



# Constitutional Awareness

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## CONSTITUTIONAL AWARENESS

This document is a guide to the Constitution and constitutional reform.

It consists of:

- A. What is a Constitution? (p.1-6)
- B. Key Provisions of the Current Burmese Constitution (p.7-14)
- C. Possible Areas for Reform (p.14- 25)

The document is not written for the specialist in constitutional law. Nor is it intended to be fully comprehensive. It selects those issues which appear to be most relevant to Burma/Myanmar at the present time.

## **CONSTITUTIONAL AWARENESS**

### **A. WHAT IS A CONSTITUTION?**

A Constitution is a collection of rules and principles which set out how a state will be governed.

It forms the framework for all decisions made by every government official and, particularly the legislature (the law making body), executive (President/Prime Minister/ministers) and the courts.

It also sets out the rights of everyone which must be respected by the state and therefore establishes the relationship between the government and the people.

### **Why is a constitution important?**

A constitution is important because it ensures that those who make decisions on behalf of the public fairly represent public opinion.

It also sets out the ways in which those who exercise power may be held accountable to the people they serve.

And it sets out where government powers end by guaranteeing individuals' specific rights and freedoms. These rights help to assure the protection and promotion of human dignity, equality and liberty.

Constitutions may provide for the division of powers between the central government and the regions.

Constitutions should be agreed rather than imposed so as to provide an acceptable framework for the settling of different political views. They help provide for a stable society by ensuring that, although everybody may not agree with the government all the time, the people accept the legitimacy of the system of choosing governments.



## **What does a constitution contain?**

A constitution will often contain a number, if not all, of the following features:

**A Preamble:** This sets the constitution in context, outlining the state's fundamental values and objectives.

**The Identity of the State:** The constitution may set out the official language or languages, the country's flag, who is eligible to be a citizen and the position of the state in the world.

**A Bill of Rights:** The constitution will set out the rights of individuals and the circumstances in which these may be limited or suspended.

**Commitment to the rule of law:** Many constitutions endorse the rule of law, whereby laws must be clear and accessible, equally enforced, and where people have the opportunity to assert their rights in courts where they must receive a fair trial before independent and impartial judges.

**The Role and Composition of the Legislature (Law Making Body):** The constitution will set out who will make up the legislature and how its members will be chosen. There may be one or two bodies and the constitution will say what their respective roles are.

**The Role and Composition of the Executive (President/ Prime Minister/ Ministers):** The constitution will determine who will be part of the executive and how they will be chosen. It sets out the powers of the executive including those of the head of the executive (president / prime minister). In some constitutions the head of state has a great deal of powers, and in others the head of state is more in the nature of the representative of the people, and the main executive power is wielded by a prime minister. The constitution also sets out how the executive is accountable for the exercise of power to the legislature, the courts and the people.

**The Structure and Appointment of the Judiciary:** The constitution sets out conditions for choosing judges and their independence from the other branches of government (the legislature and the executive) as well as the kinds and levels of courts. The role and method of appointment of the government legal advisor (Attorney General) and public prosecutors will also normally also be provided for in the constitution.

**Provisions for Elections:** The constitution sets out requirements for elections. These may include which voting system is to be used, regulations for political parties, who may stand for election and regulations regarding how elections are to be carried out fairly and honestly.

**Other Important Bodies:** The constitution may provide for additional bodies such as a central bank, and bodies to support democracy, for example an Electoral Commission, Anti-Corruption Commission, Financial Oversight Commission or a Human Rights Commission.

**The Structure of the State:** The constitution will determine how power is to be allocated between the national, regional and local levels.

**The Economy and Distribution of Resources:** Some constitutions set out which economic system a state is to follow (for example, market economy or socialism). Most however leave that question to the choice of the people. It may also determine how natural resources and other wealth are to be allocated between levels of government or regions.

**The Role and Control of the Armed Forces/Police:** The constitution may set out the duties of the military and police as well as provisions for their supervision, control and accountability.

**Emergency powers:** The constitution should address who can declare an emergency and in what circumstances, and who is granted what powers during an emergency.

**Amendment Provisions:** The constitution will set out how it can be changed, normally by a majority of more than 50 per cent of the members of the legislature and sometimes also by a referendum of the people.

### **What distinguishes a Constitution from Laws Made by the Legislature?**

Because they form the framework for all decisions and actions of officials, the rules and principles outlined in constitutions are normally regarded as superior to laws passed by the legislature.

This means that representatives in the legislature should only pass a law if it is compatible with the constitution. The courts normally have the role of deciding whether a law conflicts with the constitution.

Since constitutional rules have this higher status there are often tougher requirements for changing them than for ordinary law. However, it is important that a constitution can be amended so it can undergo improvement and respond to changing circumstances.

Constitutions also usually allow for the suspension of some or all of its provisions, but only in time of emergency, such as when it is seriously necessary to safeguard national security or vital public interests.

## **How can a constitution protect individuals' rights?**

A constitution can protect individuals by outlining their rights, normally in a 'bill of rights' at or near the beginning of the constitution.

The rights which the constitution contains are normally owed to everyone in a country with the exception of rights which may be reserved for citizens only, such as the right to vote.

**Civil and political rights** include rights such as to life, to personal liberty, protection from torture, protection from slavery, freedom of expression, the right to equal treatment and the right to demonstrate peacefully.

These rights place limits on the power of the state and the constitution permits everyone to assert them through access to courts where there is a further right to a fair trial before impartial and independent judges.

Some countries have a right to administrative justice, which impose a duty on all public officials to act within the law, to give people fair hearings and to act reasonably.

Some constitutions also contain **economic, social and cultural rights** such as the right to housing, the right to education, the right to healthcare, the right to work and even environmental rights.

These may be important to allow people to enjoy their political and civil rights by helping to guarantee them an adequate standard of living. However, some people believe including these 'positive' rights in a constitution limits the government's ability to make economic and social policy. A constitution may therefore determine that the state's duty to guarantee such rights can be realized gradually over time.

The rights included in a state's constitution will also be determined by which international treaties it has signed, such as UN Conventions on various rights, since these set out detailed requirements for how states should treat individuals.

**Absolute rights** are rights which cannot be limited in any situation or for any reason, for example, protection from torture.

**Limited rights** can be restricted in certain circumstances. The right to free speech, for example, may not extend to speech which offends the reputation of others or which incites racial or religious hatred. The constitution should outline how and when rights can be limited.

**Derogable rights** are those which can be suspended, for example, during a state of emergency. Such rights might include the right to freedom of expression or assembly. The constitution should set out in what circumstances suspension is allowed.

**Non-derogable rights** are those which a state can never suspend, for example, protection from torture.

#### Who is protected?

The rights set out in the constitution are in most cases owed equally to everybody.

However, they may be most important to those who have faced disadvantages in the past, for example, ethnic minorities and women.

As a result the general principle of equality outlined in the constitution may need to be accompanied by clear protections for women or minorities against discrimination.

#### Enforcement

The constitution is also important in determining how rights will be enforced.

It should in particular outline the role of courts in deciding rights violations and the compatibility of legislation with constitutional rights.

The constitution may also provide for independent bodies to assist enforcement of rights, such as a Corruption Commission, or a Human Rights Commission which can receive complaints, monitor respect for constitutional rights and promote their recognition.

### **How do the Government and Courts Function?**

A constitution establishes three main bodies: a legislature which passes laws, an executive which implements the law and a judiciary which enforces compliance with the law. It also determines how power is to be allocated between these three.

The **legislature** is made up of representatives of which all, or a majority, are elected by the people for specified lengths of time. It is responsible for passing laws, holding the executive to account, debating issues of the day and representing the people.

The **executive** plans and promotes government policy and is responsible for putting the law into action. It also plays a role in proposing new legislation and supervising state bodies such as the civil service and the military. The head of the executive may have further specific powers including the power to appoint members of the executive and the power to refuse or delay legislation, enter into international treaties and the power to make war or declare peace.

The **courts** administer justice –between two private persons or institutions, or between a person and the state. It is therefore of vital importance that judges are impartial and independent from the government or other interests. To ensure independence, judges must be appointed on the basis of merit rather than on the basis of their personal or political connections. For the same reason, the constitution must also set out strict guidelines as to when a judge can be removed.

### **How is Power Allocated between the Centre and the Regions?**

A constitution must also set out how power is to be allocated between the national and regional level.

**Unitary states** are governed as a single unit with the central government playing the most important role. Although there may be local government to deal with certain matters, the central government will have the freedom to grant and withhold the powers which it enjoys.

A **constitutionally decentralized union** is a state in which the constitution devolves some powers to the regions. The different regions may enjoy the same powers or the powers may differ in different regions (known as ‘asymmetrical devolution’).

In **federal states**, the constitution shares power between the central (federal) government and the regions (usually known as states or provinces).

## **B. KEY PROVISIONS OF THE CURRENT BURMESE CONSTITUTION**

### **Bill of Rights:**

Various civil, political, economic, social and cultural rights are set out in the Constitution. Many of these rights are reserved for citizens.

Some rights are given as absolute. These include:

the protection from a penalty that violates human dignity [art. 44], the right to equality under the law [art.347], the right against discrimination [art.348], the ban on enslaving and trafficking individuals [art. 358] the right of defence and appeal under law [art. 19(c)], and the right to equality, liberty and justice [art. 21(a)].

However, many rights set out in the Constitution can be limited in certain circumstances which are often very general and wide-ranging. These include:

the right to freedom of conscience [art.34], protection against actions harmful to life and personal freedom [art. 353], the right of expression, assembly, and association [art.345], protection from forced labour [art. 359], the right to freely develop literature, culture, arts, customs and traditions [art. 365], protection against being held in custody for more than 24 hours without the approval of a judge [art. 376], the right to compensation for complaints entitled under the law [art. 381] and, protection against sexual discrimination when civil service positions are believed to be suitable only for men [art. 352].

All of the rights set out in the constitution are derogable since they can be suspended in a state of emergency [art.414; art.420].

## **The Role and Composition of the Legislature**

### How is the Legislature chosen?

The Pyidaungsu Hluttaw (the legislature) is made up of two bodies: the Pyithu Hluttaw and the Amyotha Hluttaw [art.74].

The Pyithu Hluttaw has a maximum of 440 representatives [art.109].

330 representatives are elected by the people to represent townships by population.

110 representatives are Defence Services personnel put forward by the Commander-in-Chief of the Defence Services.

The Amyotha Hluttaw has a maximum of 224 representatives [art.141].

168 of these are elected by the people: 12 from each State and Region, including one representative from each Self-Administered Division or Self-Administered Zone.

56 representatives are Defence Services personnel put forward by the Commander-in-Chief of the Defence Services (4 from each Region or State).

Representatives are elected (or appointed) for 5 years [art.119; art.151].

### What are the powers of the Legislature?

The Pyidaungsu Hluttaw is responsible for making law [art. 95; art.96].

A proposed law is passed if it achieves a majority of support in both Hluttaws [art.95 (a)]. If there is a disagreement between the two Hluttaws this must be discussed and resolved in the Pyidaungsu Hluttaw [art. 95 (b)].

The Pyidaungsu Hluttaw also plays a role in approving, refusing or limiting spending proposed by the President in the Union Budget Bill [art.103]. However, there are certain items of spending which the Pyidaungsu Hluttaw cannot reject [art.103 (b)]

While the legislature has an important role to play in discussing proposed law and raising and answering questions, Article 89 prevents the minutes of the Pyidaungsu Hluttaw being published if their publication is forbidden by law.

## **The Role and Composition of the Executive**

The Constitution sets out a presidential system in which power is shared between the executive (of which the president is the head), the legislature and the courts [art.16; art.11 (a)].

### How is the President chosen?

The President is chosen by the Presidential Electoral College [art.60 (a)]

The Presidential Electoral College is made up of three groups: Hluttaw representatives elected from the Regions and States, Hluttaw representatives elected on the basis of township and population, and Defence Services Hluttaw representatives [art.60 (b)].

Each group selects a Vice-President and from among these three people, a President is elected by all the Pyidaungsu Hluttaw representatives [art.60 (c), (e)].

Once elected the President holds the position for 5 years and can be elected President no more than twice [art.61].

Article 59 sets out the requirements which a person must meet to be elected as President. These include citizenship, residency and age requirements, as well as a requirement that the person is loyal to the Union and well acquainted with its affairs. In addition, Article 59 (f), states that a candidate's parents, spouse, child or child's spouse cannot be loyal to a foreign country, be a citizen or subject of a foreign country, or enjoy the rights of a citizen or subject of a foreign country.

### What are the Powers of the President?

The President has the power to choose the members of the Union Government [art.232; art.237] except for the Vice-Presidents who are elected by the Electoral College. Whilst the people he/she chooses must be agreed to by the legislature, it can only disagree if it can prove that the person does not meet the requirements for the role [art. 232 (c), (b); art.237 (a), (b)]

The Ministers of Defence, Home Affairs and Border Affairs must be chosen by the President from a list given to him/her by the Commander-in-Chief of the Defence Services [art.232 (b)].

The President has a number of further powers including:

Starting or ending relationships with other countries with the approval of the legislature [art.206]

Making or ending agreements with other countries with the approval of the legislature



[art.209]

Making a speech to the Pyidaungsu Hluttaw, the Amyotha Hluttaw, or to the whole country

[art.210]

Calling an emergency session of the legislature [art.211]

Putting into effect a law that is needed urgently when the legislature is not assembled

[art.212]

Taking military action in the case of aggression against the Union in agreement with the National Security and Defence Committee [art. 213].

Deciding on non-constitutional disagreements over management at the state, region and self-administered zone level with the help of the government [art. 226].

The President must sign a proposed law approved by the legislature within 14 days. During this time the President can give feedback to the legislature. However, after 14 days it will become law with or without the President's signature [art.105].

Article 215 states that the President is not accountable to the legislature or the courts for using the powers outlined above.

However, the Constitution does set out provisions for the legislature to remove the President in certain circumstances [art. 71].

## **The Structure and Appointment of the Courts:**

### How are judges chosen?

The President chooses the Chief Justice of the Union (the head of the Supreme Court) with the agreement of the legislature. The legislature can only disagree with the person the President has chosen if this person does not meet the requirements for the role [art. 299]. With the help of the Chief Justice, the President then chooses the rest of the judges for the Supreme Court [art. 299 (d)] and the Chief Justices of the High Courts of the Regions and States [art.308 (b)]. The rest of the judges at this level are then chosen by the Chief Minister and Chief Justice of the State or Regions [art.308 (b)].

Finally, the President chooses a third of the judges of the Constitutional Tribunal [art.321]. Another third are chosen by the Speaker of the Pyithu Hluttaw and the final third by the Speaker of the Amyotha Hluttaw. The members of the Constitutional Tribunal hold this role for five years [art. 335].

## What are the powers of the courts?

Power is shared among the Supreme Court of the Union (which is the highest court of appeal), High Courts of the Regions, High Courts of the States and Courts of different levels including Courts of Self-Administered Areas [art.18].

The High Courts of the Regions and States have the power to hear and settle cases and appeals [art. 306].

The Supreme Court has the power to give written orders to:

Require a person held by the authorities to be brought before a court so it can be determined whether their imprisonment is legal.

Make a lower court or public official perform a specific duty

Stop a lower court doing something the law forbids

Require a person who is exercising some right or power to prove they have the authority to do so

Review a decision of a lower court

The Constitutional Tribunal is responsible for interpreting the rules set out in the Constitution and checking that laws made by the legislature are consistent with the Constitution [art.46].

However, the Constitution does not specify the effect of a decision by the Constitutional Tribunal that an inconsistency exists. It appears the Tribunal is simply to state its findings and any inconsistent law will therefore continue in force.

## **The Structure of the State:**

### How is power distributed between different levels?

The Constitution allows for powers of the executive, legislature and court to be shared between the Union and States, Regions, Self-Administered Divisions and Self-Administered Zones [art.11 (b)]

The Constitution provides for the creation of legislatures at the State and Region level [art.161] and in Self-Administered Divisions and Self-Administered Zones [art.196]. These legislatures may make laws in certain areas. However, laws passed by the Pyidaungsu Hluttaw are superior and there are few areas in which Region or State legislatures have exclusive law making powers [art.198 (b)].

The Constitution also gives executive power to Region or State governments in areas in which Region or State legislatures can make law [art. 249]. However, Chief Ministers of the Region and State are chosen by the President [art.261 (b)] and are accountable to him.

There are courts at the State, Region, Self-Administered Area, township and district level that have the power to hear cases and appeals. However, the President chooses the Chief Justices of the High Courts of the Regions and States in consultation with the Chief Justice of the Union [art.308 (b)].

The powers of the Regions, States, Self-Administered Divisions and Self-Administered Zones can be withdrawn in the case of an emergency [art.411; art.413].

The constitution forbids States, Regions, Self-Administered Divisions and Self-Administered Zones from leaving the Union [art.10].

### **The Role and Control of the Armed Forces:**

All armed forces in the Union are under the command of the Defence Services [art. 338]  
The Commander-in-Chief of the Defence Services is in charge of all armed forces [art.20 (c)]

The President chooses the Commander-in-Chief from a person suggested and approved by the National Defence and Security Council (art.342).

#### What are the powers of the armed forces?

The Constitution makes the Defence Services responsible for safeguarding the Constitution [art. 20 (f)] and protecting the Union from all internal and external dangers [art.339].

The Defence Services has the power to order the involvement of all people in Union security and defence [art.20 (d)].

The Constitution allows the Defence Services the right to independently control all affairs of the military [art.20 (b)].

Military justice is to be dispensed outside the normal court system in Courts- Martial [art. 319]. In deciding matters of military justice the decision of the Commander-in-Chief of the Defence Services is final [art.343 (a)].

There is no provision for any civilian oversight or control of the actions of the armed forces.

## **Emergency Powers:**

### In what circumstances can a state of emergency be called?

If administrative duties cannot be carried out in a Region, State, Union Territory or Self-Administered Area in accordance with the Constitution [art.410].

If there is (or is likely to be) an emergency threatening people's lives, shelter and property [art.412].

If there is a situation which may lead to disintegration of the Union, disintegration of national solidarity or a threat to national sovereignty [art. 417].

### Who can declare an emergency?

In the first two cases above the President, after discussing with the National Defence and Security Council, can announce a state of emergency, stating which areas it affects and for how long [art.414 (a)].

In the third case above the President, after discussing with the National Defence and Security Council, can announce a state of emergency which is to last a year and covers the whole Union. This state of emergency can be extended twice for up to six months each time [art.421 (b)]. Article 40 (c) also allows the Commander-in-Chief to take over in this circumstance.

### Who holds emergency powers and what are they?

During the first type of emergency, executive and legislative powers of the Region, State or Self-Administered Area can be transferred to the President [art.411].

During the second type of emergency, military services can offer help to the administration or the President may announce a military administration with executive powers and the powers of the courts passing to the Commander-in-Chief of the military [art.413].

In the third type of emergency the powers of the executive, legislature and the courts pass to the Commander-in-Chief [art.418]. Once the emergency is over, these powers are given to the National Defence and Security Council until the legislature comes together again [art.427].

In all cases of emergency, citizens' rights may be withheld as required [art.414; art.420]. Furthermore, no legal action may be taken against the actions of those in power during a state of emergency [art.432].



### **Amendment Provisions:**

A suggested amendment must be submitted to the Pyidaungsu Hluttaw by 20% of its representatives [art. 433; art.434; art.435]

It must have the support of 75% of the Pyidaungsu Hluttaw representatives to be passed [art.436].

Amendments relating to specific sections of the Constitution must also be approved by a majority of those eligible to vote in a nation-wide vote [art. 436(a)].

## **C. POSSIBLE AREAS FOR REFORM**

### **Bill of Rights**

#### Important Additional Rights

The Constitution currently does not include a number of important rights. It does not ban torture or cruel punishment. It does not grant the right to legal advice for defendants, or the right to be heard by the courts on a matter in which you are involved, or the right to present and challenge evidence. It also does not protect against being tried twice for the same crime and it does not require a presumption that a person is innocent until proven guilty. These are all rights which could be included if the Constitution were changed.

Consideration might also be given to rights which are contained in a number of new constitutions such as the right to administrative justice, which places a duty on all public officials to act within the law, to give all persons a right to be heard, and not to act in an arbitrary fashion. Environmental rights are also increasingly being adopted in modern constitutions.

## Absolute and Limited Rights

There are other important rights which the Constitution does protect, but this protection is often weak. It may therefore be necessary for these rights to be strengthened.

The ban on actions which are damaging to life and freedom, for example, may be overridden by a law which allows such actions. Similarly the right against forced labour may be overridden by a law which allows forced labour consistent with the public interest.

These are examples of limited rights which it may be preferable to make absolute. This would mean that they were recognised by those in power as rights which should be protected in all circumstances. Other rights which it may be desirable to make absolute include protection against being held in custody for more than 24 hours without the approval of a judge.

In some cases it will still be necessary to have limitations on rights in order to protect the freedom of others. The right to free speech for example may be limited by a law which prohibits the incitement to violence, particularly against another ethnic group.

However the limitations which the Constitution sets out are currently very broad, allowing for rights to be limited in a wide range of circumstances.

Freedom of expression, freedom of assembly, for example, are all currently limited by laws made for Union security, law and order, community peace or public order and morality.

Most constitutions and international human rights instruments, specifically provide the circumstances under which rights may be curtailed. They require the purpose for the limitation on a right to be legitimate and really necessary in a democratic society. Any laws curtailing the rights must be clear and the measure taken must be proportionate to its objective. In short, the limitation must be compatible with a democratic society and not go any further than is necessary.

## The Right to Vote and the Right to Stand for Election

The right to vote and the right to stand for election are two more examples of rights which may be considered to be overly limited. Not only do they require citizenship which is hard to acquire, but the right to vote can also be denied through a law even despite the right's inclusion in the Constitution [art.391].

These rights are also denied to members of religious orders and prisoners [art. 392; art.121]. Denying these rights to members of religious orders conflicts with the principle of non-discrimination on the basis of religion which is guaranteed elsewhere in the Constitution [art. 348].

Given the importance of allowing people to choose who represents them in the system which governs them, changes might be made to extend the right to vote. Any limitation on a right to vote must be for a good reason, and be proportionate to that reason. Otherwise, limitations on the right to vote may undermine people's choice freely to choose who represents them and threaten the legitimacy of the legislature and the laws that it makes.

## Rights for Ethnic Minorities, Women, Children and the Disabled

There may also be a need for clear constitutional protections of equal ethnic minority rights given the past history of ethnic strife.

Consideration might be given to allowing ethnic minorities a greater role in governing their own communities and to protect their culture and language. The right to develop literature, cultures, arts, customs and traditions is presently limited in the Constitution since this right may to be denied if it is harmful to national unity.

Women's rights may also need to be explicitly protected, particularly as some civil service positions may presently be reserved for men.

Finally, the Constitution currently sets out no specific rights for children or the disabled. These might be included.

## Human Rights Commission

A Human Rights Commission has been established by President Thein Sein. Given the important role a Human Rights Commission could play in protecting and promoting rights it may be desirable to make provisions for the Commission in the Constitution.

It will be necessary to outline the functions of the Commission, how it is to be funded and who its members are to be.

International principles suggest that the Commission should be given the right, as well as the duty, to :

Protect and promote rights

Send its opinions, recommendations, proposals and reports on human rights to the government, legislature and any other body

Ensure the compatibility of national laws with international human rights standards

Help with the country's reports to United Nations committees

Work with international, regional and other national human rights institutions

Help with human rights education

Publicize and promote human rights

The Commission may also be granted a role in hearing and considering complaints of rights violations.

It will be important that the Commission is independent from the executive whose exercise of power it will have to check.

It is widely held that to ensure independence, its members must represent a wide range of different people, it should not be reliant on the government for funding and its role should be established.

## Placement of the Bill of Rights

Unlike most constitutions, the Constitution does not place a "bill of rights" at the beginning of the Constitution. Consideration should be given to whether all the rights found in the constitution should be placed together in a bill of rights at the beginning of the constitution.

## **The Role and Composition of the Executive**

### Choosing the President

The first area of potential reform here relates to how the President is chosen. The President is currently chosen by the Electoral Presidential College rather than directly by the people, and the military has an important say in this decision. It should be considered therefore whether the President (and Vice-Presidents) should be directly elected by the people. This would make the President more representative of the people and more accountable to them for his/her exercise of power.

### Military influence in the Executive

As well as playing a role in choosing the President the military also influences the executive by appointing the Ministers of Defence, Home Affairs and Border Affairs. The reform of these powers should be considered.

### Requirements for being President

One very important issue to consider is whether the requirements which must be met in order to be elected President are unreasonable.

This relates specifically to Article 59 (f), which states that a candidate's parents, spouse, child or child's spouse cannot be loyal to a foreign country, be a citizen/subject of a foreign country or enjoy the rights of a citizen/subject of a foreign country. Requirements that the President was born in the state's territory to parents who were both citizens, and must have resided in the country for the last twenty years, may also be considered too tough.

Whilst some conditions based on the candidate's connection and loyalty to the country may be desirable (for example, a requirement of citizenship), the requirement set out in Article 59 (f) does not seem to have a relevant bearing on the candidate's ability to perform the role of President, or indeed, his/her loyalty to the country. Thus, it appears to undermine the commitment to equality (and against discrimination) outlined elsewhere in the constitution (e.g. art. 6(e): art. 21(a): art 347: art.348 and art.349). This is because the unequal treatment Article 59 (f) promotes is not based on requirements relevant to the office. Particularly irrelevant and disproportionate seems to be the citizenship of a previous spouse or the spouse of a child.



It also unnecessarily restricts the electorate's choice of candidates who would otherwise be fit to undertake the role: their ability to choose a leader without unreasonable restriction is a fundamental democratic principle.

### Separating Power between the Executive, Legislature and Courts

The Constitution currently concentrates power in the executive and in some cases the powers of the executive prevent checks on it by the legislature and the courts. It may therefore be desirable to give greater power to the legislature and the courts so that power is more evenly shared out.

One important area in which this may be achieved concerns the executive's powers to choose people for key roles including judges and ministers. The current Constitution only allows the legislature to disagree with the person the President has chosen if this person does not meet the required qualification. This could be relaxed to give the legislature a greater say in who is chosen for important positions.

It must also be asked whether the President should still have the power to put into effect a law that is needed urgently when the legislature is not assembled or the power to settle non-constitutional disagreements over management at the state, region and self-administered zone level, or whether the first power should be reserved for the legislature and the latter power for the courts. This would allow for power to be more truly separated between the executive the legislature and the courts.

Finally the ability of the legislature and courts to check the President's power could be undermined by the fact that the Constitution says he/she shall not be answerable to them for the exercise of the powers and functions of his/her office. It is important that the powers of the President can be checked because it is a fundamental principle of democracy and the rule of law that no-one is above the law.

## **The Role and Composition of the Legislature**

### Choosing Members of the Legislature

Currently 25% of the members of the legislature are non-elected Defence Services personnel chosen by the Commander-in-Chief of the Defence Services.

It should be considered whether the Constitution should be changed towards a situation common in most democracies that the legislature is fully elected and therefore only made up of representatives chosen by the people. This could be done progressively, in stages.

### Transparent Law Making

Information about how and why the legislature make laws is not always open to the public. This is because the Constitution prevents the minutes of the legislature's sessions being published, when the law so provides. It should be considered whether the Constitution should guarantee the public access to information about the legislature's discussions so that people can see what their representatives are saying and doing.

## **The Structure and Appointment of the Courts**

### Choosing Judges

Although the Constitution recognises the independence of the courts, one concern is that this is undermined by the power the Constitution gives to the President to choose judges. Even if this choice is exercised objectively this power gives the appearance of bias and therefore calls into question the courts' independence from the executive.

If the courts are independent they are more likely to hold governments to account and ensure that laws passed by the legislature are enforced. If they are not independent there is a risk that judges may be influenced by the executive who has given them their position.



## Ensuring the Independence of the Courts

One possible way of ensuring independence is by taking the constitutional power to choose judges away from the executive and giving it to an independent appointments commission, perhaps with a majority of lawyers and some lay people. This has been done by many countries and is increasingly becoming an international standard.

Whatever means is adopted for choosing judges however, it will be extremely important that it prevents judges being chosen for the wrong reasons: reasons which are not based on merit alone.

Another way to ensure the independence of the courts is to allow judges to hold their positions for many years and to have strict guidelines setting out when a judge can be removed. If judges can be easily removed for making an unpopular decision they will be under pressure not to exercise their independence.

Whilst the Constitution allows judges of the High Court and Supreme Court to serve up until the age of 70 and 65 respectively, judges appointed to the Constitutional Tribunal only hold their positions for five years.

One reform which might be considered therefore is allowing the judges of the Constitutional Tribunal to hold their positions for much longer. It may also be desirable to stagger when they are chosen so that if the executive or legislature does play a role in helping to choose judges, one particular government will not be able to influence the character of the whole court.

Finally, given the controversy surrounding the nine members of the Constitutional Tribunal in 2012, and the threats to remove them from office, it might be timely to make clear in the constitution the right of the legislature or executive to remove a judge who makes an unpopular decision.



## The Powers of the Constitutional Tribunal

Another area for consideration is whether the Constitution should more clearly set out the powers of the Constitutional Tribunal with regards to legislation it decides is incompatible with the Constitution. At present it seems as if the Constitutional Tribunal has no power to 'strike down' such a law (with the result that the law has no further effect).

Most constitutions do allow the highest constitutional court to strike down a law which conflicts with the constitution. Should the Constitution allow the Tribunal to strike down such a law so that it has no effect? Or should it remain in effect despite the Tribunal's decision that it is incompatible, leaving it to the legislature whether to alter or abandon the law? Alternatively a constitution could allow for the Canadian model whereby the legislature can choose to remake the law after it has been struck down by the Constitutional Tribunal but must renew this decision every few years.

The power of the Constitutional Tribunal in this respect will be particularly important with regards to laws which are deemed incompatible with fundamental human rights.

## **The Structure of the State**

### Distribution of power between the centre and regions

One important area of possible reform concerns the distribution of power between the Union and the Regions, States and Self-Administered Areas:

Should power remain concentrated at the Union level?

Should there be a decentralization of power with greater power being transferred to the States, Regions and Self-Administered Areas?

Should the Union be replaced by a federation in with the constitution guarantees substantial powers to the States, Regions and Self-Administered Areas? These powers could be granted to all regions or only to some?

This is a particularly important issue given that many ethnic minority communities desire to play a greater role in determining their political fate.

Some possible ways of achieving greater de-centralization, if this is what is desired, are:

Allowing ministers of the Region and State to be locally elected

Granting State and Regional governments greater budgets and/or allowing them greater powers to raise money through taxation.

Allowing State and Regional legislatures to make laws on a wider number of areas.

## **The Role and Control of the Armed Forces**

### Supervision of the Military

The constitution currently provides for no supervision of the military's actions by anyone outside of the military.

In addition, the legislature play no role in approving the Commander-in-Chief and there are no qualifications required for the role, no provisions regarding how long the role is to be held and no provisions regarding how to remove the Commander-in-Chief.

In most democracies the military is under civilian control, under the supervision of the executive.

It may also be necessary to set out clear requirements for holding the position of Commander-in-Chief, how long it can be held and under what circumstances the Commander-in-Chief might be removed.

### Military Justice

Under the current Constitution allegations of human rights violations, including forced labour and sexual violence by the military, cannot be judged by the normal courts. Rather they are decided on in Courts-Martial with the Commander-in-Chief having the final say. One possible option is for the Supreme Court (or another court) to supervise the decisions of the Courts-Martial. This may be particularly important since there is currently no right to appeal a decision of the Courts-Martial. Another option is for members of the military to be brought to justice by the ordinary court system in cases where they have, for example, violated human rights.



## **Emergency Powers**

### Declaring an Emergency

The current Constitution sets out three circumstances in which a state of emergency can be declared. These are reasonably wide-ranging circumstances and it may be desirable to have more narrow definitions of an emergency. This is especially important because of the impact a state of emergency currently has on individual's rights.

Whilst the President has the power to declare a state of emergency, it may be asked whether this should be approved by the legislature or reviewed by the courts. One option is for the President's declared state of emergency to come to an end after a specified time unless the legislature agrees it can continue. Currently the first two types of emergency outlined in the Constitution do not have time limits.

### Emergency Powers

The constitution currently allows both the President and the Commander-in-Chief of the Defence Services to exercise emergency powers which include powers over the executive, legislature and the courts.

The first question is whether the role played by the courts should ever be fully transferred to either the President or the Commander-in-Chief, given the importance that courts are always available and free to administer independent justice.

Another question is whether emergency powers should continue to be exercised by a person who is not democratically accountable, namely the Commander-in-Chief.

It may also be considered whether the President's use of emergency powers should be overseen by the legislature or the courts.

### Emergency Powers and Individual Rights

The current Constitution allows for all rights to be suspended in the case of an emergency. Are there some rights which should not be able to be suspended even under an emergency (for example, the right to life, the right to a fair trial, the ban on slavery and the ban on torture)?

As said above in the discussion about limitation of rights, if the Constitution does allow certain other rights to be suspended in an emergency it may be that the circumstances in which those rights can be suspended should be clarified.



## **Amendment Provisions**

There are currently very tough requirements for changing the Constitution. These are very hard to fulfil and therefore make constitutional change extremely difficult.

The requirement for the support of 75% of the Pyidaungsu Hluttaw to make an amendment to the constitution is higher than most amendment provisions. It gives the Defence Services representatives particular power to block changes by voting together. It may be desirable to make the requirements for changing the constitution less difficult, for example, by needing only the support of a two thirds majority in the legislature.

It should also be considered whether amendments for certain parts of the Constitution should always require the support of half of the voting population.

There are advantages in protecting a constitution from frequent and rushed amendments. One advantage is that this gives the constitution credibility.

However, the ability to change the constitution is important so that it can be improved and can respond to changing circumstances. If any of the possible changes outlined above are to be made it will be necessary to be able to change the Constitution.

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