

# THE NEED FOR A CONSTITUTIONAL SETTLEMENT TO FURTHER THE REFORM PROCESS IN MYANMAR (BURMA)

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## I. INTRODUCTION

During her visit to Australia in November 2013, Daw Aung San Suu Kyi—now a Myanmar legislator—stood on the center stage of the Sydney Opera House facing an applauding crowd of Australians who stood with her through the many years of her struggle for a democratic, pluralistic, tolerant, and free Myanmar.<sup>1</sup> Amidst the crowd’s well-placed applause and laughter in her honor, Daw Aung San Suu Kyi made a statement on that day that we consider key. She said: “So this present government[,] which is in part through the 2010 elections[,] is carrying out the seventh part of [its] road map . . . by which th[is] government will bring Burma to what they described as disciplined democracy. Now that’s very suspect.”<sup>2</sup> We agree. We approach this article with some combined thirty-five years of experience in engaging with Myanmar and her people. Given this experience, we know that Myanmar has an unpredictable future. We also know there are some who have attempted to pre-determine that future.

Over the last sixty plus years in Myanmar, since the 1947 Panglong Agreement,<sup>3</sup> there has been considerable effort to create a bona fide and lasting constitutional system of government. However, these efforts—evidenced from the 1947, 1974, and 2008 constitutions—have failed because of structural weaknesses. The main weakness has been the imbalance of power between the military government and the numerous ethnic minority groups. As Daw Aung San Suu Kyi raised in her suspicion of the military-led government, this plan to create “disciplined democracy” appears as merely another unilateral and superficial effort. It is more akin to the past failings that seek to appease and maintain control

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1. This article will use the term Myanmar rather than Burma, as this is currently in greater use within the international community.

2. Daw Aung San Suu Kyi, Address at the Sydney Opera House (Nov. 28, 2013) (transcript available at <http://newsroom.uts.edu.au/news/2013/11/aung-san-suu-kyi-addresses-the-sydney-opera-house>) (describing that the military government created a seven step roadmap to bring about democracy, which included holding free and fair elections; adding that the U.N. admits that the elections held in 2010 were flawed).

3. The Panglong Agreement was drafted by U Pe Khin. The Panglong Agreement emerged from a process that included two meetings (one in Chin State and another in Shan State) in 1946.

rather than engage and share power. If there is to be a meaningful constitutional government, then the central issue is one about the structure of the reform process for creating a constitutional system. This structure must create a process that incorporates all parties meaningfully both to satisfy military stakeholders and to involve minority groups.

This article argues that the answer to this structural question is a need for a constitutional settlement—a political pact. Such a pact must be one that embraces federalism as the structural solution. A federalist system would divide power to protect against military-led government abuses, engage and include minority groups, and unite the nation with a single constitutional identity that brings stability and peace. This paper analyzes the past structural failings to achieve a democratic, constitutional system to highlight the structural problem. It then proposes that a constitutional settlement, reminiscent the 1947 Panglong Agreement, is necessary and that a form of federalism is the structural solution for this.

To this end, Part II considers the historical basis for the emerging constitutionalism within Myanmar from the 1947 Panglong Agreement to the 2008 constitution. Part III contains the crux of our argument—that there is a need for a constitutional settlement in Myanmar. This section considers the relevant federalism literature situated within an argument for a pragmatic federalism in Myanmar to create such a settlement. Part IV contains a discussion of that relevant literature. Part V discusses Myanmar's new political structure and the potentiality of constitutional settlement.

## II. EMERGING CONSTITUTIONALISM IN MYANMAR

A constitutional settlement has long eluded Myanmar despite three previous periods of constitutional government since the people regained independence at 4:20 a.m. on January 4, 1948.<sup>4</sup> There was a constitutional democratic period from 1948 to 1962—with an interregnum of a military caretaker government from 1958 to 1960—led by U Nu and the Anti-Fascist Peoples Freedom League (AFPFL).<sup>5</sup> Then, from 1962 to 1968, there was a military government led by General Ne Win.<sup>6</sup> This included the rule of the Revolutionary Council from 1962 to 1974 and was followed by the constitutional socialist period from 1974 to 1988 under the Burma Socialist Programme Party (BSPP), also known as the Lanzin Regime.<sup>7</sup>

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4. See CHRISTINA FINK, *LIVING SILENCE: BURMA UNDER MILITARY RULE* 23 (2001) (explaining that the early hour was selected by Burmese astrologers as the most propitious for the country's new beginning).

5. See *id.* at 23–30 (detailing Myanmar's democracy experience and the problems that arose during that time period); see also SOE MYINT, *BURMA FILE: A QUESTION OF DEMOCRACY* 8–9 (2004) (describing U Nu's rise to power as prime minister in 1948, the political turmoil after the split in the AFPFL in 1958 when the military stepped in, and the 1960 elections that brought U Nu briefly to power).

6. See MYINT, *supra* note 5, at 9–10 (recounting the political, judicial, and religious changes made when General Ne Win took control of Myanmar); see also FINK, *supra* note 4, at 31–35 (detailing General Ne Win's rise to power and his successes as a leader during that time).

7. MYINT, *supra* note 5, at 9–10 (explaining General Ne Win's and the Revolutionary

Finally, in 2011, the disciplined democratic constitutional period under U Thein Sein and the Union Solidarity and Development Party (USDP) commenced.<sup>8</sup>

Not since the 1947 Panglong Agreement,<sup>9</sup> a political pact forged to form the Federal Union of Burma, has there been such a political moment to work for constitutional change by way of constitutional advances as presents itself today. Constitutional settlement is the ultimate goal, but whether Myanmar is on the cusp of achieving that—over sixty years since it was agreed to—remains an open question. However, the political conditions, as constrained as they are by the military-led Seven-Step Roadmap to Disciplined Democracy<sup>10</sup> and 2008 constitutional framework,<sup>11</sup> have the potential to secure constitutional advances and set the scene for constitutional settlement.

The United Nationalities Federal Council (UNFC)<sup>12</sup>—the key alliance of Ethnic Nationalities armies and organizations<sup>13</sup>—has emphasized that the Panglong Agreement was struck to establish national equality, self-determination, and

Council's rise to power after a coup on March 2, 1962, the banning of all political parties except the BSPP in 1964, and the eventual one-party state created in 1974).

8. See WILLIAM J. TOPICH, *THE HISTORY OF MYANMAR* 141–44 (2013) (observing the transfer of power in 2011 to U Thein Sein and the significant reforms he began implementing shortly after).

9. The Panglong Agreement, Myan., Feb. 12, 1947, available at <http://www.blc-burma.org/?q=node/136> (declaring that the Federal Union of Burma would have a central government but that each area of the union would have autonomy to handle a majority of the affairs for that area, including independent legislative, judicial, and administrative powers).

10. See David Arnott, *Burma/Myanmar: How to Read the Generals' "Roadmap" – A Brief Guide with Links to the Literature*, IBIBLIO (Apr. 18, 2004), [http://www.ibiblio.org/obl/docs/how10.htm#\\_ftn3](http://www.ibiblio.org/obl/docs/how10.htm#_ftn3) (observing that the roadmap will not be any different than the 1993 to 1996 National Convention process, which had representatives consisting of a few elected civilians and a majority of serving military officers drafting the constitution, which ensured that the military retained its power throughout the democratic process and Myanmar remained a military-dominated state).

11. See, e.g., CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008; see Sai Wansai, *Union of Burma: Rejecting Panglong Agreement could Reignite Extreme Type of Self-Determination*, SHAN HERALD (Aug. 29, 2011), [http://www.shanland.org/index.php?option=com\\_content&view=article&id=3988](http://www.shanland.org/index.php?option=com_content&view=article&id=3988) (observing that the 2008 constitution gives the military a significant amount of power over the decision-making process in the union and prevents a truly united union between the military and the non-Burman ethnic groups).

12. See UNFC - *United Nationalities Federal Council*, MYANMAR PEACE MONITOR, <http://www.mmpeacemonitor.org/stakeholders/unfc> (last visited Oct. 1, 2014) (describing the UNFC, its structure, and its objectives).

13. The term “Ethnic Nationalities” refers to the groups of ethnic minorities that make up Myanmar. The country has over 100 ethnic groups, languages, and dialects, and Ethnic Nationalities make up almost 40% of the nation's population. See MARCIA ROBIU, CMTY. ORG. & RIGHTS EDUC. (CORE), *EXCLUDED: BURMA'S ETHNIC NATIONALITIES ON THE MARGINS OF DEVELOPMENT & DEMOCRACY*, 12 (2012), available at <http://www.burmalibrary.org/docs15/Excluded-en-red.pdf> (describing Myanmar's ethnic groups); see also *Burma's Ethnic Minorities*, CANADIAN FRIENDS OF BURMA <http://www.cfob.org/burmaissue/ethnicGroups/ethnicGroups.shtml> (last visited Oct. 14, 2014) (explaining that Ethnic Nationalities sought autonomy after independence in 1948 and worked with Burman leaders to amend the 1947 constitution).

democracy.<sup>14</sup> Instead, civil war and instability have continued for more than sixty years, with conflict besieging Myanmar, leading to the oppression of democratic development during this long period of instability.<sup>15</sup>

Myanmar's constitutional moment may be upon it with, among other things, the Pyidaungsu Hluttaw<sup>16</sup> forming a Constitution Reviewing Committee (PHCRC).<sup>17</sup> It is large, like most committees in Myanmar, with 109 members.<sup>18</sup> Although clunky and containing some of the military regimes' command and control language and adherence to some of the constitutionally-mandated, draconian, basic principles, the PHCRC's terms of reference have a wide scope, allowing the committee to review the country's large constitutional capital, which includes taking note of historical artifacts and events.<sup>19</sup> This, of course, could be read narrowly, but the PHCRC has the opportunity to read it broadly. Given that scope, combined with the invitation for public submissions, the PHCRC may receive some submissions carrying this constitutional capital. The terms of reference also consider the obligatory paternalistic dictate about considering the peoples' political maturity.<sup>20</sup> Not since the 1947 constitutional government period has the Parliament had such a substantial role in constitutional review.<sup>21</sup> The PHCRC is no different from past constitutional committees regarding its size and warnings, but it ostensibly could help chart a constitutional course that secures constitutional advancement and further lays the groundwork for constitutional settlement.

14. See Wansai, *supra* note 11 (explaining that ethnic groups like the UNFC want self-determination, equality, and democracy, which are emphasized in the Panglong Agreement, but not in the 2008 constitution); see also *Burmese Government Rejects Peace Talk Based on Panglong Treaty*, KACHIN NEWS GRP. (Aug. 23, 2011), <http://www.kachinnews.com/news/2029-burmese-government-rejects-peace-talk-based-on-panglong-treaty.html> (stating that the UNFC has rejected the government's offer for peace talks because of the government's refusal to consider the Panglong Agreement).

15. See MYINT, *supra* note 5, at 9 (describing the effect of the military coup in 1962, which abolished the constitution, suspended fundamental rights, and removed any democratic process, replacing it with all the legislative, executive, and judicial powers vested in one person).

16. See Kay Latt, *Panglong Agreement, Federal Principles and the 2008 Constitution*, THE IRRAWADDY (Oct. 19, 2009), [http://www2.irrawaddy.org/print\\_article.php?art\\_id=17017](http://www2.irrawaddy.org/print_article.php?art_id=17017) (explaining that Pyidaungsu Hluttaw is the term given to the joint houses of the National Parliament, which consists of an upper house—Amyotha—and a lower house—Pyithu).

17. Press Release, Pyidaungsu Hluttaw, Joint Committee for Reviewing the Constitution of the Republic of the Union of Myanmar Press Release (Oct. 3, 2013), available at <http://www.myanmargeneva.org/pressrelease/constitution%20review%20committee%204%20oct.pdf> (describing the measures taken to reform the 2008 constitution and seeking advice).

18. Tha Lun Zaung Htet, *Burma's Constitutional Review to Stay Confidential Until Next Year*, THE IRRAWADDY (Aug. 28, 2013), <http://www.irrawaddy.org/reform/burmas-constitutional-review-to-stay-confidential-until-next-year.html>.

19. See *id.* (“The joint committee will consider the country's historical background as well as current political, economic and social realities, the political maturity of the people, the national reconciliation process, rule of law and stability.”).

20. *Id.*

21. See MARCUS BRAND, ‘A BIRD IN THE HAND...’ - THE FEDERAL PATTERN OF MYANMAR'S 2008 CONSTITUTION 6 (2012), available at [http://www.academia.edu/1883468/A\\_bird\\_in\\_the\\_hand\\_-\\_The\\_federal\\_pattern\\_of\\_Myanmars\\_2008\\_Constitution](http://www.academia.edu/1883468/A_bird_in_the_hand_-_The_federal_pattern_of_Myanmars_2008_Constitution).

There has been extensive and intelligent collaboration among the parties desiring democracy shaped by a federal state, including Myanmar's Ethnic Nationalities parties, with the value found within the relationships forged for common constitutional and political purposes. Those who have a working knowledge or democratic instincts understand that constitutional, democratic federalism is the best form of state for a country that is multicultural, multiethnic, multilingual, and multi-religious, albeit with a Buddhist majority.<sup>22</sup> In short, the unity sought by all such parties in Myanmar is best accomplished by recognizing and sanctioning the diversity of Myanmar as a constitutional resource.

If the Pyidaungsu Hluttaw and the executive government can find a way to include and incorporate this valuable constitutional resource, then it will achieve two things that may facilitate constitutional advancement. First, it would demonstrate to the political actors, including the Ethnic Nationalities, that the military and the government are serious about constitutional change. Second, it may be used as the platform to construct the framework for constitutional settlement, which may calm the concerns of those Ethnic Nationalities who are apprehensive about abandoning the 2008 constitution.

This article argues that the time to seek and secure constitutional advances and constitutional settlement is now. Secession has been expunged from the constitutional debate and is no longer the objective of the Ethnic Nationalities organizations.<sup>23</sup> Moreover, federalism is on the lips of the parliamentary leaders, including the current president.<sup>24</sup> Many factors are creating a political climate conducive to constitutional advance, including the advent of the constitutional review of the 2008 constitution, the peace process, the sitting of the National League for Democracy (NLD) in Parliament, and the recognition from military leaders that political frameworks are needed to secure political solutions for peace.

This is said with a degree of optimism, but tempered by the realities of Myanmar's protracted political history, which is shrouded in a miasma of distrust. Daw Aung San Suu Kyi has said very publicly that she is "cautiously optimistic."<sup>25</sup> This is the most precise and accurate political assessment thus far. She has also warned that the country could go back to military government, another precise and accurate assessment.<sup>26</sup>

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22. *See id.* (discussing the benefits of a constitution featuring both federalist and democratic characteristics); ROBIU, *supra* note 13, at 25 (observing that the majority religion in Myanmar is Buddhism).

23. *See* Saw Yan Naing, *Where is Ethnic Reconciliation Going?*, THE IRRAWADDY (Oct. 23, 2013, 6:24 PM), <http://www.irrawaddy.org/news-analysis/news-analysis-ethnic-reconciliation-going.html?print=1> (explaining the ethnic leaders' decision to refrain from seeking secession during the government negotiations).

24. *See id.* (discussing that the ethnic leaders have considered federalism during their peace talks and government negotiations).

25. David Ljunggren, *Myanmar's Suu Kyi Says Reforms Could be Reversed*, REUTERS (Feb. 29, 2012), <http://www.reuters.com/article/2012/02/29/us-myanmar-suuky-i-cabinet-idUSTRE81S1N020120229>.

26. *See id.* (explaining that ultimate power still rests with the army, so the country is not yet

### III. SEEKING A CONSTITUTIONAL SETTLEMENT IN MYANMAR

Everyone, it seems, agrees on the need for constitutional change. Not everyone, however, agrees on whether to amend the 2008 constitution or to write a new one. If everyone had the freedom to choose between these options, then most would choose the latter. Most agree to go with constitutional amendment, as they are not free to choose due to the number of military still in Parliament who supported the 2008 constitution. A large number of Ethnic Nationalities organizations, notably the UNFC and the United Nationalities Association (UNA), have stated a preference for a new constitution.<sup>27</sup> The NLD likewise is discussing this matter as part of the whole debate and are asking the public's views on this and also on what needs changing.<sup>28</sup>

This section then speaks to Myanmar's constitutional history replete with constitutional capital, focusing on the lack of a constitutional settlement and demonstrating how the political fault line of federalism was equated with secession. It also discusses how Myanmar's appropriation of politics by the Armed Forces (Tatmadaw) for over sixty years has blocked a political pact, which has prevented constitutional settlement. Today's political conditions are ripe to lay the groundwork for settlement. The goal of this narrative is to set the scene for constitutional settlement despite the lack of constitutional consensus and to secure constitutional change by advancing both the constitutional and political change agendas.

The past and prevailing political conditions are recounted in this article to understand and to support Myanmar's slow march to a constitutional settlement. This last phase of the independence struggle, which began in 1988, needs to be secured with a constitutional settlement. Such a settlement cannot be the panacea for all of Myanmar's ills, but it is the basis to secure national reconciliation and to quell the clamor for stability and the rule of law.

Settlement can only be had by political means, which, again, have been missing for some sixty years. The means to achieve constitutional settlement was wrested from Myanmar's democratically elected political leaders when General Ne Win seized power in a military coup in March 1962.<sup>29</sup> In seizing power, he blamed

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past a point where there is no danger of a return to military government, and the democratic movement is still reversible).

27. See Nang Mya Nadi, *Ninety Percent of Karen Locals Want Constitution Changed: Survey*, DEMOCRATIC VOICE OF BURMA (Oct. 10, 2013), <https://www.dvb.no/news/ninety-percent-of-karen-locals-want-constitution-changed-survey-burma-myanmar/33292> (explaining that the UNFC has already outlined plans to completely rewrite the constitution out of a desire for greater ethnic autonomy and rights under a federal structure); see also Nan Tin Htwe, *Constitution Rewrite Push from Ethnic Groups 'Radical'*, MYANMAR TIMES, Aug. 11, 2013, <http://www.mmtimes.com/index.php/national-news/7803-peace-centre-warns-against-extreme-constitution-demands.html> (stating that after a four day meeting, the UNFC announced its members would draft their own constitution rather than accept the 2008 constitution).

28. See Nadi, *supra* note 27 (discussing the NLD's survey of four hundred people over three townships finding a majority of the people favored amending the constitution and noting the NLD's intent to conduct similar surveys in more communities).

29. MYINT, *supra* note 5, at 9.

federalism, fusing it with secession. He equated secession with feudalism in general and attributed that to the Shan State system, further citing what had taken place in the Congo and attributing that to secession as well.<sup>30</sup> The political means to complete the constitutional settlement journey are now within striking distance, but by no means a given.

Federalism in Myanmar has been long desired and detested; it has been thrown up as both unity in diversity and disintegration of the union, thus becoming a major political fault line. That line has shifted in recent times with a growing understanding that federalism is not to be feared and can work in both the constitution and state architecture. Now, secession has been dropped from all political platforms. It was a key feature of the 1947 constitution desired by the Ethnic Nationalities.<sup>31</sup> This combined development has contributed to the enhanced political conditions for dialogues for peace, politics, and constitutional change. The speaker for the Pyithu Hluttaw—the lower house of the Pyidaungsu Hluttaw—U Shwe Mann, has indicated that a constitutional amendment to incorporate the Ethnic Nationalities' federal desires must be accommodated.<sup>32</sup> It can be said that there is a tacit acceptance, if not wild embrace, of the need for a federal system. It is worth noting that some, including constitutional expert Marcus Brand, claim that the 2008 constitution is at least quasi-federal.<sup>33</sup> To the extent that this contention can be supported, it would characterize the 2008 constitution as gradually becoming federal in form if not practice. Significantly though, it is not one forged by a political pact and deliberate design. It therefore lacks the elements essential to secure a federal state by way of a constitutional settlement.

The 1947 constitution was the closest in intent, if not design, of the parties to attain federalism. The Ethnic Nationalities had wanted a secession clause included based on their belief that they were entering freely and wanted provision, at least, that they could leave freely.<sup>34</sup> No secession clause was included in the Panglong

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30. See Janelle Saffin, *Federalism in Burma: Federalism, Burma and How The International Community Can Help*, LEGAL ISSUES ON BURMA J., April 2002, available at <http://www.ibiblio.org/obl/docs/LIOB11-Saffin.htm> [hereinafter Saffin, *Federalism in Burma*] (stating that at a meeting of the Revolutionary Council after he seized power in 1962, General Ne Win pointed out the dangers of the Shan State seceding and giving rise to foreign interference, as well as citing the example of Katanga's recent secession from Congo after it won independence).

31. See Wansai, *supra* note 11 (observing that the Ethnic Nationalities voluntarily opted for a federal design in 1947); see also FINK, *supra* note 4, at 22 (explaining that the concept of a federal union was agreed upon in 1947 at a multi-ethnic conference, in which union the ethnic states would have full autonomy over their internal affairs).

32. See Nyein Nyein, *USDP Leader Urges Committee to Review Key Constitutional Reforms*, THE IRRAWADDY (Feb. 18, 2014), <http://www.irrawaddy.org/burma/usdp-leader-urges-committee-review-key-constitutional-reforms.html?print=1> (stating in a letter to the parliamentary committee in charge of constitutional reform that the committee should consider amendments concerning political autonomy for ethnic regions through a federal union and elections appointing chief ministers in states).

33. BRAND, *supra* note 21, at 1.

34. See Naing, *supra* note 23 (explaining that secession was a goal of the Ethnic Nationalities, because they did not want to coexist with the ethnic Burman-dominated central

Agreement.<sup>35</sup> U Aung San said that it was a matter for debate at the 1947 elected constituent assembly that was convened to prepare and promulgate the constitution.<sup>36</sup> The constituent assembly chose to include it.<sup>37</sup>

General Ne Win used secession as the penultimate weapon, not only against the Ethnic Nationalities, but also equally against the democratic state in the 1962 coup.<sup>38</sup> Sixty-one years later, another military man, now quasi-civilian President U Thein Sein in an address to the nation said this on secession: “Of all of the achievements, the one that I value most is the decision by all ethnic groups to not secede from the Union. Such a position indicates that our ethnic brothers and sisters wish to be part of the Union of their own accord.”<sup>39</sup>

Janelle Saffin has advised from the outset to drop secession and embrace federalism.<sup>40</sup> The advice was given not because the Tatmadaw, along with others, were scared of secession, but on the principle that if one chooses to go into the union, then one does so on their own volition and has to be prepared to make it work.<sup>41</sup> Federalism is not to be feared; rather, the old system of government allows for sharing and dividing power and can work for all. Saffin advised that politics were key and that it is best to secure a political pact.<sup>42</sup> Creating a constitution with

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government).

35. See *The Right of Secession: A Paper Tiger that Scares Those who Want to be Scared*, THE SHAN HERALD (Feb. 10, 2012), [http://www.english.panglong.org/index.php?option=com\\_content&view=article&id=4405%3Athe-right-of-secession-a-paper-tiger-that-scars-those-who-want-to-be-scared&Itemid=308](http://www.english.panglong.org/index.php?option=com_content&view=article&id=4405%3Athe-right-of-secession-a-paper-tiger-that-scars-those-who-want-to-be-scared&Itemid=308) (explaining that the treaty never actually mentions secession, because it was going to be written into the 1947 constitution); see also Saffin, *Federalism in Burma*, *supra* note 30 (stating that the secession matter not in the Panglong Agreement would be raised by the constituent assembly when drafting the 1947 constitution).

36. See Saffin, *Federalism in Burma*, *supra* note 30 (stating that U Aung San requested that secession be discussed and debated by the constituent assembly drafting the 1947 constitution); see also Lian H. Sakhong, *Democracy Movement Towards Federal Union: The Role of UNLD in the Struggle for Democracy and Federalism in Burma*, CHIN HUM. RTS. ORG. (July 16, 2009), <http://www.chro.ca/index.php/resources/articles/323-democracy-movement-towards-federal-union-the-role-of-unld-in-the-struggle-for-democracy-and-federalism-in-burma> (discussing U Aung San’s promise to the Ethnic Nationalities to include the right of secession in the 1947 constitution).

37. See generally THE CONSTITUTION OF THE UNION OF BURMA, Sept. 24, 1947, ch. X, art. 201–202, available at <http://www.burmalibrary.org/docs07/1947Constitution-facsimile-red.pdf>.

38. See Saffin, *Federalism in Burma*, *supra* note 30 (explaining General Ne Win thought the Shan State’s possible secession from the union was dangerous and would give rise to possible foreign intervention and also describing the Tatmadaw’s fear of secession); see also TOPICH, *supra* note 8, at 85 (stating that the rationale behind General Ne Win’s coup was the deteriorating condition of the union).

39. U Thein Sein, President of Myanmar, Delivered Speech Through Radio Programmes to the Nation (Oct. 2, 2013) (transcript available at <http://www.president-office.gov.mm/en/?q=briefing-room/speeches-and-remarks/2013/10/02/id-2705>).

40. See Saffin, *Federalism in Burma*, *supra* note 30 (acknowledging that secession clauses are inconsistent with the idea of federalism and cause more issues, while federalism can bring constitutional settlement, peace, and prosperity for Myanmar).

41. See *id.* (discussing the Tatmadaw’s fear of secession and why including a secession clause reveals that party’s skepticism about the government’s future).

42. See *id.*



a secession clause was destabilizing because with such a clause some groups will think they can leave when they wish, which creates uncertainty and worries other groups. All parties discussed and debated secession for years and deliberately developed a keener working knowledge of federalism and constitutional democracy.<sup>43</sup> As the Tatmadaw plunged more into political debate, as opposed to armed battles, with Ethnic Nationalities and the primarily Burmese, democratic-political activists who fled to the Thai-Myanmar border, all parties came to the view themselves that secession was no longer a genuine federal union prerequisite.<sup>44</sup>

Because of strongly held and politically polarizing positions, federalism was not achieved. One of the three main national causes or guiding principles of the Tatmadaw and its government has been the non-disintegration of the union.<sup>45</sup> The National Convention, instituted in 1992, raised non-disintegration to constitutional prominence as a key guiding principle.<sup>46</sup> It is also found in Declaration No. 1 of 1990,<sup>47</sup> a seminal decree that lives today in the 2008 constitution as a basic principle.<sup>48</sup> Non-disintegration is also constitutionally mandated in political parties' platforms.<sup>49</sup> Despite the appearance that non-disintegration is constitutionally mandated as a basic principle of the union, there is a constitutional provision prohibiting enforcement of all basic principles in a court of law.<sup>50</sup>

Many questions are raised by this political-constitutional scenario. Is

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43 See *id.*

44. See TIMO KIVIMÄKI & MORTEN B. PEDERSEN, CRISIS MANAGEMENT INITIATIVE & MARTTI AHTISAARI RAPID REACTION FACILITY, BURMA: MAPPING THE CHALLENGES AND OPPORTUNITIES FOR DIALOGUE AND RECONCILIATION 59–73, 48 n.29 available at [http://www.burmalibrary.org/docs08/Mapping\\_the\\_challenges.pdf](http://www.burmalibrary.org/docs08/Mapping_the_challenges.pdf) (discussing the formation and changes in the various ethnic groups at the Thai-Myanmar boarder, their changing ideologies in political objectives, the formation of new political groups and ceasefire agreements, and the changed view that secession is no longer an objective goal).

45. See State Law and Order Restoration Council Declaration No. 1/90, ¶ 10, (July 27, 1990), available at [http://burmalibrary.org/docs/Declaration\\_1-90.htm](http://burmalibrary.org/docs/Declaration_1-90.htm) (stating that the Tatmadaw has been persistently carrying out its three main tasks of preventing disintegration of the union, preventing disintegration of national solidarity, and ensuring perpetuity of state sovereignty).

46. See HUMAN RIGHTS WATCH, VOTE TO NOWHERE: THE MAY 2008 CONSTITUTIONAL REFERENDUM IN BURMA, 15 (May 2008), available at <http://www.hrw.org/sites/default/files/reports/burma0508webwcover.pdf> [hereinafter HUMAN RIGHTS WATCH, VOTE TO NOWHERE] (describing the National Convention's guidelines for the formation of the constitution).

47. See State Law and Order Restoration Council Declaration No. 1/90, *supra* note 45, ¶ 10 (discussing the goal of preventing disintegration of the state).

48. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, pmb. (stating that the nation shall steadfastly adhere to the objective of non-disintegration).

49. See *id.* ch. X, art. 404 (“A political party shall: (a) set the objective of non-disintegration of the Union, non-disintegration of national solidarity and perpetuation of sovereignty; (b) be loyal to the State.”).

50. See *id.* ch. I, art. 6 (stating that non-disintegration of the union and non-disintegration of national solidarity are basic principles of the constitution); *id.* ch. XV, art. 451 (stating that all basic principles of the union are unenforceable in a court of law).

Myanmar's constitutional moment now? If so, who can, or will, best deliver it? More aptly, what will be the mechanism that will deliver it? Will it be the executive government, the military, the national Parliament, the regional and state parliaments, the Ethnic Nationalities, or the people? First and foremost, it must be understood that the Tatmadaw will need to approve any change.

The Pyidaungsu Hluttaw has been leading the way in terms of democratic advances and practice. The Pyidaungsu Hluttaw is not skewed in terms of initiating debate and leading discourse, despite being skewed to the military in terms of the number of votes.<sup>51</sup> The speakers, U Shwe Mann of the Pyithu Hluttaw, the lower house, and U Khin Aung Myint of the Amyotha Hluttaw, the upper house, have taken strongly to their roles as advocates for change.<sup>52</sup> The support of the 2012 elected NLD members of Parliament (MPs) and the notable support of opposition leader Day Aung San Suu Kyi—the leader people claim as theirs—has further strengthened this Hluttaw advocacy.<sup>53</sup>

The military still has the power and control, and they have obviously approved the advances made so far. There is no direct political pact or laid-out plan about advance or constitutional settlement, but the government's stated plan is to amend the 2008 constitution, built in accordance with the Seven-Step Roadmap to Disciplined Democracy.<sup>54</sup> However, the roadmap goes back to Declaration No. 1 of 1990, which decreed today's constitutional architecture.<sup>55</sup>

Myanmar has tried three times to create an enduring constitution since regaining independence in 1947 with the constitutions of 1947,<sup>56</sup> 1974,<sup>57</sup> and

51. See Dan Rivers, *The Vote in Myanmar: Military Will Keep Control*, CNN (Nov. 5, 2010), <http://www.cnn.com/2010/WORLD/asiapcf/11/04/myanmar.election.preview/> (explaining that the military junta has a plurality of seats in Parliament, and the rest are contested among candidates from other parties, including one formed by the military-backed prime minister); Zin Mar Win & Khin Khin Ei, *Shwe Mann Takes Over as Union Parliament Speaker*, RADIO FREE ASIA (Jul. 31, 2013) <http://www.rfa.org/english/news/myanmar/parliament-07312013192727.html> (describing the democratic progress made by Parliament under its speakers and making the Parliament debate more effective than its first term).

52. See Win & Ei, *supra* note 51 (explaining that Parliament passed fifty-eight laws under Khin Aung Myint and predicting that Shwe Mann will lead Myanmar further along its democratic path by taking on more parliamentary responsibilities to advocate for civil peace and change the constitution).

53. For discussion about Aung San Suu Kyi and the newly elected NLD MPs' advocacy for change see Daniel Ten Kate, *Suu Kyi's Party Declares Landslide as Myanmar Opens Up*, BLOOMBERG (Apr. 2, 2012), <http://www.bloomberg.com/news/2012-04-01/aung-san-suu-kyi-wins-myanmar-by-election-seat-party-says.html>.

54. See Win & Ei, *supra* note 51 (stating one of Shwe Mann's goals in leading Parliament is to amend the 2008 constitution); see Arnott, *supra* note 10 (outlining the drafting and adoption of a new constitution through the seven-step roadmap).

55. See State Law and Order Restoration Council Declaration No. 1/90, *supra* note 45, ¶ 11 (laying out steps the State Law and Order Restoration Council (SLORC) has taken to ensure democracy, such as enacting the Multi-Party Democracy General Election Commission and the Political Parties Registration law to enable democratic elections).

56. CONSTITUTION OF THE UNION OF BURMA, Sept. 24, 1947, *available at* <http://www.burmalibrary.org/docs07/1947Constitution-facsimile-red.pdf>.

57. CONSTITUTION OF THE SOCIALIST REPUBLIC OF THE UNION OF BURMA, Jan. 3, 1974,

2008.<sup>58</sup> The 1947 constitution was the most inclusive and democratic, as it was forged via political pact with the Panglong Agreement.<sup>59</sup> This agreement is much revered and has been imported into current debates, with many still seeking a twenty-first century Panglong Conference.<sup>60</sup>

In contrast, neither the 1974 nor the 2008 constitutions were products of political pacts and therefore were not built on constitutional consensus.<sup>61</sup> Apart from deficiencies in form and substance, the lack of political agreement is the fundamental weakness of these constitutions. The 1974 constitution was based on the “Burmese Way to Socialism,”<sup>62</sup> another decreed, but not agreed-upon, doctrine. The 2008 constitution was based on the Seven-Step Roadmap to Disciplined Democracy.<sup>63</sup> Both of these decrees emanated from undemocratic governments: the Revolutionary Council led by General Ne Win and the former State Law and Order Restoration Council (SLORC), now known as the State Peace and Development Council (SPDC), led by General Than Shwe.<sup>64</sup> Both the 1974 and 2008 constitutions were enacted through nationwide referendums.<sup>65</sup> The choice in both referendums was between the constitution created by the current military government or the continuation of the military dictatorship.<sup>66</sup> The question was not framed so simply, but the outcome of voting against the referendum was clearly to

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available at <http://www.unhcr.org/refworld/country,LEGAL,,,MMR,,3ae6b5b64,0.html>.

58. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008.

59. The Panglong Agreement, *supra* note 9.

60. See Kanbawza Win, *The Second Panglong Conference*, (KACHINLAND NEWS) Feb. 15, 2013, <http://kachinlandnews.com/?p=23117> (discussing proposed negotiations on a second Panglong Conference lead by Suu Kyi).

61. See HUMAN RIGHTS WATCH, VOTE TO NOWHERE, *supra* note 46, at 11–21 (providing an overview of the constitutional processes in 1974 and 2008 and the lack of fair, transparent drafting policies).

62. REVOLUTIONARY COUNCIL OF THE UNION OF BURMA, THE BURMESE WAY TO SOCIALISM, (1962) available at [http://www.burmalibrary.org/docs/The\\_Burmese\\_Way\\_to\\_Socialism.htm](http://www.burmalibrary.org/docs/The_Burmese_Way_to_Socialism.htm).

63. See, e.g., HUMAN RIGHTS WATCH, *Chronology of Burma's Constitutional Process*, <http://www.hrw.org/sites/default/files/reports/burma0508chronology.pdf> (last visited Nov. 13, 2014) [hereinafter HUMAN RIGHTS WATCH, *Chronology of Burma's Constitutional Process*] (outlining the Seven-Step Roadmap to Disciplined Democracy program, as implemented by Prime Minister General Khin Nyunt).

64. See *Timeline: Myanmar's Slow Road to a New Constitution*, REUTERS (Feb. 9, 2009), <http://uk.reuters.com/article/2008/02/09/uk-myanmar-elections-constitution-idUKBKK26169420080209> (providing a detailed timeline of politics in Myanmar, including the governmental control of the Revolutionary Council and the SLORC, now the SPDC).

65. See HUMAN RIGHTS WATCH, VOTE TO NOWHERE, *supra* note 46, at 11–21.

66. See *id.* at 12, 44–46 (discussing the deep entrenchment of military power in the Myanmar government, even in light of proposed constitutional reforms). In addition, the military government implemented a carefully crafted exit plan in the 2008 constitution, ensuring that military and related leaders and officials were secure in their wealth and from prosecution for any heinous crimes committed. See Sebastian Strangio, *Myanmar's Constitutional Uncertainty*, THE DIPLOMAT (July 21, 2014), <http://thediplomat.com/2014/07/myanmars-constitutional-uncertainty/> (describing the constitutional measures to protect military and related officials from any state of emergency).

continue the military's governmental rule. The constitutional options offered at least a whiff of change to the people of Myanmar.

The formulation of the 2008 constitution began in 1990 with the issuance of Declaration No. 1 of 1990 and took over twenty-one years to complete.<sup>67</sup> The constitution was formulated during the lengthy, unrepresentative National Convention process, during which the Tatmadaw carefully choreographed the constitution-making process.<sup>68</sup> This background gives rise to the key question cited above: can true constitutional settlement be secured from the 2008 constitution and the current political conditions?

Constitutional analysis and a cursory glance at the text of the document demonstrate that the 2008 constitution is flawed. Although much of this is due to process and design faults, there are underlying fundamental problems, such as a lack of constitutional consensus in the document's drafting and the absence of informed consent by the Myanmar populace. "Thus on fundamental issues facing Myanmar, the constitution is most likely to fail the people. And the difficulties in transition from its faulty principles and structures to a more democratic and equitable society are deliberately embedded in the constitution[.]"<sup>69</sup> While the people accept that the current constitution is an improvement on the military dictatorship, they nevertheless want the document changed or rewritten.<sup>70</sup>

At a public event in Pyin Oo Lwin, Daw Aung San Suu Kyi, chairwoman for the Myanmar opposition party, publicly stated, "[l]et me frankly say that although some people believe this constitution was adopted by popular demand, I and others do not believe it," indicating her significant doubts that 92.4% of the population voted for the 2008 constitution.<sup>71</sup> In contrast, President U Thein Sein has publically commented that the constitution was adopted by popular demand.<sup>72</sup> It is likely that Daw Aung San Suu Kyi is correct—the voting process lacked electoral integrity and even the "yes" vote does not equate to adoption by popular demand.

Privately, some USDP members—and even some ministers—make the same or similar claims regarding the lack of public consensus in the 2008 constitution.<sup>73</sup>

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67. See State Law and Order Restoration Council Declaration No. 1/90, *supra* note 45.

68. See HUMAN RIGHTS WATCH, VOTE TO NOWHERE, *supra* note 46, at 15–19 (describing the National Convention and the firm governmental control over this process).

69. YASH GHAI, THE 2008 MYANMAR CONSTITUTION: ANALYSIS AND ASSESSMENT, 39 (2008), available at [http://www.burmalibrary.org/docs6/2008\\_Myanmar\\_constitution—analysis\\_and\\_assessment-Yash\\_Ghai.pdf](http://www.burmalibrary.org/docs6/2008_Myanmar_constitution—analysis_and_assessment-Yash_Ghai.pdf).

70. See Strangio, *supra* note 66 (reporting on the mass public outcry for constitutional reform).

71. See Theingi Htun, *Suu Kyi Doubts 92 Percent Supported 2008 Constitution*, MIZZIMA (June 10, 2013), <http://www.mizzima.com/mizzima-news/politics/item/9512-suu-kyi-doubts-92-percent-supported-2008-constitution> (quoting Suu Kyi's speech given in Pyin Oo Lwin).

72. See Jim Middleton, *Thein Sein Rejects Suu Kyi's Constitutional Reform Demands*, ABC NEWS (June 8, 2013), <http://www.abc.net.au/news/2013-06-08/an-thein-sein-rejects-suu-kyi-demand/4742094> (referencing President U Thein Sein's comments affirming that the constitution was voted on by the Myanmar public).

73. *Id.* (discussing the government's official position that the 2008 constitution was legitimately voted on by the Myanmar populace).

But, publicly, the USDP government maintains that the Myanmar population overwhelmingly supports the constitution and that it was written and voted in by the people.<sup>74</sup> This constitutional controversy brings to mind the oft-repeated sentiment attributed to Vaclav Havel: in a dictatorship everyone lives a lie to some degree.<sup>75</sup>

Despite this faulty framework, the 2008 constitution and developing state architecture provide a backdrop to work towards change. U Shwe Mann, the current speaker of the Pyithu Hluttaw and the Pyidaungsu Hluttaw, Joint Houses of National Parliament, and former high-ranking member of the military government's SPDC and Tatmadaw, has said the 2008 constitution was designed to be changed.<sup>76</sup> This statement is not strikingly revelatory in itself, but Mann's implication that the constitution not only could, but *would* be changed is remarkable. Some have said these words are simply rhetoric, but many believe it is time to seize the opportunity and work towards turning Mann's words into reality.

The majority of Myanmar's political parties are working toward constitutional reform, and more recently, many groups have been working together to advance this and political change. These groups include the Nationalities Brotherhood Forum (Brotherhood), the reformed UNA, the alliance of Ethnic Nationalities parties, the UNFC, and the latter reconvened Shan National League for Democracy (SNLD), led by Khun Htun Oo.<sup>77</sup> All these groups eschew the 2008 constitution, but accept the current political reality and work within the political space the constitution has provided, a space not previously there.

The Brotherhood is an alliance of several Ethnic Nationalities political parties. It is represented across the parliaments at national, state, and regional levels and works to effect constitutional change.<sup>78</sup> This is accomplished both on its own and by collaborating with major parties like the NLD.<sup>79</sup> This allows the

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74. *Id.*

75. VACLAV HAVEL, *POWER OF THE POWERLESS* (1978), available at <http://mrdivis.yolasite.com/resources/Vaclav%20Havel%27s%20Power%20of%20the%20Powerless.pdf> (comparing Polish Czechoslovak to Myanmar).

76. *Exclusive Interview with Shwe Mann, Myanmar's House Speaker*, MCOT.NET (Sept. 29, 2013, 6:39 PM), <http://www.mcot.net/site/content?id=5248116f150ba01a1100020e#.VBuuHZUcTIU>.

77. See Paul Keenan, *Ethnic Political Alliances*, BRIEFING PAPER NO. 18, (Burma Centre for Ethnic Studies, Peace, and Reconciliation), Oct. 2013 at 1–3, available at [http://www.burmalibrary.org/docs16/BCES-BP-18-Ethnic\\_Political\\_Alliances-en.pdf](http://www.burmalibrary.org/docs16/BCES-BP-18-Ethnic_Political_Alliances-en.pdf) (offering background on the Brotherhood, the UNA, and the SNLD and discussing the return of leader Khun Htun Oo after his political imprisonment); *United Nationalities Federal Council*, MYANMAR PEACE MONITOR, <http://www.mmpeacemonitor.org/stakeholders/unfc> (last visited Oct. 22, 2014) (providing general information on the background and activities of the UNFC).

78. See generally Zin Mar Win, *Fifteen Myanmar Ethnic Groups to Form Unified Party*, RADIO FREE ASIA (June 11, 2013), <http://www.rfa.org/english/news/myanmar/party-061201390735.html> (discussing the actions of the Brotherhood and their collaboration with other Myanmar political groups).

79. *Id.*

Brotherhood to cover all fronts in working towards constitutional change.<sup>80</sup> A summary of the Brotherhood's motivation and its view on the current constitutional situation is expressed in its Ninth Statement:

We, members of the Nationalities Brotherhood Forum, had participated in the 2010 elections in the interest of democratic development, and not because we had believed that the 2008 constitution was a sound charter. Amidst many great challenges, our parties were able to secure a combined total of 127 seats across the three tiers of parliaments. The November 7, 2010 elections were neither free nor fair. But we saw that the recent by-elections on 1<sup>st</sup> April 2012 were relatively much freer and fairer. We now hope that the next elections in 2015 will be fully free and fair.<sup>81</sup>

The UNFC also rejects the 2008 constitution, finding it undemocratic and lacking the foundation of a political pact, and argues it provides no substantial improvements for the majority of Myanmar's population.<sup>82</sup> As a result, the UNFC is writing a model draft of its own constitution.<sup>83</sup> However, the NLD specifically speaks to the ongoing debate and the vexing issue of whether it is best to write a new constitution entirely or amend the current one in place.<sup>84</sup>

As evidenced by the differing positions of the UNFC and the NLD on whether to write a new constitution or amend the current one, Myanmar's ethnic political groups fall on different sides of the debate. Therefore, the key issue is one of *realpolitik*: how to work within the 2008 constitution as it is now. Without a deliberate, agreed-upon political pact for democratic transition, the Constitution is the only route available for political reform that is open to all parties.

Recently, five parties representing the UNA that were once members of the Committee Representing the People's Parliament—Khun Htun Oo of the SNLD, Pu Cin Sian Thang from the Zomi National Congress, Aye Thar Aung from the Arakan League for Democracy (ALD), Nai Ngwe Thein from the Mon Democracy Party, and Saw Harry from Karen National Congress for Democracy—met with the NLD's Chairperson Daw Aung San Suu Kyi to discuss constitutional change, federalism, and the voting system, namely proportional representation.<sup>85</sup> SNLD

80. *See id.* (discussing the Brotherhood's collaboration with other parties and its tactics to circumvent the rule that a citizen can only act in one political party at a time to spread the message of constitutional change and promote a federal union).

81. THE 9<sup>TH</sup> POSITION STATEMENT OF THE NATIONALITIES BROTHERHOOD FORUM, APR. 7, 2012 (Nationalities Brotherhood Forum, Myanmar).

82. *See Analysis of UNFC Position*, EBO BRIEFING PAPER No. 4 (Euro-Burma Office, Myanmar) Aug. 2013, at 1, *available at* [http://www.burmalibrary.org/docs15/EBO-Brief\\_No.8-2013-UNFC.pdf](http://www.burmalibrary.org/docs15/EBO-Brief_No.8-2013-UNFC.pdf) (providing a detailed overview of the UNFC's condemnation of the 2008 constitution).

83. *See* Nyein Nyein, *Ethnic Groups Plan to Finish Federalist Draft Constitution Soon*, THE IRRAWADDY (Oct. 11, 2013), <http://www.irrawaddy.org/burma/ethnic-groups-plan-finish-federalist-draft-constitution-soon.html> (discussing the UNFC's plans to release an alternative federalist constitution).

84. *Id.*

85. *See* Kay Zin Oo, *NLD, Ethnic Parties Unite in Push for Constitutional Reform Before 2015 Election*, MIZZIMA (June 20, 2013, 11:58 AM), <http://www.mizzima.com/mizzima->

Secretary Sai Nyunt Lwin stated that the group discussed the approach to constitutional reform and all agreed that constitutional change was the key to the nation's future.<sup>86</sup> ALD leader, U Aye Thar Aung, reported that all of the leaders concurred that a federal system was needed and that Aung San Suu Kyi had said that in all likelihood federalism will not happen immediately, but that this system should be worked on and will happen over time.<sup>87</sup>

Some USDP leaders accept that the constitution requires reform and, as early as 2012, established their own party committee to consider the matter.<sup>88</sup> They, of course, carry the numbers in the Hluttaws, but ultimately operate with the consent of the Tatmadaw.<sup>89</sup>

The NLD party platform at its foundation and in the 2012 by-elections was constitutional change.<sup>90</sup> Daw Aung San Suu Kyi pointed out that by canvassing the peoples' desires, the NLD was not seeking signatures, but only wanted to listen to wishes for constitutional reform.<sup>91</sup> She urged NLD members to make field trips covering the entire country over the course of two months.<sup>92</sup> U Ko Ne—a leading NLD lawyer—has been active in this task.<sup>93</sup> In Statement No. (02/09/2013) the NLD asserted that the current constitution has provisions inconsistent with democratic principles and affecting the holding of free and fair elections.<sup>94</sup> On the specific question of revision or re-drafting cited above, they stated:

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news/politics/item/9559-nld-ethnic-parties-unite-in-push-for-constitutional-reform-before-2015-election (reporting on the meeting between NLD leader Aung Sun Suu Kyi and ethnic political party leaders).

86. Htwe, *supra* note 27.

87. See Zin Mar Win, *Suu Kyi, Ethnic Parties Discuss Constitutional Amendments*, RADIO FREE ASIA (June 18, 2013), <http://www.rfa.org/english/news/myanmar/charter-06182013210915.html> (summarizing the positions taken during a meeting between Aung Sun Suu Kyi and ethnic political party leaders on specific topics like proportional representation, voting set-up, and the military).

88. See Kyaw Kyaw Aung, Myint Oo, & Nay Rain Kyaw, *Myanmar Sets up Panel to Review Constitution but Concerns Remain*, RADIO FREE ASIA (July 26, 2013), <http://www.rfa.org/english/news/myanmar/charter-07262013192623.html> (discussing the creation of a government committee to review the 2008 constitution, as well as the significant concerns that remain over the independence and effectiveness of this committee).

89. *Id.*

90. See Rachel Harvey, *Aung San Suu Kyi Registers for Burma Election Run*, BBC WORLD NEWS (Jan. 18, 2012), <http://www.bbc.co.uk/news/world-asia-16606608> (discussing the NLD and Aung San Suu Kyi's platform for democratic reform in the 2012 by-elections); David Loyn, *Suu Kyi's NLD Democracy Party to Rejoin Burma Politics*, BBC WORLD NEWS (Nov. 18, 2011), <http://www.bbc.co.uk/news/world-asia-15787605> (discussing the background of the NLD and its continued commitment to constitutional reform).

91. *NLD's Public Feedback So Far Calls to Amend or Replace 2008 Constitution*, ELEVEN (Oct. 16, 2013), [http://www.elevenmyanmar.com/index.php?option=com\\_content&view=article&id=3760:nld-s-public-feedback-so-far-calls-to-amend-or-replace-2008-constitution&catid=32&Itemid=354](http://www.elevenmyanmar.com/index.php?option=com_content&view=article&id=3760:nld-s-public-feedback-so-far-calls-to-amend-or-replace-2008-constitution&catid=32&Itemid=354).

92. *Id.*

93. *Id.*

94. *Id.*

1. When the National League for Democracy discussed with ethnic nationalities parties about constitutional reforms, we agreed that “revision of 2008 Constitution or re-drafting a new constitution and peace process are connected so cannot be separated.”

2. We believe that peace and establishing a genuine democratic state is based on the revision of 2008 constitution so it definitely needs to be revised.

3. When the NLD met with Ethnic Nationalities parties and discussed about strengths and weaknesses, causes and effects regarding revision of 2008 constitution or re-drafting a new constitution, we found;

(a) In the 2008 constitution, there is a provision that said “Tatmadaw (military) is responsible to protect the constitution.” So drafting a new constitution invites and involves the Tatmadaw in the process.

(b) Although the NLD discussed the above mentioned findings with Ethnic Nationalities parties, we had not yet decided in unity about whether the 2008 constitution should be revised or re-drafted.

(c) To do so, we need to inquire about the will of the people.<sup>95</sup>

Following these meetings, the NLD canvassed the public for its opinion on amending or replacing the 2008 constitution, visiting Yangon, Ayeyawady, Mandalay, Bago, and Kayin.<sup>96</sup> “The NLD will submit its constitutional proposal, based on the people’s desires as collected in the talks, to the Union Assembly Constitution Reviewing Committee. The Committee must present its report to the Union Assembly by the end of the year.”<sup>97</sup>

The National Unity Party (NUP) Central Executive Committee Member U Thein Htun, at their twenty-fifth anniversary function, spoke on whether the constitution should be amended or rewritten and supported amendment.<sup>98</sup> He said:

We aim to work for the development of our nation within a political framework based on the 2008 constitution. We don’t see that it is necessary to completely rewrite the constitution to improve it but should only amend certain points prioritising [sic] the interests of the ethnic nationalities and the public.<sup>99</sup>

U Thein Htun concluded, “[w]e see that it is necessary to allow more power for ethnic regions, to decrease power centralization, to promote regional governance and socio-economic development. In order to do that, chapters 1, 2, 3 and 5 of the 2008 constitution should be reviewed.”<sup>100</sup> These chapters address the basic principles of the union,<sup>101</sup> the structure of the state,<sup>102</sup> the head of state,<sup>103</sup> and the

95. National League for Democracy, Statement No. (02/09/2013).

96. *NLD’s Public Feedback So Far Calls to Amend or Replace 2008 Constitution*, *supra* note 91.

97. *Id.*

98. See Peter Aung, *NUP Calls for Constitution to be Amended, Not Re-Written*, DEMOCRATIC VOICE OF BURMA (Sept. 25, 2013), <http://english.dvb.no/news/nup-calls-for-constitution-to-be-amended-not-re-written/32802>.

99. *Id.*

100. *Id.*

101. See THE CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29,



executive branch.<sup>104</sup>

In order to establish peace, all parties will need to work together and collaborate politically. The Myanmar Peace Centre (MPC) issued a warning to Ethnic Nationalities organizations not to be too “radical” in their demands for federalism.<sup>105</sup> This warning came after the UNFC said it did not accept the 2008 constitution and would prepare its own draft model.<sup>106</sup> UNFC Joint General Secretary Khun Okker stated that “[i]t will be too hard to change [the Constitution] from within the Hluttaw. The 2008 constitution has many features that are undemocratic.”<sup>107</sup> The ceasefires between the Tatmadaw government and the Ethnic Nationalities’ armies assist this process, with the most recent rapprochement between the Tatmadaw and the Kachin Independence Organisation inching towards a ceasefire.<sup>108</sup> This process will take some artful and skilled legwork on the part of all, especially on the part of the individual Ethnic Nationalities organizations, the UNFC, and the Union Level Peace Working Committee, whose practical work is led by Union Minister U Aung Min.

U Shwe Mann, answering a question about Ethnic Nationalities recently said, “[i]n implementing peace in our country, if you talk about their rights, it needs to be considered that they should be given equal rights and autonomy, the main thing is about having fairness. And when we do that, it is related to matters of reviewing the constitution as well.”<sup>109</sup> Interestingly, he turned to a matter that U Aung San had included in his Seven Directives: the ideas of autonomy located within a constitutional framework and change. This language has been missing for a long time, because of the Tatmadaw and their military governments, of which U Shwe Mann was part. Despite his past, U Shwe Mann is on a quest for change, even discussing Ethnic Nationalities, federalism, and secession.<sup>110</sup>

The question then is: will the Ethnic Nationalities be ignored in the constitution reviewing process as they have been for over half a century? Some have said U Shwe Mann’s words were sweet, but they are not persuaded that his words will lead to concrete constitutional actions. Equally, some do not want to be

2008, ch. I.

102. See THE CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, ch. II.

103. See THE CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, ch. III.

104. See THE CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, ch. V.

105. See Htwe, *supra* note 27.

106. *Id.*

107. *Id.* (alteration in original).

108. For a discussion on the conflict and peace process in Kachin see Curtis W. Lambrecht, *Ongoing Struggles: Jane’s Terrorism and Security Monitor*, BURMALIBRARY.ORG, (May 2013), [http://www.burmalibrary.org/docs15/Ongoing\\_Struggles-Curt\\_Lambrecht.pdf](http://www.burmalibrary.org/docs15/Ongoing_Struggles-Curt_Lambrecht.pdf)

109. *Exclusive Interview with Shwe Mann, Myanmar’s House Speaker, supra* note 76.

110. Saffin and U Shwe Mann had a detailed discussion on these topics during Mann’s visit to Australia.

part of the reviewing process for reasons not based on a political pact.

The terms of reference for the constitutional process do not specifically mention the states and regions, but this matter requires detailed consideration for any genuine federal advance. One recommendation for considering states and regions in the process includes states and regions proffering up their respective heads of state by way of popular choosing and preparing their own constitutions within a federal framework.<sup>111</sup> This could be accomplished now without offending any provision in the 2008 constitution. It would simply require the political agreement of the president.

In 2004 at the National Convention, thirteen ceasefire groups tendered a political proposal where, among other things, they requested equal access at the plenary session.<sup>112</sup> Their proposal was rejected, and all the issues and points they proposed were not included in the 2008 constitution.<sup>113</sup> However, the committee reviewing the constitution could review all of the constitutional capital described above and invite the Ethnic Nationalities, including the UNFC and ceasefire groups, to participate in a constitutional conversation.

Inclusion of these parties is key, as peace making and the constitution process are intertwined. As U Shwe Mann stated: “The 2008 constitution of our country, some of the matters concerning federalism are also included, and I believe that there may be open opportunities based on the union system that we already have. I also believe that it will contribute to peace making by reviewing the constitution.”<sup>114</sup> These observations suggest that federalism, autonomy, and constitutional inclusion are required to establish peace; however, there is also a need for constitutional settlement. Aung San Suu Kyi has echoed the need to address ethnic tensions during this process: “Ethnic problem[s] will not be solved by this present constitution which does not meet the aspirations of the ethnic nationalities. The democracy problem will not be solved by this constitution.”<sup>115</sup>

It is all a long way from the second of the Seven Directives that U Aung San issued as guidelines for the drafting of the constitution of a sovereign, independent Myanmar.<sup>116</sup> It said, “[w]ithin the Union, the individual States established by the

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111. See Janelle Saffin, *Burma's Election and Constitutional History: A Snapshot*, LEGAL ISSUES ON BURMA J., Dec. 2000 at 67, 70 [hereinafter Saffin, *Burma's Election and Constitutional History*] (outlining remarks given at a seminar on Myanmar and its path towards independence and democracy).

112. See Zin Linn, *Burma Creates a 109-member Committee to Review Constitution Under Uncertainty*, ASIAN CORRESPONDENT (July 30, 2013), <http://asiancorrespondent.com/111311/burma-creates-a-109-member-committee-to-review-constitution-under-uncertainty/>.

113. *Id.*

114. *Exclusive Interview with Shwe Mann, Myanmar's House Speaker*, *supra* note 76.

115. Robert Muller, *Suu Kyi Calls for Speedy change to Myanmar Constitution*, REUTERS (Sept. 17, 2013), <http://www.reuters.com/article/2013/09/17/us-myanmar-suukyi-idUSBRE98G0ZZ20130917>.

116. THE SEVEN DIRECTIVES OF GENERAL AUNG SAN, *reprinted in* NAI BANYA HONGSAR, FEDERALISM IN BURMA/MYANMAR: SELECTED PAPER AND REPORT, 124–25, *available at* <http://monnews.org/wp-content/uploads/2012/11/Federalism-in-BURma-Nov-2012-Locked.pdf> (last visited Oct. 25, 2014).

Constitution, shall enjoy the powers of autonomy prescribed by the Constitution.”<sup>117</sup>

General Khin Nyunt, Secretary of the SLORC, announced the decree of Declaration No. 1 of 1990 two months after the multiparty general election of May 27, 1990 in which the NLD won 392 of the 485 constituencies contested.<sup>118</sup> The military-backed party, the NUP, won 10 of the 485 constituencies.<sup>119</sup> The SLORC government then embarked upon a process to effect legitimacy and legality so as to maintain state and political power and decide when it would be transferred, who would write the constitution and, seminally, to whom the power would be transferred.<sup>120</sup> The Tatmadaw was certain of one thing: power was not going to be transferred to Aung San Suu Kyi and some former Tatmadaw generals’ NLD.<sup>121</sup>

Previously, the NLD issued a statement, contained in the Gandhi Hall Declaration of July 29, 1990,<sup>122</sup> that it would govern with the 1947 amended constitution,<sup>123</sup> called the NLD Interim Constitution.<sup>124</sup> The Ethnic Nationalities parties and independent MPs endorsed this in the 1990 Bo Aung Kyaw Agreement, another key political pact that was never able to be implemented.<sup>125</sup>

The SLORC said this about the constitution: “Consequently under the present circumstances, the representatives elected by the people are those who have the responsibility to draw up the constitution of the future democratic State.”<sup>126</sup> It stated further:

It is hereby declared that the [SLORC] will in no way accept the drawing up of a temporary constitution for forming a government to take over State Power and that it will take effective action if it is done so, and that in the interim period before a government is formed in accordance with a new firm constitution drawn up according to the desires and aspirations

117. *Id.* at 125.

118. Derek Tonkin, *The 1990 Elections in Myanmar (Burma): Broken Promises or a Failure of Communications?*, IBIBLIO (Mar. 23, 2004), <http://www.ibiblio.org/obl/docs/DT-Elections.html>.

119. See Saffin, *Burma’s Election and Constitutional History*, *supra* note 111 (outlining remarks given at a seminar on Myanmar and its path towards independence and democracy).

120. See Ramesh Kumar, *Myanmar’s Transition to Democracy: Challenges Ahead* (Southeast Asia Research Ctr. Working Paper Series No. 135, 2012) 2–3, available at [https://www.academia.edu/3184514/Myanmar\\_s\\_Transition\\_to\\_Democracy\\_Challenges\\_Ahead](https://www.academia.edu/3184514/Myanmar_s_Transition_to_Democracy_Challenges_Ahead) (last visited Oct. 26, 2014) (noting SLORC’s refusal to honor results of election and SLORC’s arrest of many political opponents).

121. *Id.* at 3 (noting that Aung San Suu Kyi was kept under house arrest by SLORC).

122. NATIONAL LEAGUE FOR DEMOCRACY, *GHANDI HALL DECLARATION*, (July 29, 1990), available at [http://www.ibiblio.org/obl/docs/Gandhi\\_Hall\\_Declaration.htm](http://www.ibiblio.org/obl/docs/Gandhi_Hall_Declaration.htm).

123. Tonkin, *supra* note 118.

124. See *NLD Interim Constitution* (July 28, 1990), available at <http://www.blc-burma.org/?q=node/131> (last visited Oct. 22, 2014).

125. See UNLD and NLD, *Bo Aung Kyaw Road Joint Declaration*, (Aug. 29, 1990) available at <http://networkmyanmar.org/images/stories/PDF/bakren.pdf>.

126. State Law and Order Restoration Council Declaration No. 1/90, *supra* note 45, at ¶ 20.

of the people.<sup>127</sup>

Declaration No. 1 of 1990 set out how the Tatmadaw would march the nation towards a disciplined democracy.<sup>128</sup> The seven-step roadmap of 2004, delivered by General Khin Nyunt in his capacity as the SLORC prime minister, was a continuation of Declaration No. 1 of 1990.<sup>129</sup> The current constitutional, disciplined, democratic order existing today is the culmination of Declaration No. 1 of 1990, with the current state architecture and the current political transformation having its legal genesis in 1990 rooted firmly in Declaration No. 1 of 1990.<sup>130</sup>

Declaration No. 1 of 1990 went on to state “[t]he [SLORC] will take measures for summoning the Hluttaw in accordance with this provision.”<sup>131</sup> In a 1992 coordinating meeting with the State and Division Law and Order Restoration Councils Senior “SLORC Chairman General Than Shwe noted that it was almost four years since the SLORC took over State responsibilities, and that this is a term for a normal government.”<sup>132</sup> He further said that “[t]he Tatmadaw would not hold on to power for long and would return it to the people at an appropriate time,”<sup>133</sup> and some twenty-three years later, U Shwe Mann said, “So the 2008 Constitution was written to be able to transfer the nation’s power to a new government.”<sup>134</sup> This transfer to a new government was undemocratic given that the NLD won that right in 1990. The SLORC did summon the Hluttaw and establish the government twenty-one years after the 1990 elections, holding the 2010 elections so that only the military-backed USDP could win, the military having secured constitutional power as well.<sup>135</sup>

Declaration No. 1 of 1990 then did a number of things with the key intent of effecting legality and seeking legitimacy. It retrospectively decreed the nature of the 1989 elections by changing Election Law 14/89 so that Chapter 2, Section 3, which said that the elected MPs would form the constituent assembly, was

127. *Id.* at ¶ 21.

128. *See generally id.*

129. H.E. U KHIN MAUNG WIN, MYANMAR ROADMAP TO DEMOCRACY: THE WAY FORWARD (2004), available at [http://www.burmatoday.net/burmatoday2003/2004/02/040218\\_khinmgwin.htm](http://www.burmatoday.net/burmatoday2003/2004/02/040218_khinmgwin.htm).

130. After the SLORC refused to transfer power following the 1990 elections, it claimed that a new constitution would first have to be written. *See* HUMAN RIGHTS WATCH, *Chronology of Burma’s Constitutional Process*, *supra* note 63. The SLORC then held a national convention with the goal of drafting the basic elements for the new constitution. *See id.* These elements and suggestions are the subject of Declaration No. 1 of 1990. *See* State Law and Order Restoration Council Declaration No. 1/90, *supra* note 45.

131. *Id.* at ¶ 12.

132. *Burma Press Summary*, IBIBLIO (Sept. 1992), <http://www.ibiblio.org/obl/docs3/BPS92-09.pdf>.

133. *Id.*

134. Joshua Lipes, *Myanmar’s Speaker Says Junta Constitution Written to ‘Transfer Power’*, RFA (Sept. 9, 2013), <http://www.rfa.org/english/news/myanmar/constitution-09092013175352.html>.

135. *See* Kumar, *supra* note 120, at 5 (noting that the constitution provided the military central power in running the country and that the military, combined with USDP supporters, were given eighty-four percent of the parliamentary seats).

ignored.<sup>136</sup> The same electoral airbrush was applied through the Pyithu Hluttaw Electoral Law of 2010.<sup>137</sup> The SLORC decreed that now the role of the elected MPs was to write the country's constitution.<sup>138</sup> The SLORC decreed that it did not have to enter into political negotiations, particularly with the Ethnic Nationalities' armies.<sup>139</sup> The SLORC then violated and ignored Declaration No. 1 of 1990 by not allowing the MPs to write the constitution.<sup>140</sup> Instead, the SLORC manufactured their own constitution-making forum—the National Convention—which led to today's 2008 constitution.<sup>141</sup> They then decreed the National Convention framework and hand-picked the delegates.<sup>142</sup> At the outset, only fifteen percent of the delegates were MPs and by the time it wound up, it was around one percent.<sup>143</sup>

The National Convention commenced in 1993 and continued over a fourteen-and-a-half year period, with a long intermission from 1996 to 2004.<sup>144</sup> The 2008 constitution stayed on script with the guiding and general principles prevailing. Early on the Tatmadaw decreed that there would be six guiding principles and 104 general principles that would frame the constitution and they were not to be abridged in any shape or form, as they said the principles had been decided and

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136. Compare State Law and Order Restoration Council Declaration No. 1/90, *supra* note 45, ¶ 12 (“The Information Committee has, from time to time explained that the Multi-Party Democracy General Election Commission, the parties which won seats in the election and the elected representatives should carry out measures which should be carried out in accordance with the law and rules.”), with State Law and Order Restoration Council Law No. 14/89, Chapt. II, Sect. 3, [http://www.burmalibrary.org/docs15/1989-SLORC\\_Law1989-14-Pyithu\\_Hluttaw\\_Election\\_law.pdf](http://www.burmalibrary.org/docs15/1989-SLORC_Law1989-14-Pyithu_Hluttaw_Election_law.pdf) (“The Hluttaw shall be formed with the Hluttaw representatives who have been elected in accordance with this law from the Hluttaw constituencies.”).

137. The State Peace and Development Council, *The Amyotha Hluttaw Election Law* (Mar. 8, 2010), available at <http://www.networkmyanmar.org/images/stories/PDF3/14b.pdf>.

138. See State Law and Order Restoration Council Declaration No. 1/90, *supra* note 45, ¶ 20 (“[U]nder the present circumstances, the representatives elected by the people are those who have the responsibility to draw up the constitution of the future democratic State.”).

139. See Hamish Low, *Doublethink and Dictatorship: The Legitimacy of the State in Burma/Myanmar*, PEACE AND CONFLICT MONITOR, [http://www.monitor.upeace.org/archive.cfm?id\\_article=519](http://www.monitor.upeace.org/archive.cfm?id_article=519) (last updated June 4, 2008) (“Since the [SLORC] is not a political government, it has no reason at all to negotiate by political means with any armed insurgent organization.”)

140. See generally *Impunity Prolonged: Burma and its 2008 Constitution*, INT’L CTR. FOR TRANSITIONAL JUSTICE (Sept. 2009), <http://ictj.org/sites/default/files/ICTJ-Myanmar-Impunity-Constitution-2009-English.pdf> (documenting Myanmar’s struggle with the democratic process).

141. *Id.* at 3, 7.

142. See *The 1990 Elections and the National Convention Process*, <http://www.burmalibrary.org/show.php?cat=1142&lo=d&sl=0> (last visited Nov. 5, 2014) (“The National Convention, most of whose members were hand-picked by SLORC, first met in January 1993 with the goal of drafting the basic elements for such a constitution.”).

143. See HUMAN RIGHTS WATCH, *Chronology of Burma’s Constitutional Process*, *supra* note 63 (detailing the history of Myanmar’s National Convention, including various cancellations and the membership of the delegates). See generally Lipes, *supra* note 134.

144. See HUMAN RIGHTS WATCH, *Chronology of Burma’s Constitutional Process*, *supra* note 63 (providing a timeline of the National Convention).

desired by the people.<sup>145</sup> Given this decree, there was little room for creativity on constitutional advance, despite some valiant attempts by participants. There was one major abridgement of the 104 principles by the Tatmadaw: their decision to change Myanmar's capital from Yangon to Nay Pyi Taw.<sup>146</sup> To this day there has been no explanation, comment, or apology for this decision.

One keen-witted participant said that participation in the National Convention was more containment than convention.<sup>147</sup> Considering that Order 5/96 could prohibit and criminalize any discussion outside the National Convention, or within, this observation seems to hold true.<sup>148</sup>

The fifty-four member committee, which was given the task of turning the guiding and general principles into a workable constitution, had a formidable task. They had only a short time frame and likely lamented not having adequate time to reflect, confer, and cross check compatibility of articles.<sup>149</sup> While the committee managed to include some beneficial provisions, most of the rights are subjugated to caveats on the exercise of those rights, while the Tatmadaw has power essentially outside the state and the right to coup d'état in constitutional circumstances with relative ease.<sup>150</sup>

Twenty years later, in 2010, the Tatmadaw and the SPDC declared the 1990 election result invalid under Section 91 of the Pyithu Hluttaw Electoral Law 3/2010.<sup>151</sup> Section 91 states:

Pyithu Hluttaw Electoral Law (The State Law and Order Restoration

145. See *Burma's National Convention: Illegitimate, Unrepresentative and Oppressive*, ALTSEAN 6–8 (Feb. 16, 2005), <http://www.altsean.org/Docs/PDF%20Format/Thematic%20Briefers/Burma's%20National%20Convention%20-%20Illegitimate%20Unrepresentative%20And%20Oppressive.pdf> (discussing the military mandate behind the principles meant to guide the drafting of the constitution); see also Middleton, *supra* note 72 (discussing President U Thein Sein's statement that the constitution was written with the people's approval and should only be changed by the Parliament).

146. See Kate McGeown, *Burma's Confusing Capital Move*, BBC NEWS, <http://news.bbc.co.uk/2/hi/asia-pacific/4416960.stm> (last updated Nov. 8, 2005, 12:14 GMT) (discussing how the Myanmar government's move of the capital from a city with established infrastructure to a secluded city in the mountains led to confusion and speculation). See generally Maung Aung Myoe, *The Road to Naypyitaw: Making Sense of the Myanmar Government's Decision to Move its Capital* (Asia Research Inst., Working Paper Series No. 79, 2006), available at [https://inetapps.nus.edu.sg/ari/docs/wps/wps06\\_079.pdf](https://inetapps.nus.edu.sg/ari/docs/wps/wps06_079.pdf).

147. See Min Zin, *Reviewing the Junta's Strategy*, THE IRRAWADDY (Aug. 24, 2004), [http://www2.irrawaddy.org/print\\_article.php?art\\_id=3827](http://www2.irrawaddy.org/print_article.php?art_id=3827) (noting the military regime's containment of the NLD during the National Convention).

148. *Burma/Myanmar's Dictators Must Repeal Military Order 5/96*, BURMA TODAY (Oct. 2003), [http://www.burmatoday.net/burmatoday2003/2003/10/031028\\_asicj.htm](http://www.burmatoday.net/burmatoday2003/2003/10/031028_asicj.htm).

149. See KIVIMÄKI & PEDERSEN, *supra* note 44, at 42–44 (“[T]he [constitutional drafting] process was heavily scripted, and for many delegates deeply unsatisfactory.”).

150. See CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, Ch. VIII, art. 354 (noting that the rights of citizens in terms of freedom of speech are upheld only in so far as they are not contrary to laws enacted for union security).

151. *Pyithu Hluttaw Election Law* (The State Peace and Development Council Law No. 3/2010) Mar. 8, 2010, Section 91, available at <http://www.blc-burma.org/sites/default/files/Law%202010-03e.pdf>.

Council Law No 14/89) is repealed by this Law. The Multiparty Democracy General Elections held in accordance with the law repealed by this law is not relevant anymore with the Constitution and the results of the elections shall be considered automatically void.<sup>152</sup>

Despite this electoral and extra-legal airbrushing, the 1990 election remains a valid election according to the law of Myanmar at the time.<sup>153</sup> Repealing laws does not in turn constitute repeals of the outcomes and impacts of those laws.

The point of this retelling is to demonstrate that the 2008 constitution puts the Tatmadaw, their chosen MPs, and executive government firmly in control of the state architecture. The manner of its production, the National Convention, the referendum, and the 2010 elections puts that beyond doubt. The SPDC was not going to risk another 1990 result that saw a civilian political party and other democratic and Ethnic Nationalities parties win the election, which would have seen a democratically-convened Pyithu Hluttaw and a civilian government led by Aung San Suu Kyi's NLD.<sup>154</sup>

The military government has long appropriated national politics, essentially since it took over the government in a coup in 1962.<sup>155</sup> Military control has intensified from 1988 until today, despite the trappings of new and prima facie democratic state architecture.<sup>156</sup> However, there is a thawing and recognition that for peace to prevail and national reconciliation to take root, there must be political engagement, dialogue, and ultimately some sharing of power.

In 1990, the message about politics was that it was off the agenda completely. One scholar, in discussing the propensity for doublespeak by the military regime, had this to say:

Since the Tatmadaw is not a political organization, it did not hold negotiations with the insurgents by political means. However, it welcomes all those who have renounced the programme of armed struggle and returned to the legal fold and a body formed by it is carrying out resettlement work for them. Since the [SLORC] is not a political government, it has no reason at all to negotiate by political means with any armed insurgent organization.<sup>157</sup>

The challenge then for those seeking democracy and inclusion is to have political dialogue, as the Tatmadaw has always eschewed it.<sup>158</sup> It is only now that

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152. *Id.*

153. *See* Tonkin, *supra* note 118.

154. *See* Low, *supra* note 139 (detailing how the current regime fears its future should the elections of 1990 take effect and its attempts to ensure that any constitutional advancement is done on its terms).

155. *See id.* (detailing the current regime's rise to power under General Ne Win).

156. *See id.* (describing the regime's actions in stifling challenges to its authority and suppressing free exchange of information).

157. *Id.*

158. *See* KIVIMÄKI & PEDERSEN, *supra* note 44, at 7, 12 (explaining how the military's agenda has revolved around equating its own needs to be equal to or greater than the needs of the people and all attempts at dialogue between the military and opponents has been co-opting rather

political dialogue is more openly accepted by the country's government leaders. President U Thein Sein showed such acceptance, with specific reference to the current peace process and Ethnic Nationalities in his most recent address to the nation.<sup>159</sup>

A move toward political dialogue is in process now but in a halting and ad hoc manner given the tight hold that the Tatmadaw has over Myanmar's political space.<sup>160</sup> This hold is based on their belief that politicians cannot be trusted and only they, the military, can genuinely look after and be trusted to control national politics.

Therefore, securing a constitutional settlement requires recalibration of this firm hold on the political space. Absent a political pact, which would be ideal, recalibration and use of the current "wait and see" approach adopted by the Tatmadaw can advance even political space.<sup>161</sup>

#### IV. A BRIEF CONSIDERATION OF THE RELEVANT LITERATURE

Writing prior to the 2008 implementation of the constitutional reforms in Myanmar, Alan Smith outlined the milieu, which has informed the prospects for a federal approach in the country.<sup>162</sup> At that time, Smith saw the development of the 2008 constitution as a "military-managed regime transformation . . . a process through which a military, long and much experienced in holding state power, either directly or indirectly, is seeking to entrench elements of a political system that serve its interests and perpetuate its values."<sup>163</sup> Smith suggested that the constitution may offer an opportunity for a "slightly more open society."<sup>164</sup> Importantly, he also recognized there would be "legislatures at the state level."<sup>165</sup> At that time Smith called for the question of federalism to be "dealt with pragmatically rather than dogmatically."<sup>166</sup> It seems that post-2008, Smith is correct. While there is a place for understanding classical approaches to federalism and the pursuit of ideals represented by such approaches, the context of Myanmar calls for a uniquely pragmatic approach that seizes the legal and political opportunities to secure a lasting settlement.

Baogang He has also argued for federalism within the Asian context.<sup>167</sup> For

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than substantive compromise).

159. See U Thein Sein, President of Myanmar, Speech to the Nation (Oct. 1, 2013) (discussing plans for a nationwide ceasefire in an effort to bring various actors together to move further towards the goal of national peace).

160. See *id.* at 94 (detailing how reconciliation between various actors in the conflict will be difficult to resolve by stalemate as the government has asymmetrical power over the other actors).

161. See generally *id.*

162. See generally Alan Smith, *Ethnicity and Federal Prospect in Myanmar*, in *FEDERALISM IN ASIA* 188, 188–212 (Baogang He et al. eds., 2007).

163. *Id.* at 188–89.

164. *Id.* at 189.

165. *Id.* at 190.

166. *Id.* at 203.

167. See generally Baogang He, *The Federal Solution to Ethnic Conflicts*, 7 *GEO. J. INT'L AFF.* 29 (2006).



Baogang, federalism offers a means of conflict resolution, in particular in relation to secessionist agendas, especially where such agendas are intrinsically linked to ethnic divisions.<sup>168</sup> Interestingly, in relation to Myanmar, Baogang suggests that “[s]ome solutions may be based on an historical agreement which does not necessarily involve a federal constitution, but nonetheless puts federal structures into practice.”<sup>169</sup> This insight seems key in light of this thesis.

An informed pragmatism that engages with the theoretical, but also understands that a unique approach will best serve the peoples of Myanmar. In seeking to draw upon relevant theoretical insights, Ronald Watts,<sup>170</sup> Alfred Stepan,<sup>171</sup> and Juan Linz<sup>172</sup> have been influential.

Watts adopts an approach to federalism that seems to prioritize the “societies upon which [federal governments] have rested.”<sup>173</sup> He is keen to ensure the understanding that federalism is no panacea and that no “single pure model of federalism . . . is applicable everywhere.”<sup>174</sup> While recognizing the emergence of federalism as a post-colonial response, Watts sees federalism as a formula that “makes possible the large political and economic unit composed of varied peoples and cultures in which these smaller groups are assured some autonomy.”<sup>175</sup> Watts’s approach seeks to strike balance and coordination between general and regional governments by prioritizing the interdependence of the different levels of government, which in turn serves the needs of the particular society.<sup>176</sup> Coordination between these levels of government is the result of a political leadership capable of compromise, while desiring unity and prioritizing conciliation.<sup>177</sup> For Watts, the number, strength, and internal discipline of political parties influence the successful implementation of federal government.<sup>178</sup>

Alfred Stepan provides additional insight by classifying federalism into three

168. *See id.* at 33 (explaining that the driving force behind Asian federalism is threats to existing states by internal forces).

169. *Id.* at 36.

170. *See generally* Ronald L Watts, *Comparative Conclusions, in* DISTRIBUTION OF POWERS AND RESPONSIBILITIES IN FEDERAL COUNTRIES 322 (Akhtar Majeed et al. eds., 2006) [hereinafter Watts, *Comparative Conclusions*]; RONALD L WATTS, *COMPARING FEDERAL SYSTEMS* (3d. ed. 2008) [hereinafter WATTS, *COMPARING FEDERAL SYSTEMS*]; RONALD L WATTS, *NEW FEDERATIONS: EXPERIMENTS IN THE COMMONWEALTH* (1966) [hereinafter WATTS, *NEW FEDERATIONS*]; Ronald L Watts, *Typologies of Federalism, in* ROUTLEDGE HANDBOOK OF REGIONALISM AND FEDERALISM 19 (John Loughlin et al. eds., 2013).

171. *See generally* ALFRED STEPAN, *ARGUING COMPARATIVE POLITICS* (2001).

172. *See generally* Juan J. Linz, *Elements of Breakdown, in* THE BREAKDOWN OF DEMOCRATIC REGIMES 14 (Juan J. Linz & Alfred Stepan eds., 1978).

173. WATTS, *NEW FEDERATIONS*, *supra* note 170, at Preface.

174. WATTS, *COMPARING FEDERAL SYSTEMS*, *supra* note 170, at 1.

175. *Id.* at 7.

176. *See id.* at 13 (explaining that interdependence between central and regional governments achieves federal goals by preventing subordination at either level).

177. *See* WATTS, *NEW FEDERATIONS*, *supra* note 170, at 60–61 (detailing the various successes and failures of political leadership in Asian and African nations).

178. *Id.* at 61.

species distinguished categorically by whether the initial purpose of a specific federation was “coming together,” “holding together,” or “putting together.”<sup>179</sup> Viewed as a continuum, Stepan explains the various differences between the three categories. Federations that come together are largely voluntary, bargain-based, autonomous units who pool sovereignty in an effort to increase security.<sup>180</sup> Federations that hold together often emerge as a result of a consensual parliamentary decision to establish a multinational federal system.<sup>181</sup> Federations that are put together often stem from a heavily coercive effort by a centralizing power to establish a multinational state despite knowing that some jurisdictions have been independent previously.<sup>182</sup>

Recalling the importance of a political pact in Myanmar, Juan Linz has succinctly encapsulated a key consideration worth mentioning. While recognizing that the constitution drafting process itself will have long-term implications for the country, Linz considers the initial agenda adopted by the first government to be of equal, if not more, import.<sup>183</sup> Linz argues that this initial agenda often creates expectations that cannot be satisfied within the existing framework.<sup>184</sup> Accordingly, it “become[s] the source of semi-loyalty on the part of forces involved in the regime-building process.”<sup>185</sup>

Further, Watts recognizes that federations are not static structures, but rather are dynamic and evolving systems that require the use of various tools to ensure the proper development of the federation.<sup>186</sup> One such tool is the use of councils.<sup>187</sup> Using Australia as a case study, Watts explains how the country established the Council of Australian Governments (COAG) to oversee the extensive intergovernmental ministerial councils that had already developed.<sup>188</sup> One particular objective of COAG was to make the Australian economic union more effective.<sup>189</sup> Through COAG, state and federal ministerial-level politicians gathered to discuss and develop a legislative agenda, which, in turn, enabled them to return to their respective legislatures on a platform from which to stand.<sup>190</sup>

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179. STEPAN, *supra* note 171, at 324.

180. *Id.*

181. *Id.*

182. *Id.*

183. *See* Linz, *supra* note 172, at 40–41 (describing the importance of the initial goals agendas addressed by the adopted constitutional provisions of the first government).

184. *Id.*

185. *Id.*

186. *See* Watts, *Comparative Conclusions*, *supra* note 170, at 345 (explaining the dynamic nature of federations).

187. *Id.* at 342.

188. *Id.*

189. *Id.*

190. *Id.*; *see also* John M Williams & Clement Macintyre, *Commonwealth of Australia, in* DISTRIBUTION OF POWERS AND RESPONSIBILITIES IN FEDERAL COUNTRIES, *supra* note 170 (explaining that the COAG plays a significant role in maintaining and managing the distribution the powers and responsibilities in the federation by being a forum for negotiation between political leaders, despite having no express constitutional standing).

By generating political pacts, forums such as COAG provide an ongoing development towards federalism without needing to rely on constitutional instruments or formalizing such development within a particular federation. Myanmar has the ability to establish such forums if it so chooses.

### V. A PRAGMATIC FEDERALISM FOR MYANMAR

With the advent of the new state architecture, the Tatmadaw, secured by their constitutional power base, has an opportunity to recalibrate the political space in Myanmar, albeit with most of the same state actors and only a change of uniform from green pants to the more colorful *longyis* and *kaung baungs*. Though both the constitutional change and peace processes are key drivers, constitutional transformation is seminal and likely requires deft political positioning directed at democratic organizations, such as Myanmar political parties and the Ethnic Nationalities Forces.

The political pact that survives to this day in Myanmar is the Panglong Agreement, which embodies the aspirations of Myanmar's many peoples and their desire to live in a state structured on "genuine federalism."<sup>191</sup> While President U Thein Sein was quoted saying, "it seems we are moving closer to the advent of a genuine federal union that we have all been dreaming for, for six decades,"<sup>192</sup> the Ethnic Nationalities are seeking political dialogue and substantial constitutional reform by way of a political pact, hoping that eventually leads to a constitutional settlement.

A political pact premised on power sharing between federal and state bodies is the first requirement to secure an enduring constitutional settlement in Myanmar. The question of whether a constitutional settlement can be secured without such a pact remains open—it has bedeviled all political and military actors since regaining independence—but waiting for it to happen before any constitutional engagement takes place is missing an opportunity for constitutional advance.

Constitutions by their nature are part political and part legal. Constitutions are a product of political thinking, irrespective of who produces them and under what circumstances. Whether decreed by a military dictatorship, as in Myanmar, or developed through a process designed to reflect the peoples' will, constitutions represent political discourse. They are not simply frameworks individually drafted. Political actors, therefore, have two choices. The first option is to agitate the government and advocate for more substantial political dialogue, which has been attempted, relatively unsuccessfully, since the 1990 elections. The second option is to engage with the government and drive the political process towards open dialogue and transparency.

Undoubtedly, constitutional advances are strongest when supported by a

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191. See generally The Panglong Agreement, *supra* note 9.

192. Op-Ed., *A Genuine Federal Union*, MIZZIMA NEWS (Sept. 14, 2013), <http://www.mizzima.com/opinion/ed-op/item/10107-a-genuine-federal-union/10107-a-genuine-federal-union>.

mechanism that works towards a conclusive constitutional settlement. Today, both the Tatmadaw—should they choose to publicly speak—and those in power, including the executive government and MPs, would likely say such a mechanism exists in the form of the recently adopted state architecture. Whether this is in fact true or just constitutional *samsara*<sup>193</sup> is of no import. Failing to have such a mechanism at the outset of constitutional advances is neither paramount nor fatal to achieving the ultimate shared goal of constitutional settlement.

With respect to constitutional change, the president has consistently said that it remains a matter strictly for Parliament.<sup>194</sup> In an exclusive interview with the Australian Broadcasting Corporation, President U Thein Sein rejected the idea that he had authority to engage in constitutional reform.<sup>195</sup> Opposition leader Daw Aung San Suu Kyi requested he use his authority to allow her to take over the presidency by amending Section 59(f),<sup>196</sup> which prohibits candidates from running for the presidency if they have children who are overseas citizens. The president was adamant that he is not in a position to lobby for constitutional reform in order to pave the way for Daw Aung San Suu Kyi, claiming that it is not his place to interfere.<sup>197</sup> “There are three main pillars in our country. That is the executive branch, the legislative branch and the judicial branch. I do not have authority over the parliament.”<sup>198</sup> The 2008 constitution acknowledges these three spheres of government as separate, but only to the extent possible.<sup>199</sup>

The president actually has broad powers, though not expressly granted by the constitution, and can offer views on a wide range of public interest topics, including constitutional change.<sup>200</sup> He also has authority to introduce bills to Parliament and to initiate a referendum, which must be passed by seventy-five percent of Parliament before it is enacted.<sup>201</sup> The president’s failure—or refusal—to recognize this authority has stunted efforts to promote constitutional reformation in Myanmar. Additionally, his continued deference to Parliament has made any meaningful demand for change moot.

Countries supporting Myanmar’s political transformation must address the

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193. *Samsara* is Sanskrit and means a repeating cycle.

194. Middleton, *supra* note 72.

195. *Id.*

196. See CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, art. 59(f) (prohibiting candidates from qualifying for the presidency if they or any of their relatives have foreign citizenship).

197. See Middleton, *supra* note 72 (discussing the president’s reticence to engage in constitutional reform for fear of interfering with Parliament).

198. *Id.*

199. See CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, art. 11(a) (“The three branches of sovereign power namely, legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves”).

200. *Id.* art. 66 (“The President or the Vice-Presidents shall exercise duties and powers vested by this Constitution and other laws”).

201. See Middleton, *supra* note 72 (explaining the challenge of overcoming the seventy-five percent requirement necessary to amend the constitution).

president's reluctance and make their views known. Engagement cannot slip into appeasement. Similar to how the USDP government offers countries guidance, expectations regarding Myanmar need to be finely articulated and voiced. Australia and Myanmar now have high-level consultation. Australia has agreed to assist in the electoral process at the request of the head of Myanmar's Union Election Commission, U Tin Aye, and constitutional reform is assumed to be a standard agenda item available for discussion.<sup>202</sup> As with other countries, including the United States, Australia would be compromised if it assisted a process that was blatantly not free and fair.<sup>203</sup>

As such, people are left asking why the president refuses to recognize his role in reforming Myanmar's constitution. In this period of transformation, this failure alone is a destabilizing factor. When coupled with the deafening silence emanating from the Tatmadaw, who remain "mainly responsible for safeguarding the constitution,"<sup>204</sup> uncertainty and concern become increasingly prevalent.

Many statements pertaining to constitutional change have been made by U Shwe Mann, suggesting the desire for a cease to this constitutional standoff; however, none has been more telling than his proposition that the government, meaning the executive, is the key to securing constitutional reform.<sup>205</sup> In a report from *The Bangkok Post*, U Shwe Mann said that the decision to amend the constitution or not will need the blessing of reformist President U Thein Sein's government.<sup>206</sup> Though the hope is that such endorsement is enough, many question whether the military lawmakers, who have twenty-five percent of the seats in Parliament guaranteed under the current constitution, may prove to be an obstacle towards efforts to amend the document, regardless of whether the government presses for change.<sup>207</sup>

One development worth mentioning is the creation of a shared constitutional identity. To make the state work, people need to take their own ethnic, lingual, cultural, and religious identities and, through a constitutional settlement, supplement them with a common constitutional identity, creating a foundation for a federal union of Myanmar. It need not be conscripted or decreed, as the military has tried to do for decades, by imposing national culture, but rather can grow from a shared common constitutional identity created by citizens linked by a united body. This could be Myanmar's starting point, a common identity that gives expression to the concept of unity in diversity. Myanmar's political transformation,

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202. See generally Janelle Saffin, *The Constitution and 'The Lady Prohibition'*, MYANMAR TIMES (July 15, 2013), <http://www.mmtimes.com/index.php/opinion/7494-the-constitution-and-the-lady-prohibition.html> [hereinafter Saffin, *The Lady Prohibition*].

203. *Id.*

204. *Id.*

205. See generally Myanmar speaker says govt pivotal in constitutional change, FOX NEWS (Aug. 16, 2013), <http://www.foxnews.com/world/2013/08/16/myanmar-speaker-says-govt-pivotal-in-constitutional-change/>.

206. *Id.*

207. *Id.*

built upon a common constitutional identity, can start the long and complicated task of changing the culture of the country. Through constitutional change, Myanmar can become a country respecting human rights, tackling poverty, curbing forceful attacks from Tatmadaw or Ethnic Nationalities' armies, contracting land ownership and title, encouraging education, and celebrating ethnic identity.

With even a cursory glance at the state, the long-standing sentiment that Myanmar needs a constitutional settlement is self-evident. It is not self-evident, however, that such a settlement is within Myanmar's grasp. A federal arrangement advocating both shared and self-rule is possible. The bulk of the responsibility, however, rests on the political will of the Tatmadaw.<sup>208</sup> Waiting for the Tatmadaw's decision on what is or is not permissible can seem interminable, especially as many are anxious to learn the outcome.

The most direct way to secure a constitutional settlement is through a deliberate agreement built upon a mutually accepted political pact where all parties agree to the nature of the state and the sharing of power. Once in effect, the next step is to frame this agreement in a constitutional compact. This is what the NLD scripted in 1990 after recognizing the need to transform the 1947 constitution through more modern amendments. Through the work of the Pyithu Hluttaw, a countrywide consultation to script a new constitution was born. The Tatmadaw could do this today, and in turn, empower the executive and the Parliament to join in taking steps to create such reform. It would not only be welcomed throughout Myanmar, but also would be applauded by jurisdictions beyond Myanmar's borders.

## VI. CONCLUSION

The state of Myanmar is known to the world as one of great natural beauty, with an abundance of natural resources<sup>209</sup> and was once known as Asia's rice bowl. It is now, however, also known as a county wracked with poverty where people go hungry, children die needlessly from preventable disease, and women die far too readily in and from childbirth.<sup>210</sup> It is known as a country besieged with conflict, particularly with the Tatmadaw and Ethnic Nationalities' armies. Further, Myanmar is marked by corruption where doing business relies on military largesse and cronyism, not the rule of law.<sup>211</sup> It is a country where a small group of men in the Armed Forces amassed incredible wealth, human rights abuses are the norm rather than the exception, and democratic aspirations of the many peoples have long been subjugated. Yet despite these negatives, Myanmar is politically transformable.<sup>212</sup>

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208. See Saffin, *The Lady Prohibition*, *supra* note 202 (suggesting that the current transformation is welcome, but scripted and guided by the Tatmadaw who are responsible for safeguarding the constitution).

209. See generally *Myanmar Overview*, THE WORLD BANK (Oct. 2014), <http://www.worldbank.org/en/country/myanmar/overview>.

210. *Id.*

211. *Id.*

212. *Id.*

Over the twenty-three years since Declaration No. 1 of 1990, Myanmar has seen the 2008 constitution, a number of parliaments at national, state, and regional levels, the 2010 general election, and the 2012 by-election.<sup>213</sup> It has introduced a national executive government, state and regional governments, a judicial hierarchy, and a constitutional court.<sup>214</sup> Many of these developments are the result of the Seven-Step Roadmap to Disciplined Democracy, yet all have been scripted, calibrated, and decreed by the Tatmadaw.<sup>215</sup> The country of Myanmar, however, wants more. With a desire to engage the international community and attract foreign investment, Myanmar seeks to shed its image as a pariah state. To do this, they must shift ground yet again.

Though there is a political plan of sorts, as decreed by the Tatmadaw, it remains one-dimensional, and despite being better than military dictatorship, the current approach still wreaks havoc on the national psyche. The modus operandi of command and control has not changed; rather, it has instantiated itself into today's existing constitutional order. The Tatmadaw, therefore, has an opportunity to seize the moment through two key processes currently underway: the constitutional review and the peace process. Both are working towards constitutional change and both are seeking constitutional settlement.

Unequivocally, Myanmar would benefit from a clear constitutional settlement prior to the 2015 election. As this seems unlikely, but could be done if the political will was present, a commitment to execute a framework for constitutional advance prior to, and continuing through, the 2015 election would be sufficient to demonstrate the country's willingness to change its political tune. Starting down such a path will guarantee that a constitutional settlement framework, geared towards curbing Myanmar's current unflattering realities, will support the 2020 election.

Despite internal and external pressure, the NLD and the key Ethnic Nationalities political parties took the first step, demonstrating keen political acumen, by choosing not to participate in the 2010 elections.<sup>216</sup> Believing such participation would endorse the current framework, these parties opted out of fundamentally weakening their political position and instead guarded their platform for future negotiations.<sup>217</sup> Thus, the interests of others seeking constitutional advance were protected as well.

The questions explored in this article are on the minds of those who have

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213. See generally *Myanmar Profile: A Chronology of Key Events*, BBC NEWS ASIA (Oct. 7, 2014, 10:22 AM), <http://www.bbc.com/news/world-asia-pacific-12992883>.

214. *Id.*

215. Saffin, *The Lady Prohibition*, *supra* note 202.

216. See, e.g., *Suu Kyi party to boycott election*, BBC News (Mar. 29, 2010), <http://news.bbc.co.uk/2/hi/asia-pacific/8592365.stm> (covering NLD's decision not to take part in the 2010 citing unjust election laws).

217. See generally Michael F. Martin, *Burma's 2010 Elections: Implications of the New Constitution and Election Laws*, CONGRESSIONAL RESEARCH SERVICES, 9–10 (Apr. 29, 2010), available at <http://fas.org/sgp/crs/row/R41218.pdf>.

taken an interest in constitutionalism. This includes people from the international community who have joined the Myanmar cause and key political actors within Myanmar who are drawn from the main political parties and the Ethnic Nationalities organizations. All agree there are no easy choices, but fear of not securing constitutional settlement should not prohibit the establishment of a constitutional framework necessary to achieve that end goal. Constitutional settlement relies upon political negotiation and ideally includes a political pact. Attention needs to be given to these key issues.