This advance to tackle GBV globally was extended and cemented by the 1998 Rome Statute of the International Criminal Court, establishing the court and its powers to prosecute crimes against humanity, war crimes, genocide and crimes of aggression. Sexual violence is considered across these four concerns. From 2000 to the present, the UN Security Council has agreed successive resolutions (SCRs) contributing to the Women, Peace and Security (WPS) agenda and which focus on women's political participation, conflict prevention, protection from violence and relief and recovery in equal measure. The SCRs have explicitly recognized the need to prevent sexual violence against women and girls in conflict situations and the importance of laws to protect and

prevent such violence, including ending the impunity perpetrators benefit from. The WPS agenda also recognizes that violence is a major barrier to women's participation in peace processes and public decision-making more broadly.

At the regional level, Myanmar also signed the 2004 Association of Southeast Asian Nations (ASEAN) Declaration on the Elimination of Violence Against Women. Along with Brunei Darussalam, Myanmar stands out in ASEAN for having no law to protect women from violence.

3. Gender-based violence in Myanmar

Over two decades after signing CEDAW, Myanmar still does not have an appropriate constitutional provision or a law that addresses the disproportionate violence perpetrated by men against women and girls. An official GBV prevalence study was to commence in 2021 but was postponed due to the military takeover in February 2021. Women's rights organizations have conducted studies which indicate that half of the women surveyed had experienced one or more forms of GBV (GEN 2014). The legacy of decades of military rule, deep-seated patriarchal norms across all ethnic and religious groups, and hierarchal societal structures, together with male dominance in public life and institutions, powerfully combine in Myanmar to reinforce gender inequality—the basis of GBV, including CRSV perpetrated by armed actors. Since the 2021 military takeover and the descent into violent conflict, the military and police have been linked to GBV including in sites of detention.¹

Women and girls are relegated to traditional gender roles and seen as inferior to men and boys, leading to the marginalization and lack of meaningful participation in leadership and decision-making roles (Buchanan and Williscroft 2016). Due to these patriarchal norms, GBV is typically tolerated as an accepted form of violence, and ignored, fostering a culture of stigma and shame for survivors and their families. In turn, this leads to a reluctance to report incidents of violence to authorities (GEN 2018) especially in a context where policing has been weak for generations and an instrument of authoritarian rule. The situation is further exacerbated by the over-representation of men in the police force, presenting another barrier to women reporting and having to disclose humiliating experiences and victimization. Intersectionality—recognition of multiple identity markers such as age, ethnicity, gender, disability—also plays a role in silencing some women in areas outside of control of the de facto authorities where no services exist and where it is considered shameful to speak out against your own ethnic group, even when a member has perpetrated violence against you. In Myanmar, some women and girls are forced to marry their abuser to avoid family dishonour or are banished when they bear children born of rape. The trafficking and exploitation of people from Myanmar to regional countries, particularly China and Thailand, also exposes many women and girls to sex trafficking and forced impregnation.

Authoritarian rule in Myanmar has also been associated with minimal state expenditure on health, justice and social welfare services, further exacerbating difficulties for those escaping GBV. Service provision gaps and challenges abound with weak and limited referral systems; lack of access to information on support services; few refuges or shelters for women and children escaping violence and limited access to existing shelters and services due to associated costs; limited transportation options or lack of safe referral options within an area; and minimal formal support from authorities with a lack of protocols for responding to GBV (GEN 2018; Buchanan and Thin Aung 2020). In internally displaced persons camps and settlements, these challenges are amplified and access to services is further limited. Some healthcare professionals may not have adequate knowledge of how to respond to reports or how to provide effective care for survivors of violence.

Civil society organizations (CSOs) and local women's rights organizations have stepped into the critical service gap and lead GBV response and prevention interventions, despite facing the barriers of limited resources and capacity to provide adequate survivor-centred support. Many women's organizations are diverted from their original goal of advancing women's rights in their communities or states into becoming frontline service providers regardless of their competency or confidence to do so. Service provision may not always align to international good practice and the

1. 'UN Special Representative Patten expresses grave concern over reports of sexual violence in detention setting in Myanmar', 25 June 2021. Available at <www.un.org/sexualviolenceinconflict/press-release/un-special-representative-patten-expresses-grave-concern-over-reports-of-sexual-violence-in-detention-setting-in-myanmar-3/>.

need for assistance to women's organizations to evolve services—particularly to survivor-centred approaches—is pressing. Furthermore, none of this work is constitutionally guaranteed and there is no ability to cite the highest law in the land as the rationale for protecting women and girls from violence when justifying CSO interventions to sceptical, or even hostile, local authorities and powerholders.

3.1 Conflict-related sexual violence

In Myanmar, violent conflict between the Myanmar Armed Forces (Tatmadaw) and various ethnic armed organizations (EAOs) commenced shortly after Myanmar gained independence. These protracted conflicts are multifaceted with complex drivers and manifestations, one of which is CRSV. Since 2015 there has been a formal political dialogue and ceasefire process in place, encompassing 10 of the EAOs, the government and Tatmadaw. Prospects for lasting peace are unclear following the 2021 military takeover. In more recent years violent conflict has grown exponentially in Rakhine State, resulting in the unprecedented displacement of Rohingya people and large-scale perpetration of CRSV.

Following events in Rakhine State in 2017, the UN Special Representative for the Secretary-General on Sexual Violence in Conflict officially listed the Tatmadaw as a CRSV perpetrator in March 2018 (United Nations 2018a). In December 2018, the Government of Myanmar signed a Joint Communiqué with the UN on the prevention and response to CRSV (United Nations 2018b). The Rakhine violence also prompted other international mechanisms of investigation and accountability. The UN Human Rights Council established the Independent International Fact-Finding Mission on Myanmar, which found that sexual violence and GBV were a hallmark tactic of war that had been perpetrated by the Tatmadaw, Border Guard Police, Myanmar Police Force and some EAOs against women and girls from ethnic and religious minorities since 2011 (UNHRC 2019). Due to the widespread and systematic use of CRSV by armed actors, the Fact-Finding Mission prepared and issued a thematic report in 2019, which focused solely on the perpetration of sexual violence against women, girls, transgender people, and men and boys from ethnic minorities in Kachin, Northern Shan and Rakhine states. This was a significant step and provided clear evidence of the intersectional nature of such violence, which is layered with religious, sexual orientation and ethnic oppressions. In 2019 The Gambia also brought a case before the International Court of Justice in relation to the conduct of the Tatmadaw in Rakhine, with sexual violence a prominent feature of the allegations.

Seeking to adhere to the provisions of the Joint Communiqué and UN SCRs to implement 'specific time-bound commitments to combat sexual violence', the Government of Myanmar established the National Committee on Prevention and Response to Conflict-Related Sexual Violence, led by the Ministry for Social Welfare Relief and Resettlement (MSWRR) and the Ministry of Defence, to develop an action plan (United Nations 2013). At the end of 2020, a draft national action plan to prevent and respond to CRSV has still not been finalized. Public commitments such as this are significant when a lack of legal protection, including constitutional protection, against GBV is the status quo.

4. Addressing gender-based violence in Myanmar

Following the Beijing Declaration and Platform for Action at the Fourth World Conference on Women in 1995, the MSWRR established the Myanmar National Committee for Women's Affairs (MNCWA) (Aye 2019). In 2013, the MNCWA developed the National Strategic Plan for the Advancement of Women (NSPAW) 2013–2022, in line with the Beijing priorities and CEDAW commitments, with key objectives to prevent and respond to all forms of violence against women and girls (Aye 2019).

Again, this non-binding plan is significant because it provides a base from which to secure more commitments, including laws and policies, over time. The need for legal benchmarks, set within the parameters of democratic policymaking, cannot be overstated, particularly as the most relevant law for addressing GBV is the 1861 Penal Code (Myanmar 1861), which contains outdated and discriminatory provisions. This law defines rape as a man having 'sexual intercourse' with a woman when it is against her will, without consent, coerced, or when the woman is 13 years old or

younger. Under the Penal Code, marital rape is effectively legal, provided the wife is over 15 years of age (raised from 13 years in 2016).

4.1 Efforts to secure a modern law to address violence towards women and girls

The need for a comprehensive modern law addressing violence against women and girls is pressing, as the 2008 Constitution does not signal that GBV has no place in Myanmar and that a whole-of-society approach is required to eliminate it. The 2021 military takeover has seriously disrupted the efforts to build more legal protection and standards to end GBV. The contentious status of the Myanmar Constitution and the reform challenges are well documented (Williams 2014). Hence, the focus on securing a comprehensive law to address GBV in recent years, including in the momentum to modernize Myanmar under the U Thein Sein transitional government and in lieu of formal constitutional reform.

A draft Prevention of Violence Against Women (PoVAW) law was introduced in 2013–2014 but progress has since stalled under successive governments despite hundreds of other laws being passed in the period 2011–2015, including laws that directly contribute to gender inequality such as the ‘Four Laws on Race and Religion’—the Population Control Law, the Buddhist Women’s Special Marriage Law, the Religious Conversion Law, and the Monogamy Law—that set back women’s rights. Various changes not clearly communicated to or discussed with CSOs or the public also shroud the current draft in doubt. Concerns were raised that the draft law in its current form (approximately end of 2020) failed to adequately provide meaningful protection from violence for a number of reasons, including: (a) inconsistencies with pre-existing laws including the Penal Code and conflicting definitions of rape; (b) failure to meaningfully address and eliminate marital rape; (c) failure to protect communities (especially ethnic communities) affected by conflict; (d) failure to address impunity for military actors regarding CRSV, which is guaranteed in Myanmar’s Constitution (article 445), resulting in a two-tier system of accountability depending on who the perpetrator is; (e) the lack of inclusive language to ensure prevention of violence for all genders and ages; and (f) failure to safeguard sexual and reproductive health rights for women subjected to sexual violence (WLB 2019; Global Justice Center 2020).

Leading women’s groups in Myanmar have long called for the PoVAW law to align with international standards and commitments on GBV. However, despite its shortcomings, CSOs, women’s organizations, the UN and the international community alike continue to advocate for the PoVAW law to be adopted in the hope that over time, further amendments to strengthen the law will enhance the protection it provides. The PoVAW law is seen as an important starting point to improving the legal protection of women and girls. CSOs and the international community have utilized international campaigns, such as 16 Days of Activism to End Gender-Based Violence, to collaborate with the government ministries; undertake longer-term training of police and judges; develop guidelines to promote consistent and non-discriminatory responses (for example, on clinical management of rape); challenge harmful customary and informal justice systems; and undertake media campaigns to shift public perceptions of the acceptability and pervasiveness of violence, amid broader efforts to address the many ways in which gender inequality manifests in Myanmar.

Case study: legal and constitutional reforms in Tunisia

This case study builds on the one included in Brief No. 2, *Substantive Equality and Women’s Representation in Public Institutions*. It tells the next part of the story about what advocates, analysts, parliamentarians, and feminist organizations in Tunisia have achieved to bring to life article 46 of the 2014 Constitution, which commits the state ‘take all necessary measures to eradicate violence against women’ and article 21, which guarantees that ‘all citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination’.

Following the Tunisian democratic uprising in 2011 and the mobilization of women to positively influence the constitution-making process, a National Action Plan for the Elimination of Violence Against Women was adopted in 2013. This plan, combined with the articles in the Constitution agreed the following year, set the stage for the development of a dedicated law to prevent violence against women. In Tunisia—as in Myanmar—such violence is highly prevalent with government-endorsed surveys revealing that one in two Tunisian women report violence in their lifetime,

according to a 2012 survey by the Tunisian National Board for Family and Population (GCI n.d.). A 2016 survey by the Ministry of Women, Family and Children concludes that 60 per cent of Tunisian women experience abuse in the home and among family (IDLO 2017).

Parliamentarians finally passed a law on the prevention of violence against women in 2017 and it entered into force in 2018. Over 43 articles, it breaks new ground with a human rights approach to outdated and discriminatory laws embedded across Tunisia's legal framework that previously rendered women second-class citizens and instilled a culture of acceptance of GBV. For example, Tunisia—like Myanmar and many other countries—formerly relied on an antiquated penal code with provisions that included rapists being able to escape criminal proceedings if they married the woman or girl they had raped. The new approach to addressing violence revamped parts of the Penal Code and now means that perpetrators of sexual violence face a 20-year prison sentence if convicted. The age of consent has also been raised from 13 to 16 years of age, with prison terms increased for non-consensual sex with a minor. Importantly, consent is now deemed to be absent if the individual is under 16 years of age. Sentences are doubled if the perpetrator is a relative of the victim.

The 2017 law applies a contemporary understanding of violence. The definition is drawn from the *UN Handbook for Legislation on Violence Against Women* and includes physical, sexual, psychological, and economic dimensions, ensuring a holistic approach to the many ways in which such violence manifests beyond physical abuse (UN Women 2012). It also contains a focus on prevention, including a direction to a host of government ministries to ensure their staff are schooled in the legal provisions and obligations and contribute to its implementation. The focus on prevention is also underpinned by data collection through the creation of a national observatory to prepare annual public reports to track implementation of the law. This is a good example of a whole-of-government approach, though in practice implementation has fallen predominantly to the Ministry of Women, Family and Children, and inadequate budgetary allocations for implementation of the law have been criticized.

In Tunisia and more widely in the region, the law has been viewed as a decisive break from the male-dominated law-making of the past. There are, however, concerns that it is not comprehensive and does not tackle the issues of so-called 'virginity testing', which is still practised and permissible, and inheritance laws, which remain predicated on Islamic legal traditions and provide females with only half shares of property. The law also deliberately did not address gender-based cybercrime, as a new law was being proposed to address all forms of cybercrime, but this has not yet come to pass and there are currently no laws that cover online sexual harassment and intimidation, stalking and abuse.

The steady progress, from the 2013 National Action Plan to the provisions in the 2014 Constitution to the new law in 2017, is a vivid example of the astute mobilization of women to eradicate violence and the many levers that are required for change to take hold. In this light, we start to see the effect of a 'critical mass' as more women start to shape and determine public policy (see Box 2 for an overview of this and other concepts in this brief). With more women in parliament shaping decisions, more women in the judiciary influencing a gender-sensitive interpretation of law, and more women in police services promoting gender-responsive security, a gradual shift is underway in Tunisia, providing inspiration for others and demonstrating what more gender-inclusive societies can both look like and achieve.

(Sources: Mahmoud 2017; GCI n.d.; IDLO 2017; Boukhatia 2020)

Box 2. Key concepts and terms

Formal equality refers to the equal treatment of women and men before the law. This is addressed in constitutions with provisions that (a) prohibit discrimination because of sex and gender (non-discrimination provisions); and (b) state that women and men are equal (equality provisions). Formal equality is important in the context of exercising many rights, such as the right to free speech and to due process (fair and equal legal procedure). Due to historical disadvantage and the myriad of ways in which discrimination and bias are embedded—consciously and unconsciously—in our societies formal equality could take many decades to be achieved if the status quo prevails.

Substantive equality acknowledges historical disadvantage and seeks to ‘adjust’ for past discrimination and political, economic and social barriers women face in accessing opportunities, exercising their rights, influencing and making decisions. By considering women’s lived realities, substantive equality not only aims for equal treatment but places primary emphasis on lowering the barriers to accessing opportunities and equality of outcomes.

Gender parity is the equal representation of men and women in processes and institutions.

Temporary Special Measures (TSMs) are actions taken by the state (and other actors) that target women and/or girls to accelerate gender equality and women’s empowerment. Article 4 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) allows for TSMs such as quotas to increase the numbers of women in a decision-making process. TSMs were affirmed in CEDAW General Recommendation No. 25 (UN Women n.d.).² They are not regarded as discriminatory, instead they are understood as positive actions intended to create opportunities for women that will otherwise not be possible due to men not being willing.

Critical mass refers to the minimum or ‘critical’ proportion of women in male-dominated spaces that is necessary for women to be heard, exert their influence, and participate effectively.

Positive actions can be found in constitutions, legislation, executive administrative orders, budgets and regulations, as well as action plans, policies and programmes to remedy women’s unequal position in society.

Special Measures are related to formal equality and linked to the recognition of certain differences between women and men that can result in discrimination. For example, maternity leave should be established and not subject to redefinition or change given the fact that women bear children and require a range of protections related to this (e.g. employment security).

Gender-sensitive refers to the deliberate inclusion of the perspectives, needs and rights of women, men, boys and girls in a process, policy, law, programme or statement. This is also known as gender mainstreaming.

Gender-responsive means bringing gender-sensitive policies or processes to life through action. Values, principles and concepts are operationalized through gender-responsive actions—namely, the practical capacity to address gender inequalities through implementation efforts that are feasible, monitored and evaluated.

Gender-inclusive refers to the combination and result of ‘gender-sensitive’ (in theory/design) and ‘gender-responsive’ (in operation) approaches that enable and enhance women’s equal representation and full and meaningful participation in decision-making processes.

² General Recommendations are interpretations of international conventions to assist with their implementation. They are developed by expert committees.

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The MyConstitution project works towards a home-grown and well-informed constitutional culture as an integral part of democratic transition and sustainable peace in Myanmar. Based on demand by Myanmar stakeholders, expert advisory services are provided to those involved in constitution-building efforts. This series of Constitution Briefs is produced as part of this effort.