Community of Democracies

AMCDP
AUSTRALIA-MYANMAR CONSTITUTIONAL DEMOCRACY PROJECT

Building a Democratic Constitutional Culture in Myanmar

Exploring the fundamental principles and concepts of constitutional democracy

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This publication was prepared by a consortium of constitutional scholars from a range of Australian universities as part of the Australia-Myanmar Constitutional Democracy Project, in cooperation with the Community of Democracies. It was funded by the Ministry of Foreign Affairs of the Republic of Korea.

For more information, please contact:
The Community of Democracies
al. Ujazdowskie 41
00-540 Warsaw, Poland
Tel: + 48 22 375 90 00

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Preface

This booklet introduces and explains fundamental principles and concepts of constitutional democracy, with a particular focus on those most relevant to the situation in Myanmar. It has been prepared by a group of constitutional scholars from Australian universities, as part of the activities of the "Australia-Myanmar Constitutional Democracy Project" (AMCDP), founded and run by a consortium of those specialists.

Since 2013, the AMCDP has conducted workshops in Myanmar on principles and practices of constitutional democracy. By 2018, a total of ten workshops have taken place in different cities of Myanmar: Yangon, Mandalay, Nay Pyi Taw, Myitkyina and Taunggyi. Since 2015, the workshops have been jointly implemented with the Community of Democracies (CoD) and funded by the Ministry of Foreign Affairs of the Republic of Korea.

The first workshop, in May 2013, was attended by leading judicial, political and scholarly figures, including Daw Aung San Suu Kyi, leader of the National League for Democracy and now State Counsellor of Myanmar. The workshop was supported by Thura U Shwe Mann, Speaker of the Lower House, Attorney General Dr Tun Shin, and the Director General of the Myanmar Supreme Court U Mya Thein. The May 2013 workshop received considerable publicity within Myanmar. It was credited with creating an unprecedented opening of political space for different groups to discuss and debate the constitution, political reform, and issues concerning the rule of law. It is on the basis of requests from attendees and supporters of the May 2013 workshop, and from others within Myanmar who are central to the democratic reform process, that we have continued and expanded the workshops.

All the workshops to date have been organized in consultation with the local community or the institutions concerned. For the Yangon and Mandalay workshops, participant lists were drawn up by local partners to ensure the participation of a wide cross-section of civil society groups, political parties, government officials, members of the legal profession, academics and students. The two Nay Pyi Taw workshops held with the Constitutional Tribunal were organized directly with the Tribunal.

The Project's overall goal is to contribute to Myanmar's ongoing transition towards constitutional democracy and to strengthen the capacity of national institutions and stakeholders within Myanmar to develop and support a culture of constitutionalism and the rule of law, at a critical time in the country's transition to democracy. It is with these ideals in mind that the AMCDP and CoD have prepared this booklet that captures the central themes of the workshops.

Like the workshops but intended to reach a larger audience, the booklet is based on the premise that constitutional democracy cannot be sustained unless it is built in essential part from the bottom up by the people themselves and that debate and discourse between diverse actors is key to building constitutional democracy. Our aim is to encourage, inform and contribute to such debate and discourse.

June 2018

1 A Strong Constitution as a Condition of Democracy

In theory, there is a tension between constitutionalism and democracy: this is because constitutionalism is sometimes seen as restricting the field of democratic decisions (which, for instance, must not breach constitutional rights). In practice, democracy is not conceivable without a strong and generally respected constitution. Arguably, two of the most important functions a constitution can provide include the legitimisation of public institutions and a guarantee of rights for citizens. In this sense, a constitution serves as a bulwark against the arbitrary use power. As constitutions are traditionally not able to change without popular consensus (ideally only through referenda), they provide a uniquely foundational and predictable structure through which a state operates and its citizens' interests are protected.

In transitional societies, constitutional reform offers a means to achieve peaceful change as a powerful alternative to violence. Interim constitutions can be highly effective in navigating change processes. They can provide for a peaceful transition from one governmental regime to another, agendas for action, and serve as a symbolic statement about the identity and values of a state.

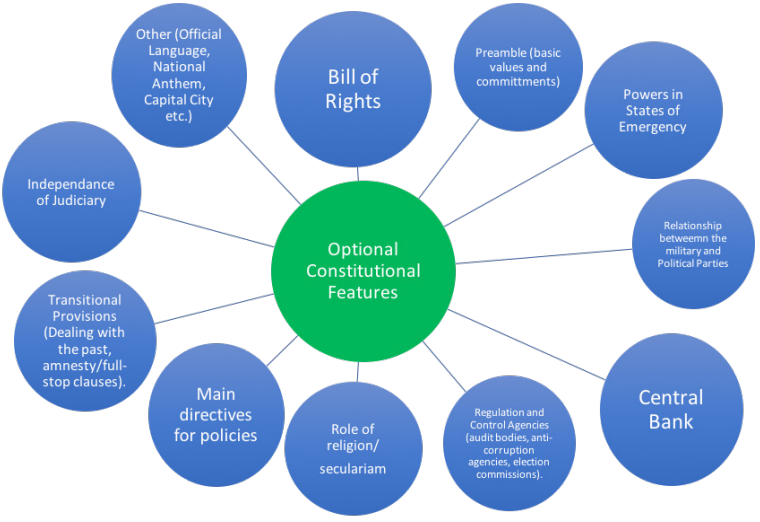
(a) Constitutional Rigidity

At the heart of the tension between constitutionalism and democracy lies the question of rigidity (sometimes called 'entrenchment'). While a constitution needs to be 'rigid' enough to be effective so that it is predictable and strong enough to withstand attempts to abuse the concepts it protects, a degree of flexibility is often necessary so as to accommodate change processes and the different interests of citizens in a society. There are different degrees of rigidity and flexibility in constitutions. These range from extreme cases of absolute entrenchment (through such mechanisms as 'eternity clauses'), to more flexible ones which give power to constitutional courts to make amendments.

A balance between rigidity and flexibility is clearly important. Much like the oak and the reed, flexibility is vital so that the constitution is able to weather changes when they are inevitable. Still, rigidity compels political actors to adapt to the 'rules of the game', and to ensure that any constitutional change or amendment is arrived at through consensus.

The question of rigidity also extends to determining which elements of a constitution are essential, and which elements are optional. Some mandatory features of a constitution

include determining the structure of authorities (both horizontally and vertically), and the rules for determining constitutional change. There are numerous optional features which can also be included. Some examples of these are:



(b) Democratic Function of the Constitution-Making Process

For constitutions to be respected and upheld, it is important that the design process is driven by consensus-seeking and compromise with a view to striking a balance between continuity and change. As all parties need to be provided with a stake in the constitutional success, the process must be an inclusive 'pacted transition' rather than an exclusive 'victor's justice'. Each party must be aware that even if in the near future it is likely to win, there will come a time of alternation in power, and then the Constitution will provide protection even to electoral losers, not just for winners. Constitution-makers should take a long-term view, not a perspective of next elections.

In order to be effective, the design process needs to be realistic. Rather than being too ambitious, the most important function, the separation and constraints of power, needs to be focused on as an underlying objective. The value of popular participation must also not be exaggerated, as 'constitutional enthusiasm' rarely lasts long. Indeed, there are certain benefits to the design process being steered by parliament, and incremental approaches to commitments can also be useful. However, at certain stage the process must include the society as a whole, for instance in the form of a referendum to ratify the Constitution and in this way, confer strong legitimacy on the basic law.

2 Constitutions, Constitutionalism and the Concept of Direct Democracy

While a written constitution is a specific instrument designed to separate and contain power, the concept of 'constitutionalism' refers to the broader values, principles and ideas that underlie and animate the constitution. Examples of these principles include sovereignty, the rule of law, the separation of powers, and equality.

There are different conceptions and practices of constitutionalism. One distinction that is often made is between legal constitutionalism and political constitutionalism. Political constitutionalism is underpinned by the idea that those who hold power are held accountable by political means. For example, ways in which the government may be accountable for its decisions include parliamentary debates, question time in parliament, elections, recall votes and parliamentary committees of inquiry. This approach is cautious and wary of the role of the courts. Political constitutionalism does not see the need for judicial review for the protection of rights. Instead, the protection and implementation of rights is said to be best left to the political process. The idea of political constitutionalism is built on the value of representative government, the idea that the people elect the government of the day and so members of parliament are representative of the people.

Legal constitutionalism is centred on the idea that those who exercise power are primarily held accountable by the law and through the courts. This requires the courts and judges to be independent. The emphasis is on law, rather than politics, because politics is perceived to be influenced by interests and passions rather than rationality. This approach is concerned with the protection of individual rights. Judicial review is a core part of a legal system that is based on the idea of legal constitutionalism.

Most countries are a mix of political and legal constitutionalism. More recent global trends in constitutional change suggest that legal constitutionalism, primarily through the emphasis on judicial review and the role of constitutional courts, has become the

main avenue for the protection of rights and accountability in many countries around the world.

(a) Constitutions and Direct Democracy

Democracy, as rule by the people, usually includes elected representatives chosen by the people to govern. Yet there is growing recognition that at certain political moments and on particularly important issues, mechanisms of direct democracy can complement the representative process.

The idea of direct democracy relates to the role that citizens should play in a democracy. Direct democracy refers to the rules, institutions and processes that allow the public to participate (often via voting) directly on matters of constitutional or legal reform, or public policy. Underlying this idea is the assumption that public participation is seen as an intrinsic good.

Referendums are one example of a process that gives people a direct vote. Referenda, or national surveys, are examples of ways in which a direct popular vote can have bearing on legal and political outcomes of significant importance. Usually, the people's role is limited to making a choice between two options. This could be accepting or rejecting, ratifying or repealing, a certain decision or proposal that is put to them. Significant examples of recent national referenda include the United Kingdom's 'Brexit' vote in 2016, the Colombian Peace Agreement Referendum of 2016, and the Thai Constitutional Referendum of 2016. The legitimacy and effectiveness of a referendum often depends on the political conditions under which it takes place.

Referenda are one avenue for direct democracy and may be regulated by constitution or law. As a vote by the people for constitutional amendment, the adoption of a constitution or for the opinion of the people on an issue of public and political significance, there has been increasing reliance on referenda as a mechanism for approving constitutional change. In 1980, just 5% of constitutions required a referendum; in 2011, over 40% of constitutions required a referendum for constitutional amendment. It is therefore important to consider both the advantages and disadvantages of a referendum

(b) Advantages of a Referendum

The benefits of a referendum include the ability of referenda to promote participation, serve as an expression of popular sovereignty, and to allow ordinary citizens to decide on difficult issues on constitutional and/or legal change. A referendum is a mechanism of giving voice to ordinary citizens on important policy issues. It is often used as a means of

authorising constitutional change. In the lead up to a referendum, the government may conduct a civic education campaign to ensure voters are informed and able to access relevant information. It can enhance transparency because information on the proposed amendment needs to be shared with the wider public. This may lead people to familiarize themselves with the process and content of the constitutional amendment process in the lead up to the referendum, and therefore engage in a meaningful way with the constitution.

(c) Disadvantages of a Referendum

There are some drawbacks which need to be addressed when considering the use of a referendum. Such a process relies on citizens having access to information, and to make a rational decision on matters which are usually complex. If a referendum is used too frequently, voters may become tired of the process. Politicians may use a referendum to shift the responsibility for decision-making, and the outcome can be influenced by those who have money and resources to campaign. Some scholars suggest that referendum favour conservative policies over progressive ones, and that there is the potential for authoritarian rulers to manipulate such processes to justify their rule and appease democratic standards through 'window-dressing'. Referendums can also be expensive and exacerbate social conflicts.

In addition, the binary nature of the referendum may be a weakness because if an entire constitution is put forward for approval, but a significant number of people disagree with part of the constitution, then the entire proposal may fail. The outcome may be highly unexpected. Those in power get to frame the proposal – so a referendum is determined by those in power. In some cases, such as Sudan and Zimbabwe, the text of the draft constitution was changed prior to submitting the draft to the referendum. Referendums have been used by authoritarian regimes in the past in contexts where people do not have the freedom to vote for the option of their choice.

(d) Issues for Constitutional Design

When opportunities arise for constitutional change or reform, there is the possibility to consider how to design a referendum as part of a constitutional amendment process. There is a range of possible options. These include mandatory referenda, when the executive is obliged to call a vote under certain circumstances, and optional referenda, where this can be done at the discretion of the parliament or executive.

It is also important for constitutions to prescribe which arms of government can initiate referenda, and whether their effect is to be binding or advisory. The process of direct

democracy initiatives can be strengthened by having turnout quotas, which ensure that a particular proportion of the population take part in any referendum. In a federal system, there may be additional requirements that reflect citizens' dual affiliation to the country and their state. Time limits are also an important mechanism to ensure that referenda are not held too frequently or infrequently.

(e) Conclusion

We began this chapter by acknowledging that constitutionalism has often been understood in terms of legal and political constitutionalism, although there is a trend towards legal constitutionalism and an emphasis on courts. Further, there have been increasing demands for participation by the people in processes of constitutional reform. This has led to the rise of the concept of direct democracy and the related emphasis on referendum. Referendum have been held more frequently in recent decades, although there are clearly still both strengths and weaknesses, depending on the design and purpose of the referendum.

In Myanmar, two referendums have been held in the past: 1973 and 2008. It is important to consider to what extent this process played a role in enhancing or constraining constitutionalism and democracy. The current Constitution of Myanmar requires a referendum on some aspects of constitutional amendment. Whether this would be perceived as a legitimate process to seek the approval of the people would depend to an extent on the social and political conditions under which the referendum takes place.

3 Human Rights and Myanmar's Constitution

Human rights and democracy are two sides of the same coin. You cannot have one without the other. Today, constitutional guarantees of human rights can be found in the overwhelming majority of national constitutions, though the scope and efficacy of these guarantees vary widely. Most constitutions set out to describe (and to limit) the power of those who govern and the way in which power is exercised, by protecting individual rights against the potentially intrusive power of the state and preventing the oppression of minorities or those without power through majoritarian political processes. As political documents often drafted in the wake of oppression, revolution, and the arrival of new political orders, national constitutions frequently embody the desire of their drafters to distinguish the new order from the old. The rights of those marginalized under past systems of law, for example indigenous peoples or women, are often explicitly protected in new constitutions. At the same time, new constitutions are sometimes seen as a bulwark against the exercise of power by the incoming governments of states newly independent of their colonial masters. In some cases, constitutions may also provide protection against the violation of rights by non-state actors.

The different emphasis placed on rights in various national constitutions reflects, to a significant extent, the issues which preoccupied the nation at the period in history during which the constitution was drafted. The Spanish Constitution, for example, drafted after 36 years of Franco's dictatorship, grants rights of association but is careful to note that 'secret and paramilitary associations are prohibited' (Article 22). Fiji's 1997 Constitution, drafted in the wake of two racially motivated coups d'état (and abrogated by the military in 2009), declared the right to freedom from discrimination, but was careful to preserve as lawful positive or affirmative measures to assist indigenous Fijians and Rotumans, perceived to have been disadvantaged under the former political order.

(a) Content of Constitutional Rights

Typically, constitutionally-protected rights address three principal concerns. First, they protect the right to choose political representatives. Second, they restrain the state from unduly interfering with individual liberties and property. Third, they place a duty on the state to assist the individual or group to realize their potential ('pursue happiness') through the opportunity to pursue economic, social, and cultural rights. Rights protected in modern constitutions have been influenced by international human rights instruments, above all the Universal Declaration of Human Rights (UDHR), the ICCPR, and the ICESCR. Many national courts draw on such instruments to interpret constitutional guarantees, sometimes as a matter of interpretive practice, in other cases in accordance with a constitutional stipulation such as that contained in Article 10(2) Constitution of Spain that '[p]rovisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain'.

Most constitutions protect political rights (such as universal suffrage and the right to vote by secret ballot) and civil rights (such as freedom from torture, freedom from unreasonable searches and seizures, freedom of expression, and equality before the law). Economic, social, and cultural rights are less commonly found in constitutions and, where present, are often couched only in aspirational terms, as a duty on the part of the state to 'promote' certain rights rather than to 'guarantee' them. For example, the Indian Constitution places economic, social, and cultural rights in a separate section to civil and political rights and describes them as 'Directive Principles of State Policy'. The Constitution provides that these principles 'shall not be enforceable in any court' but are nevertheless 'fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws'.

Judicial interpretation of constitutional rights has often functioned to expand the substantive content of rights. The US Constitution, for example, does not explicitly mention a right to privacy, but the US Supreme Court has derived such a right from other provisions of the Constitution, extending it into areas which include personal autonomy over reproductive decisions. In Roe v Wade it famously held that the right protected a woman's decision to terminate her pregnancy in certain circumstances. The Indian courts, constrained from directly enforcing economic, social, and cultural rights, have by interpretation expanded the content of (justiciable) civil and political rights to encompass economic, social, and cultural rights. For example, the obligation on the state to provide free and compulsory education (a 'Directive Principle of State Policy' only), was held by the Indian Supreme Court to be a 'fundamental right' guaranteed by the right to life and hence justiciable. The right to life in Article 21 of the Constitution has been held to include the rights

to live with dignity, to livelihood, and to health. In a similar vein, the Supreme Court of Pakistan has held that the right to life in the Constitution of Pakistan includes the right to a healthy environment.

The South African Constitution provides a leading modern example of constitutional guarantees of wide-ranging economic and social rights that are subject to review by the courts. The rights guaranteed in the Bill of Rights include the right to adequate housing, the right to healthcare services, and rights to sufficient food, water, social security, and education. The obligation of the state is in general 'to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the rights, but there are also unqualified guarantees against arbitrary eviction and refusal of emergency medical treatment. In a series of important cases relating to a number of these constitutional guarantees, the South African courts have developed a standard for assessing whether particular legislation and government policy is reasonable.

Many modern constitutions set out the permissible limitations that may be imposed on the exercise of protected rights, often drawing on the framework contained in international treaties. Generally, the state must demonstrate that any restriction is adopted in pursuit of a legitimate aim (for example, 'to protect the rights and freedoms of others', to ensure 'national security', or to protect 'public order'), is provided for by law, and is a reasonable and proportionate restriction on the exercise of the right. Even where limitations are not expressly provided for in the text of a constitution, courts frequently imply similar limitations when adjudicating on the meaning and scope of a particular right.

(b) Human Rights in Myanmar's Constitution

The 2008 Constitution of the Union of Myanmar contains a range of individual and group rights, as well as exhortations that the Union improve education and health; care for mothers, children, orphans, the aged and the disabled; and protect the natural environment. Under the Constitution, redress for rights violations may be sought from the Supreme Court, which has the power to issue writs demanding that the government take or refrain from certain actions. Applications to the Supreme Court may be suspended in times of war, foreign invasion or insurrection. Article 382 of the Constitution permits the passing of laws that restrict or revoke rights in order for the defence force to carry out their duties and maintain discipline.

To be effective, individuals must be able to access the Supreme Court and enforce their rights. Legal services must be affordable and corruption cannot be prevalent. Even if access is obtained, ambiguities within the structure and text of the Constitution and competing constitutional principles and provisions may constrain the enjoyment of rights,

making prospects for achieving redress very uncertain. Much will depend on whether the Supreme Court decides to adopt an interpretive approach that extends the scope of rights protection, or one that defers to other government policies and objectives.

Under Myanmar's Constitution, the Supreme Court's approach must be guided by the Constitutional Principles set out in Chapter I. Article 6 in Chapter I provides that the Union's objectives are: (a) non-disintegration of the Union; (b) non-disintegration of National solidarity; (c) perpetuation of sovereignty; (d) flourishing of a genuine, disciplined multi-party democratic system; (e) enhancing the eternal principles of Justice, Liberty and Equality in the Union and; (f) enabling the Defence Services to be able to participate in the National political leadership role of the State. Apart from (e), these Principles are not, on their face, ones which provide much interpretive scope for judicial decisions which champion the advancement of individual rights and interests. We do not yet know what weight and priority Myanmar's Court will attach to the different principles and objectives, nor how the Court will approach questions of competing rights and interests.

Rights are located in two places in the Constitution. They are found in Chapter I, 'the Basic Principles of the Constitution'; and Chapter VIII, 'The Citizen, Fundamental Rights and Duties of the Citizens'. Chapter I includes broad stipulations about due process rights, including: the principle that justice will be independently dispensed; that accused persons will have the right to a defence and the right to appeal against a judgment; that criminal laws will not be retrospective; and that punishments will not violate human dignity. Chap-

ter I also guarantees a set of rights that seem to be specifically reserved for citizens: rights of equality, liberty and justice; rights to ownership of private property, inheritance and patents; rights to political participation; freedom of conscience and freedom of religion, subject to public order, morality or health.

Chapter VIII, 'The Citizen, Fundamental Rights and Duties of the Citizens', includes further due process rights: the right to equal protection before the law; the right to be convicted and punished only in accordance with law; the right not to be retried unless a superior court annuls the judgment and orders the retrial; the right to a defence; and the right not to be held in custody for more than 24 hours without the remand of a competent magistrate. Chapter VIII also prohibits slavery and trafficking in persons; forced labour; and discrimination on the basis of race, birth, religion, and sex for civil service appointments. Chapter VIII guarantees the preservation of life and personal freedom, except as set out in law; and rights of ownership, the use of property and the right to private invention and patent in the conduct of business.

As in Chapter I, Chapter VIII contains some rights which seem to be specifically reserved for citizens. These include the broad right of non-discrimination on the basis of race, birth, religion, official position, status, culture, sex and wealth; and a right of equal opportunity in relation to employment and occupation. Freedom of expression, assembly and association is guaranteed to citizens, but made subject to: security; law and order; community peace and tranquillity; public order and morality. There is a stipulation that the exercise of these freedoms must not prejudice relations between races and faiths. Citizens have the right to settle and reside in any place within the Republic of the Union of Myanmar; the right to protection of property; the right to privacy and security of communication; the right to freely develop literature, culture, arts, customs and traditions; the right to a basic education; the right to conduct scientific research, explore science, work with creativity and write to develop the arts and conduct research freely of other branches of culture; the right to health care; rights of political participation; the right to conduct business freely in the Union; and the right to seek protection of the Union at home or abroad. Article 381 provides that the right of citizens to redress for grievances may be suspended only in times of foreign invasion, insurrection and emergency.

The restriction of certain rights to citizens warrants attention. Modern constitutions, such as that of South Africa, guarantee rights to all who are within the territorial boundaries of the state, with the exception for obvious reasons of voting rights and related rights of political participation. Yet in Chapter I and Chapter VIII of Myanmar's Constitution, rights are variously described as being either the entitlement of 'any person' or alternatively, of 'any citizen'. The first Article of Chapter VIII, Article 345, sets out a definition of 'citizens' as (a) persons born of parents both of whom are nationals of the Republic of the Union

of Myanmar; (b) persons who are citizens according to law on the day the Constitution comes into operation. Thus, while protections against slavery, human trafficking and due process rights apply to all within Myanmar, those who are denied citizenship are also denied the range of constitutional rights which are the preserve only of citizens. Specifically, they are denied the benefit of the prohibition on discrimination on the basis of race, birth, religion, official position, status, culture, sex and wealth; the right to freedom of religion; the right to freedom of expression and assembly; the right to freedom of movement; the right to education; and the right to enterprise. They are denied, in summary form, rights connected to political recognition, beliefs and livelihood. The result of this is that government policies, laws and regulations which deliberately target members of groups who do not possess citizenship may not be unconstitutional.

The Constitution devotes significant attention to the right to religious freedom. This, as we have seen, is a right that may be claimed by citizens only. The right to religious freedom is subject to public order, morality or health "and the other provisions of this Constitution." These other provisions include Article 34, which makes clear that the right to religious freedom shall not prohibit the Union from enacting law for the purpose of public welfare and reform; and Article 364, which provides that the abuse of religion for political purposes is forbidden, and which states that any act which is intended or is likely to promote feelings of hatred, enmity or discord between racial or religious communities or sects is contrary to the Constitution and that laws may be promulgated to punish these activities.

Under general principles of constitutional interpretation, laws that restrict constitutionally guaranteed rights and freedoms must be a proportionate response to achieving a legitimate purpose. Assessments of proportionality depend on the way the Supreme Court balances objectives such as peace, order and security, against values such as religious liberty. In the end, the Supreme Court's interpretive approach, as much as the text of the Constitution, will determine whether rights protection is circumscribed or expanded. By 2018, a decade after the Constitution was approved by the people in a referendum, the Supreme Court had still not revealed its approach to constitutional interpretation of human rights provisions.

4 Federalism and Ethnic and Religious Minorities

Federalism

(a) Constitutional Design Options for Ethnically and Religiously Divided Societies

There are a number of constitutional design options that ethnically and religiously divided societies might consider to bring about peace and facilitate democracy. These include federalism, a strongly decentralised unitary government, and consociationalism (or 'power sharing'). These measures can be supported by electoral quotas which guarantee a minimum number of seats for specific groups, as well as the provision of group rights (or individual rights with a group dimension).

(b) Federalism as a Design Option

Federalism is widely recognised as a viable constitutional design option for ethnically divided societies in certain situations. It works particularly well where the ethnic/linguistic divisions correspond to defined geographic units (as is the case, for example, in Belgium, Switzerland and Canada). It can also be particularly effective where ethnic groups make political demands for control over natural resources.

Federalism works by dividing legislative, executive and judicial powers vertically between the centre and the regions (called states or provinces). Each state or province has its own representative assembly, administration and powers of government. Often, these subunits also have their own taxation powers, so that they cannot be controlled by funding decisions made at the central level.

(c) Principles of Effective Federalism

There are several principles which must be adhered to in order for a federal model to function effectively. Firstly, it is imperative that there is a clear constitutional specification of the powers and responsibilities to be delegated to the federal and regional/provincial levels of government. It is also important to have respect for the principle of non-domi-

nation, so that the federal level of government does not act with illegitimate interference in provincial matters, or where a region has special autonomy.
One way of achieving this autonomy can come through models that provide for separated finances. This can be done through regions having defined tax-raising powers and/or a guaranteed regional share of national revenue according to a clear budgetary formula.

In order to maintain effective independence at the regional level, the settlement of disputes should be conducted only by a neutral third-party umpire, typically a constitutional tribunal with defined jurisdiction and powers.

The allocation of powers between the federal 'centre' and the regional level is governed by the principle of subsidiarity. This principle holds that the level closest to the people concerned capable of performing the function should exercise authority. In most federal systems, the central level typically has primary responsibility for macro-economic policy, the federal reserve bank, national infrastructure like ports, railways and national highways, foreign affairs and trade, and the armed forces. Provincial powers typically include social services (schools and hospitals), the regulation of regional commerce and industry, land tenure, law enforcement and justice, and the power to make laws regulating local government.

Above all, effective models of federalism require a bona fide commitment from all sides to preserve the unity of the state, subject to any constitutionally specified secession options that may be agreed upon. When this condition is met, federalism can help to build a sense of national unity and common purpose.

(d) Governance of Natural Resources

Federalism is particularly useful in situations where ethnic, religious or cultural minority groups make persistent political demands for control of natural resources in a defined area of the country. First, federalism allows for ownership of natural resources to be vested in subnational governments as independent legal entities. This step often has great symbolic value and may help to satisfy part of the political demand for local control of natural resources. At the same time, the vesting of ownership of natural resources in subnational governments allows for a range of different options regarding the management of those resources and the distribution of revenues. For example, management control of natural resources could be devolved to the state/provincial level subject to redistribution payments to poorer regions. Alternatively, large-scale natural resource projects with high capital costs and skills requirements could be managed centrally, subject to a percentage share of revenue going to the state/province. This sort of arrangement may be precisely what is required to convince ethnic, cultural or religious minority groups to support the constitution.

(e) The 2008 Myanmar Constitution

The 2008 Myanmar Constitution has some federalist features. It provides for the devolution of legislative and administrative powers to the 7 states and 7 regions. There are also five self-administered zones, one self-administered division and one union territory. Below that level, the 2008 Constitution provides for further devolution of powers to districts, towns, villages and urban wards. Schedule 1 lists the Union Parliament's legislative powers and Schedule 2 lists those of the state and regional parliaments. However, all significant powers, including those over the exploitation of natural resources, are retained at the Union level.

The regions' and states' powers, in turn, extend to what are arguably fairly insignificant matters such as non-mechanized agriculture (Schedule Two, item 3(a)), local dams (Schedule Two, item 3(e)), freshwater fisheries (Schedule Two, item 3(f)), salt and salt products (Schedule Two, item 4(b)), the cutting and polishing of gemstones within their area of jurisdiction (Schedule Two, item 4(b)), and village firewood (Schedule Two, item 4(c)).

The Constitutional Tribunal has the power under s 322(e) to decide 'disputes arising out of the rights and duties of the Union and a Region, a State or a Self-Administered Area in implementing the Union Law by a Region, State or Self-Administered Area'.

Based on the extent of the powers devolved and the capacity of the states and regions to exercise them autonomously of the central government, Myanmar under the 2008 Constitution is best described as a semi-decentralized unitary state rather than a federation. As currently formulated, the 2008 Constitution does not provide sufficient guarantees of respect for regional autonomy and local control over natural resources. As such, it is unlikely to provide the basis for a permanent political settlement.

(f) Myanmar and Federalisation: What needs to change?

Within the constraints of the current 2008 Constitution, it is possible to develop a legislative revenue-sharing model that could devolve a greater share of natural resource revenue to the states and regions. Here, a cautious approach is warranted because one of the legacies of past centralisation is that administrative capacity still needs to be built in the states and regions to take on more significant roles. In the short term, it would be futile to distribute revenue if that revenue could not be spent and administered effectively.

Should the time to reform and/or replace the 2008 Constitution come, attention needs to be given to amending the division of powers (Schedules 1 and 2), providing greater autonomy for regional and state parliaments and administrations, and to enhancing the Constitutional Tribunal's power to enforce federalist principles.

Minority Rights

(a) What is Meant by 'Minority Rights'?

Kymlicka and Norman define 'minority rights' as 'public policies, legal rights and constitutional provisions sought by... groups for the accommodation of cultural differences' (W Kymlicka & W Norman, Citizenship in Diverse Societies). In reality, there is a need for caution in the way we define 'minorities', as such definitions, by their very nature, can easily become the source of disparagement against such groups. While some groups may define themselves and/or identify as a minority, many states impose criteria for such a definition to apply to a certain group (such as population size). But even population size may not be objective criteria if only certain groups prove eligible.

So far as constitutional change is concerned, such a process can serve as an opportunity to shift the terms of differentiation and break free from past ways of defining minorities. In addition, there is also the issue of minorities within minorities. The concept of human rights holds that all individuals who belong to a minority group should still be entitled to the same rights as others, on an equal basis and without discrimination. However, an individual may be able to legally claim certain specific rights because they belong to a minority group so as to make their social position more equitable.

(b) Classification of Legal Rights Sought by Minorities

According to JT Levy (The Multiculturalism of Fear (Oxford University Press, 1997)), the range of legal rights sought by minorities can be classified in a number of ways. These include exemptions from laws which inhibit cultural practices, support to do things the majority can do, self-government for particular groups, as well as rules that aim to protect a group by imposing restrictions on those outside the group. In addition, such rights can also be sourced from the internal rules of a group, incorporation of a legal code into law (such as customary law), as well as special representation and symbolic recognition of a group.

There are several examples which illustrate these points. So far as exemptions from laws which inhibit cultural practices are concerned, some states in India have exemptions for Sikhs from motorcycle helmet laws. In Australia's Northern Territory, Indigenous peoples are granted exemptions from restrictions on hunting certain animals.

With regard to laws supporting minorities 'to do things the majority can do', some countries have multilingual ballots at elections, and also provide funding for ethnic associations and support groups.

In allowing for self-determination of particular groups, varying degrees of regional autonomy have been provided for groups in West Papua (Indonesia), Tibet and Xinjiang (China), and in the self-administered zones and divisions of Myanmar.

Rules that aim to protect one group by imposing restrictions on those outside the group can be found in the restrictions on the English language in Quebec (Canada). A state's allowance for internal rules is evident in the rights of some religious groups to excommunicate a member from their community, and for sporting or community clubs to expel a member for unbecoming conduct.

In Myanmar, Buddhist Law's specific proscription of rules and laws concerning families is an example of incorporation of a legal code into customary law. Similarly, the concept of special representation of a group is reflected in parliamentary quotas of members of minority groups, as well as the Myanmar Ministers for National Race Affairs. At times when minority groups are seeking symbolic recognition, an official apology or a national holiday on a culturally significant day are paths through which this can be achieved.

(c) Conclusion

While many societies may claim to be founded on principles of multiculturalism, the interplay between this concept and minority rights is often complex. Levy argues that when one focuses on multiculturalism and nationalism, the main concern should be to prevent the dangers that may arise due to ethnic pluralism. Here, it is suggested that rather than focusing on preserving or reinforcing ethnic identity, society needs to ensure a reduction in potential dangers such as state violence towards certain cultural groups, or inter-ethnic violence. This theory is known as the 'multiculturalism of fear'.

Minority rights require careful consideration of who constitutes a minority, the kinds of rights they should be afforded, and whether these need to be constitutionally guaranteed. One overriding concern in states with a history of violence towards certain cultural groups, or inter-ethnic violence, is to focus on preventing violence and discrimination in the future. To ensure this, constitutional reform is an opportunity to shift the terms of differentiation and reconsider past ways of defining minorities.

5 The Rule of Law and the Judiciary

Ideals for Law

In political systems and in constitutions around the world, many different, often competing, demands are made of law. In constitutional democracies, the governing ideal is usually said to be the rule of law, but this is not the only ideal governments can have. Some other ideals might, indeed, undermine the rule of law. One of these is 'law and order.' The Australian scholar of Burma, Nick Cheesman (Opposing the Rule of Law. How Burmese Courts Make Law and Order), distinguishes these two ideals by reference to two Burmese phrases which are both sometimes translated into English as 'rule of law'. He argues one, ngyeinwut-pibiyaye, means 'law and order'; only the other, taya-ubade-somoye, is correctly understood as rule of law.

(a) Law and Order (*ngyeinwut-pibiyaye*)

Some governments, particularly authoritarian and non-democratic ones, see law as primarily or exclusively an instrument of central governmental power, a means of imposing order and tranquillity on the population. On this view,

- The central role of the legal system is to impose order from above. It is not to protect citizens from abuses of power by government or other citizens;
- The emphasis is on law as a means to control rather than protect citizens, impose power and transmit and enforce instructions from the government to citizens, rather than limit the possibilities of its abuse of power.

So,

- Some institutions – the Executive, the Military, the Parliament – must come first, and be in control of all the major instruments and institutions of power. Law is one instrument for that control.
- All public institutions - courts, police, administrators - serve and must be obedient to the government; all part of the same chain of command. Judges are just members of the administration, to be directed by government like other government officials.
- You will regard the task of public institutions – administrators, police, judges – as

being to carry out government policy, not to constrain governmental power, or to evaluate the legality of governmental action

(b) The Rule of Law (*taya-ubade-somoye*)

By contrast, the ideal most closely associated with constitutional democracy is the rule of law. A central concern of the rule of law is to try to guarantee that great powers are not abused or exercised in arbitrary, unrestrained ways. To the extent that such guarantees exist and work effectively, a society has the rule of law; to the extent it doesn't, it lacks the rule of law.

People who support the rule of law understand that government must be able to exercise power effectively to carry out their proper purposes, but they also understand that dangers flow from allowing power to be exercised without limit or constraint. They believe that a society is best served when everyone – citizens, governments, officials, rich people, poor people, civilians, soldiers – is effectively required to work within legal rules laid down, which set frames, limits and necessary procedures for what can legally be done and what cannot. Among other things, they support constitutional democracy, separation of powers, and judicial independence as ways of separating, balancing and checking powers that would be dangerous (and often ineffective and counterproductive) if left solely to the unlimited will of any person or body of persons.

So, the rule of law depends on the existence in a society of reliable political, social, and institutional constraints on the ways power can be exercised, so that:

- Citizens can be protected against abuses by public officials as well as by other citizens who have power to harm them;
- Law makes rights and remedies available to ordinary people to defend their interests, even against those with power;
- Different public institutions have distinct and separated functions and are not just subordinate parts of the government's machinery to enforce its will, decisions, and power. Different branches of government exercise different powers and need to be able to check and balance the powers exercised by other branches. Some of them, like civil servants and police, carry out government policies, others, like courts, check that power is exercised within the law.

(c) Democracy and the Rule of Law

Democracy depends on citizens being able and prepared to participate in public affairs – by speaking, writing, associating, organising, voting. That depends on them having incentives and opportunities to do so. That in turn depends on them being and feeling safe to

do so. And that depends on them being able to rely on the constraints on arbitrary power that are fundamental to the rule of law. Thus, the rule of law is an essential element of constitutional democracy.

(d) Separation of Powers

The achievement of the rule of law and constitutional democracy depends on many supporting conditions, legal, political, and social. A central legal condition is that different branches of power are legally and institutionally separated from each other:

- First, because they involve different sorts of power, skills training, and ways of thinking and action;
- Second, so that not all branches of power are monopolised by the same institutions or people. Power is controlled in part by being shared between different institutions, so that different branches can check and balance the activities of other branches. Otherwise it will tend to be uncontrollable;
- Third, so that they can be held accountable for their actions by other branches, and by citizens.

Of course, separation is not enough. Institutions must also be linked to each other, so that they can co-operate, but unless a significant degree of institutional independence is achieved, institutions will not be able to check or balances the powers exercised by others. At the extreme, the result is dictatorship.

(e) Judicial Independence

Separation of powers is a general principle. The rule of law is hostile to monopolies of power, whether it be political, economic or social. Judicial independence is a particular, and particularly important, part of separation of powers, for judges play a special role here. Since their job is to ensure that other branches of government, and citizens as well, do not abuse their legal authorities, judges must be in a position to exercise judgment independent of the interests and views of those whom they must judge, or indeed anyone else with an interest in the results of a case. It is equally important that people believe judges are independent.

Central to this is that judges can, do, and are widely believed to, make judgments independent of all interested parties, particularly holders of great power, whether political, military, social, or economic. Judges should never be in a position where they can be forced or enticed to decide on the basis of who or what interests are involved or interested in a case. If the aim is that the judiciary be in a position to serve the rule of law, and

not of their superiors, or parties to the cases they judge, the judiciary collectively should be free from influence or bribes by:

- Parties to the case
- Outsiders with interests (economic, political, military, ethnic, etc.) in the case
- Other branches of government, e.g. executive, military, security

Individual judges should also be free from pressure by any of the above, and by superior judges.

(f) Legal Conditions of Judicial Independence

Like the separation of powers itself, judicial independence has many conditions. If the law prescribes it, but powerful people or institutions ignore it, it will fail. However, some legal/institutional conditions are important. They include provisions about:

Judicial Appointment:

- The process should be open and transparent, not done behind closed doors.
- No single institution should have the sole power to select and appoint judges. It is important to have distinct interests and institutions involved in the appointment process, so that no one person or body has ultimate power to overrule the others.

Career:

- Judicial salaries must be sufficient and guaranteed, so that good candidates will want to become judges, and judges are not forced to look elsewhere but their salary to fund themselves; and so that no one fears that their livelihood depends on pleasing anyone, especially people with power.
- Tenure should be secure against political or other interference, and sufficiently long so judges do not have to wonder whether their jobs might depend on the way they decide particular cases.
- Promotion should be according to publicly known rules and procedures.

Dismissal:

- Dismissal should be difficult, and only for clearly defined and extreme misconduct.

Resources:

- Should be adequate, to prevent temptation, and allocated by a mix of bodies, not just one, such as the Executive or the judges, that might be interested to influence the judges.

(g) Judicial Competence and Accountability

The rule of law depends on judicial independence, but it depends on other conditions as well, in the judiciary itself and in the wider society. Staying with the judiciary, judicial independence is essential, but it is not enough, for judges can be independent but incompetent, corrupt, and/or self-serving. To avoid that there needs to be provision for:

- Good legal training, an education that stresses legal skills, but also the key ethical requirements of their demanding profession
- Demonstrated legal competence
- Responsiveness to litigants' arguments and evidence
- A legal profession protected from interference and harassment
- Effective, honest, and rule-respecting enforcement by police, custodial agencies etc.

A government and society committed to the rule of law will value and invest in all these things. One that is primarily interested in law and order is likely to neglect them.

(h) 'Rule of Law' versus 'Law and Order' in the 2008 Myanmar Constitution

There are reflections of both these ideals in the 2008 Constitution. Indeed, there seem to be two very different views of whether the judiciary should be independent or not.
On the one hand, s. 11 (a) of the Constitution, that provides that legislative, executive, and judicial power 'are separated to the extent possible, and exert reciprocal control, check and balance among themselves,' seems to support the separation of powers essential to the rule of law. Again, s. 19 seems to support judicial independence in its three judicial principles: (a) to administer justice independently according to law; (b) to dispense justice in open court unless otherwise prohibited by law; (c) to guarantee in all cases the right of defence and the right of appeal under law.

On the other hand, the President's huge powers over judicial appointments (e.g. ss. 299, 308) and the powers of the Defence Services and the Commander-in-Chief over all adjudication involving the military, suggest strong commitments to law and order over the rule of law. This is particularly the case, given that compared to most countries in the world the military in Myanmar has such an overwhelmingly strong role - in the society as a whole, among the branches of government in the Constitution, and among the personnel of the Supreme Court and other civilian courts.

So, there seem to be two very different, arguably contradictory, views of whether the judiciary in Myanmar should be independent of higher political and military authority or

not. That should not be surprising, thought it can cause immense difficulties. It is not surprising because, according to eminent scholars who have studied Myanmar governance and law, 'law and order' was the view that dominated in ruling circles over decades. It was thoroughly built into all institutions of government, including courts. Judges were subordinates in an administrative apparatus ruled by the Army and the Executive. Institutions, people, attitudes, beliefs, interests, don't change overnight, particularly when there are important people with a stake in maintaining them.

(i) Law in Books, Law in Action, and Living Law

The elected government of Myanmar professes strong commitment to the rule of law. So it should be aware of the tensions between that ideal and the 'law and order' ideal. To remove such tensions from the 2008 Constitution, some provisions could and should be changed. There are also other provisions that could be put into the text of the Constitution, and into other laws, to make official commitment to the rule of law ideal clearer.

However, written constitutions and laws only tell a limited amount about what actually happens in any society. There is, in every country and always, a difference between 'the law in the books' (what is written in constitutions, statutes, court judgments) and 'the law in action' (what actually happens in the ways law is administered in society). And neither of these tells everything about how power is actually exercised in society, in the many places and circumstances the law simply doesn't reach. The books will not reveal the action. One needs to know social realities.

The ultimate test of judicial integrity, professionalism, and independence is, after all, not official documents but practice, what people do and experience in their everyday lives, as well as those moments in their lives when they have to deal with official agencies, among them courts. In that branch, there have been important reforms in recent years (see, for example, chapter 6 below), but if we ask about 'law in action' in Myanmar, there appears to be substantial evidence of:

- Continuing influence of the executive and military in courts
- Political use of courts against critics
- Allegations of systemic bribery and corruption, such as widespread demands for payment of unofficial fees to judges and court officials
- Lack of public access to courts, either to press a case or to witness court proceedings
- Lack of, or late, access to lawyers
- Abuses of, and threats against, parties to court actions by public officials
- Inefficiencies, delays, incompetence of individual judges

- Judicial inattention to the parties before them
- Widespread absence of trust in courts by citizens.

Many of the most serious sources of such patterns are unlikely to be accidental. They follow from long-established insistence on law and order rather than rule of law, that have been built into political, judicial, and social practices and expectations, that are familiar, and not easy to shake.

Often these are not found in any written texts, but are embedded in social networks, informal understandings, customs, conventions, and expectations that can be deeply influential in institutions but not easy to identify or put in laws. Where the rule of law is well entrenched, such conventions will support its underlying principles and make it robust. Where law and order has framed expectations of governance, by contrast many of these expectations are also hard to find spelled out in laws, but their influence can be significant, even after the formal written rules are changed.

Because of the difference between law in the books, law in action, and living law, none of these issues will be adequately addressed by changing constitutional or legal provisions alone. Addressing them requires understanding of the different logics of the rule of law and law and order, the different directions in which they lead. People who care about the rule of law must appreciate that their choice involves hard politics, interests, incentives, and disincentives.

Governments need to be persuaded that judicial independence and accountability are good for government, for example, by increasing social trust and cooperation with government; by getting compliance at lower cost; by encouraging social initiatives; and by making important information available, not only to citizens but to governmental decision-makers themselves, and so help them avoid costly errors, which often arise as much from ignorance as ill will.

The price of sabotaging independence and accountability needs to be made high: e.g., by institutional checks and balances, by free media, active civil society, interested parties, lawyers. Citizens need to be aware that their interests depend heavily on the rule of law as well. Coalitions in favour of independence and accountability need to be mobilised; these will include citizens who want the law to work for them; entrepreneurs who want a system they can rely on, and political actors, who dream of a secure, reliable, honest and effective, political system for their country. Making such dreams real is hard work, but it is a hugely valuable achievement.

6 The Role of the Constitutional Tribunal

(a) The Function of Constitutional Courts

The years since 1989 have seen a massive expansion in the number of countries with judicially enforced, written constitutions. In the process, some constitutional courts (CCs) have become powerful actors in their national political systems. Their ideal role is to act as an independent referee of political conflicts by enforcing the basic rules of constitutional system and by providing assurance to political parties that their fundamental interests will be respected and that the political system will remain open to free and fair competition. Some CCs in this way are closely identified with the democratisation project and their success is bound up with the success of democracy. In the best-case scenario, CCs contribute to nation-building, economic growth, rule-of-law establishment and the consolidation of democracy (e.g. Indonesia). In the worst case, they are sucked into politics and become an agent for one side of politics against others (e.g. Thailand). In other cases, they are simply too weak and powerless to make a difference.

(b) Factors Determining the Success of CCs

Many factors determine whether CCs may play a positive role in democratisation. These include background political and institutional conditions (such as whether the country has a rule of law tradition and whether there is a political culture of respect for judicial independence; the competitiveness of the democratic system; the design of the constitution, including the judicial appointments process and procedure for the dismissal of judges; and whether the turn to democracy itself generates public support for court). In addition, the judges themselves can control their court's success to a certain extent through wise, principled decision-making and by explaining the court's role in public media and in this way building public support.

(c) Constitutional Design

As a matter of constitutional design, the judicial appointments process must ensure that people selected for the court are talented and skilled but also perceived as independent. The independence of the court may be protected through: guaranteed level of remuneration and resources for the court; security of tenure for judges (e.g. long fixed-term or

life appointments); and giving the CC control of its own budget. At the same time, the CC must not be entirely independent of political control since democratic accountability is also important. The goal is to achieve the correct balance between sufficient independence to allow the CC to act as a powerful, politically neutral check on abuse of democratic process; and the need to avoid 'government by judges', which may undermine healthy democratic politics (e.g. Thailand, where the CC is seen by some as too powerful and closely aligned to just one side of politics).

(d) Judicial Appointments

Successful CCs (e.g. Indonesia, Colombia, South Africa) have been staffed by judges who combine legal expertise, political credibility and diplomatic tact. There is no point in staffing the Court entirely with government supporters, on the one hand, or oppositional figures, on the other. Rather, judges must be a diverse range of men and women from different social and economic backgrounds, ethnicities and regions of the country. Most countries nowadays set up some sort of standing commission (called a National Judicial Service Commission) to manage the selection of constitutional judges. The NJSC should preferably contain a mix of parliamentarians (from the main political parties, in accordance with their share of the vote, and also from the various regions of the country) and legal professionals (sitting judges, practising lawyers and university law professors). The role of the NJSC is to call for nominations, interview candidates and recommend a list of names to the executive. The executive (typically the President) then appoints the judges from the list provided by the NJSC or calls for more nominations. In Indonesia, the system is different. In that country, the President, Parliament and the Supreme Court each appoint 3 judges for a renewable 5-year term.

(e) Specialised CC or Supreme Court?

A specialised CC is set up when the existing Supreme Court has been discredited or the CC is seen as a political institution that requires special provisions to ensure independence. This is the European or civil law model, which has been used quite successfully in Indonesia. Another approach is to invest constitutional jurisdiction in the Supreme Court. This is the system used in the United States and in India. Here, the Court's constitutional review function is just one jurisdiction among many. The advantage of this second model is that the Court can build legitimacy in other areas of law apart from constitutional law.

(f) Types of Judicial Review Powers

CCs exercise two main types of judicial review powers: judicial review of rights infringements; and judicial review of federalism arrangements. Judicial review of rights infringe-

ments secures basic political values that even the majority grouping in Parliament must respect. This power can be structured in a way that allows the concerns of the democratically elected majority to be considered (for example, through a limitations clause). Federalism review is generally thought to be less controversial than rights review since the issues are more technical and there is an obvious need for a neutral, third-party umpire to adjudicate disputes between the federal government and the regions. The CC can use its federalism review powers to build the legitimacy required to engage in rights review. Both types of review may guarantee ethnic minority interests. Rights review protects group rights indirectly by protecting individual rights to religious freedom, culture, language and so on. Federalism review protects the autonomy of regions in defined policy areas.

(g) The Importance of Public Support

Generally speaking, CCs succeed when they enjoy widespread public support. Public support immunises CC against political attack. Public support for CC requires: public participation in constitution-making or constitutional reform process (to build a sense of ownership of the constitutional project); generous rules governing access to court (including ease with which claims can be brought and scope for public interest litigation); activities by NGOs, lawyers' groups and the judges themselves to popularise the work of the Court and demonstrate its relevance to ordinary people; the judgments of Court must be written in plain, simple and accessible language and be publicly available; independent and free press should support the work of the Court by reporting on its judgments and facilitating public discussion; and CC must not be immune to public criticism – rather engage public in ongoing conversation over constitutional values.

(h) The Constitutional Tribunal in the 2008 Myanmar Constitution

Sections 320-336 of Myanmar Constitution 2008 provide for Constitutional Tribunal of 9 members. Judges are approved by the Pyidaungsu Hluttaw from a list submitted by the President, with 3 members each nominated by the President and lower and upper house (ss 321, 327-29). The Constitutional Tribunal has: final decision-making powers (s 321) in federalist and (apparently) also rights review cases (latter unclear in absence of procedure for individuals to bring rights review cases (s 322)). Cases may be initiated either by another court in which a constitutional issue arises (s 323) or by the President, Speakers, Chief Justice and (depending on unspecified procedure) other political office bearers (ss 325-26). Qualifications for judicial office include a mix of judicial experience, past political expertise (no longer serving), 'political, administrative, economic and security outlook', and loyalty to country and citizens (s 333). The grounds for impeachment of judges are

quite broad and the on procedure relatively simple (impeachment is initiated by the President or by 25% of each house with a 2/3 majority required to impeach (s 334)). Section 335 provides for five-year fixed term appointments (s 335).

(i) How has the Myanmar CT performed to date?

The Myanmar CT has not played a very prominent role in democratisation so far. It has handed down very few decisions, suggesting it is not yet playing a central role in enforcing constitutional system. All 9 judges resigned under threat of impeachment in August 2012 after its March 2012 decision declaring that legislative committees were not 'union-level' organisations. The CT based its decision on text and purposes of 2008 Constitution. In purely legal terms, this was a perfectly defensible decision. But it evidently failed to take the likely strength of opposition to the decision by Parliament into account. A new bench was appointed in February 2013. Since then, the CT has handed down a comparatively small number of decisions.

(j) To what extent may difficulties experienced by Myanmar CT be attributed to differences between 2008 Constitution and international best practice?

The major departures from international best practice are: the absence of a National Judicial Service Commission and/or provision for minority-party influence on judicial appointments; very broad grounds of impeachment that include subjective criteria such as 'inefficient discharge of duties assigned by law'; the absence of any provision for judicial accountability short of impeachment; the absence of any provision for direct access to the CT by members of the public or other opportunities to build public support; and the five-year fixed term appointment is noticeably shorter than international norm (range from 7-12 years).

(k) Explaining the Performance of the Myanmar CT

Some possible reasons for the performance of the Myanmar CT to date include the fact that not many cases are referred to the Tribunal. Myanmar constitutional culture, like some others (including Australia), does not support giving power to decide controversial questions to judges. The CT also currently lacks an independent basis of support. It decides only constitutional questions, and thus cannot build a reputation for independent decision-making through regular civil litigation (unlike, the US Supreme Court or the Australian High Court, for example). The lack of public involvement in the appointment of judges and in litigation before the CT makes it hard for CT to grow its public support. This puts the CT in the position of having to choose its political master rather than being able to assert its independence.

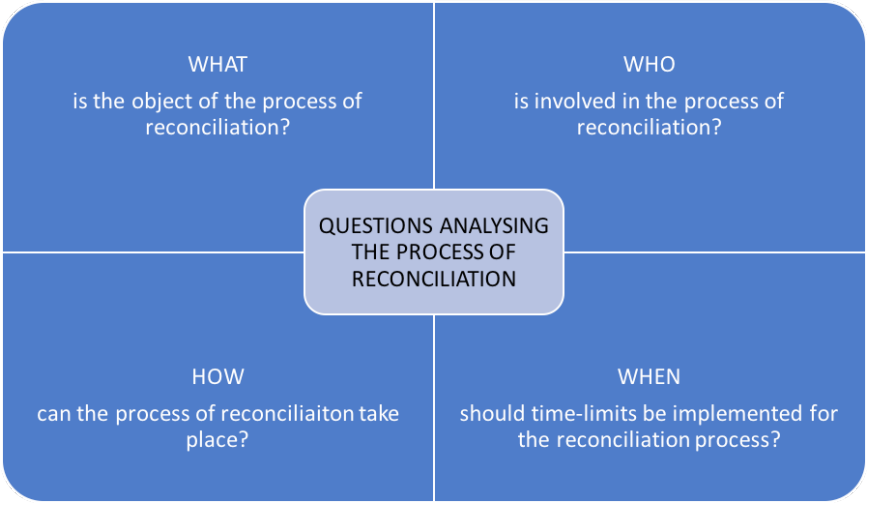
7 Constitutionalism and Reconciliation

In many respects, reconciliation and constitutionalism are mutually reinforcing and interlinked. Reconciliation is not an act in so much as it is a process, which is often catalysed by the design of strong institutions.

After periods of civil violence, human rights abuses and protracted conflicts, reconciliation is a necessary precondition to establishing a democratic and constitutional polity. Some of the fundamental problems which the process of reconciliation attempts to redress include:

1. The rebuilding of relationships;
2. Coming to terms with the past;
3. The change process (holistic, pluralist and long-term);
4. Acknowledging, remembering and learning from the past; and
5. Building institutions.

(a) The Process of Reconciliation



The process of reconciliation is based on a combination of three forms of justice: retributive justice, administrative justice and restorative justice. The first two of these forms are perpetrator-orientated, while the third form is victim-orientated.

(b) The Role of Retributive Justice in Reconciliation Processes

Retributive justice can serve several important functions in the reconciliation process. These include:

1. Avoiding private revenge;
2. Protecting the wider society from perpetrators returning to power;
3. Fulfilling the moral and legal obligations owed to victims;
4. Breaking the circle of impunity;
5. Strengthening the legitimacy and process of democratization; and
6. Individualising guilt and responsibility.

Institutional forms of retributive justice vary among different countries. However, most are usually comprised of a hybrid source of national and international measures. National measures are usually administered through tribunals and the judiciary. International measures include international tribunals, 'special' and 'ad hoc' tribunals, trials based on universal jurisdictions, as well as global judicial bodies like the International Criminal Court.

Nonetheless, retributive justice carries several limits and risks. Sometimes it can contribute to destabilizing peace agreements by posing a crippling effect on governance. It also carries the potential to undermine democracy through networks when retribution is not carried out according to law and due process. In addition, the criminal justice system in transitional societies is often too under-resourced to effectuate this, particularly when evidence may have been destroyed by a preceding regime. Retributive trials can also serve as a distraction from other important components to achieving reconciliation.

(c) The Role of Administrative Justice in Reconciliation Processes

In many cases, administrative measures are put in place to eliminate interference from individuals involved in the activities of previous repressive regimes. Methods to achieve this include political disqualification, lustration and vetting, forced retirement, or transfer to less influential positions.

(d) Amnesty

In order to guarantee the required stability for a peace process to unfold, it is usually nec-

essary to grant amnesties to at least some members of the former ruling elite involved in the mass violation of human rights. More often than not, amnesties are the product of pressure from the former ruling elite in exchange for co-operation during a peace process, often countered by opposition who would otherwise prefer retributive justice. In a reconciliation process, the granting of amnesty may be unilateral or negotiated, and either total or conditional.

Conditions limiting amnesties can include that they are:

1. Granted only after full admission of the facts;
2. Applicable only to certain 'categories' of perpetrators;
3. Restricted for a certain period of time; and/or
4. Exclusive of a country's international obligations.

(e) Restorative Justice

Restorative justice is victim-orientated rather than perpetrator-orientated. It works with the full participation of relevant communities to address facts, identify the causes of conflict and define sanctions.

The values of restorative justice include:

1. Encouragement for the entire community to be involved in holding offenders to account;
2. Emphasis that offenders must accept responsibility for their actions;
3. Recognition that a community carries responsibility for the social conditions that contribute to offenders' behaviour; resulting in
4. Empowerment of the community as a whole.

(f) Truth Commissions

Perhaps the most well-known of institutions born out of the restorative justice movement are truth commissions. One of the most famous of these is the South African Truth and Reconciliation Commission, which was founded during the reconciliation process that followed the aftermath of the apartheid regime and was chaired by Archbishop Desmond Tutu. Since 1974, some thirty such commissions have been established around the world.

In terms of their operative structures and features, truth commissions usually serve as temporary bodies for specific periods of time. They are usually quasi-judicial, which is to say that they are independent of the judiciary but retain the same powers as the courts.

Created during periods of transition from authoritarian rule to democracy, their focus is on addressing the past. They serve to investigate systematic patterns of gross violations of human rights with a view to promoting reconciliation. Commissions are normally tasked with producing a final report, which includes suggestions for institutional reform to uphold the rule of law and human rights.

Truth commissions are generally lauded as an ideal mechanism to help establish the truth about a society's past. They carry the benefits of promoting accountability and providing public platforms for recognition of victims. They also serve as a forum and stimulus for public debate, political reconciliation, and in turn, consolidation of a nascent democracy.

The establishment of truth commissions can be effectuated from either the executive or legislative branch, or through a peace accord (a political contract between the government and its opposition). In the process of designing truth commissions, the most important elements include establishing a mandate, selecting appropriate commissioners, and addressing human and material resources so as to ensure its ability to function sustainably. Other crucial elements include ensuring that they are assigned clearly defined objectives under their mandate, such as the specifics of the violations to which they inquire, powers, sanctions, and how to follow up on findings.

(g) Reparations

Another part of reconciliation, which perhaps overlays the victim- and perpetrator-orientated part of the process, is reparations. The responsibility of a successive government for abuses committed by previous regimes is supported by international law, and in some cases domestic law. Reparations could be for individual victims or for collective groups (i.e. structural reparations). There are two main types of approaches to reparations: judicial and non-judicial. Benefits of the judicial approach include that they presuppose a properly functioning legal system. Conversely, criminal courts are arguably not proper institutions to deal with victims' compensation claims as they often lack the financial and administrative competence required. So far as non-judicial approaches are concerned, truth commissions can serve as a specialised body to deal with reparations. Similarly, national administrative bodies, such as trust funds and compensation commissions, may discharge such duties effectively.

8 Building a Democratic Constitutional Culture: Constraints and Opportunities

(a) Overview

This section focuses on what can be done now to build a democratic constitutional culture in Myanmar. The answers will differ, so far as they concern the period for which the 2008 Constitution may remain in place, as well as when potential constitutional amendments, and eventual constitutional transformation may take place.

There is also the question of what institutions should play a role in this process and how their capacity might be built. Examples of these institutions include political institutions identified in the 2008 Constitution, civil society, as well as the courts and judicial system.

(b) Definitions

The process of 'building a democratic constitutional culture' requires citizens and political power-holders over time to act in conformance with democratic principles, not out of fear of sanction or because someone else tells them to, but because respect for the principles of democracy has become part of their understanding of proper political conduct.

A democratic constitutional culture exists when actions are undertaken in the reasonable expectation that others also will conform to democratic constitutional principles. Where a democratic constitutional culture exists, the Constitution is more than words on paper. It becomes a set of values that have seeped into public consciousness.

(c) The Essence of Democracy

At the heart of all democratic principles is the idea that everyone has the right to participate in the making of decisions that affect them. For the most part, this idea is implemented through representative democracy, with major policy decisions taken by a majority vote. But it also entails respect for minority rights, and for the dignity of each person (indeed, democratic decisions are limited by these equitable constraints).

The separation of state and party is also key. No single political grouping should have

the power to impose its will permanently on society, as public policies should only ever be provisional and revisable strategies for promoting the public welfare. Democracy can thus be viewed as a respectful conversation about how best to live together.

(d) Myanmar's Challenge

Working from the present reality, the 2008 Constitution provides the legal basis for all political institutions in Myanmar. Progress towards a democratic constitutional culture requires collective action by all of these institutions – the Parliament, the executive, the military, and the judiciary. For now, the question is what can realistically be done, using these existing institutions, to progress towards a democratic constitutional culture. This challenge is hardly unique to Myanmar. As the very definition of democracy can be seen as something of a utopian axiom, a realistic appraisal of societies trying to achieve popular change confirms that most democracies are 'works in progress'.

(e) Example from South Africa

In 1994, South Africa 'transitioned' to democracy after years of rule by a regime that enforced a national policy of racial segregation known as 'apartheid'. On transition, it had all the advantages of a state-of-the-art modern Constitution that was finalised in 1996. The Constitution provided for a range of institutions supporting constitutional democracy: a Constitutional Court, a public protector, and a human rights commission.

However, problems started to arise when the dominant political party (the African National Congress, or ANC) attracted nearly 70% of the vote and declared its intention to govern forever. It subsequently set about 'deploying' its supporters to all state institutions so that they became branch offices of the party rather than independent institutions supporting democracy. Inevitably, this resulted in corruption, nepotism and maladministration. South Africa is only now, some twenty years later, beginning to make proper efforts to correct these issues.

(f) The Role of the NLD

The NLD is in some ways like the ANC – a national democratic movement that enjoys overwhelming popular support. The difference is that the NLD is restrained, on the one hand, by the need to work with a powerful military establishment and, on the other, by ethnic nationalities' demands for greater regional autonomy. This requires the NLD to negotiate and compromise.

In some ways, this could be seen as indicating that Myanmar is currently in a better sit-

uation than South Africa was in the 1990s. As the NLD cannot control the whole of the state (even if it wanted to), it is compelled to represent its supporters' views in Parliament, strike political agreements with the military establishment and the ethnic nationalities that sustain the momentum to full democracy, and model the democracy it wants for the country through the way it manages its own internal procedures.

(g) The Role of the Constitutional Tribunal

Sometimes, but certainly not always, constitutional courts and/or tribunals can play a pivotal role in progress towards democratisation. This is because they are given the primary task of enforcing the Constitution, which contains the ground rules according to which democracy operates. While the role of a tribunal is anti-democratic in one sense (as it can thwart the will of the current majority power-holder), it serves as the lynchpin of democracy in preserving the conditions for free democratic competition.

In theory, the role of a constitutional tribunal should be as forceful as the health of a society's democracy requires. This is particularly true in the beginning of a democratic transition. When democracy is fragile, a tribunal may need to act boldly to protect the democratic system from attack. As the system matures, the tribunal should ideally step back, and intervene only when the system is threatened.

(h) The Role of Civil Society

Another key theme of democracy building is that building a democratic constitutional culture is not just a matter of having appropriate laws and legal institutions. It is also a political matter, since it involves the distribution of power and there will be differences of interest and power about how that should be done, and where power should lie.

It is also a social matter, since a democratic culture will only thrive to the extent that it can be taken for granted by citizens able and willing to organise and speak without fear and with the realistic hope that their views will be taken into account.

What is true, and what governments and societies both need to have reason to believe, is that constitutional government is good for them. While there are certainly reasons to believe this, it is not enough merely to assert this alone without convincing people in government and wider society.

(i) Political Culture

As constitutional democracy is a way of organising power, the way it is arranged is not

just a technical and/or legal problem, but an inevitably political one. As such, the people who hold power must see incentives for their country, themselves, and their families, so as to be convinced that it is in everyone's collective interest to abide by constitutional provisions. In South Africa, this was a key reason the white leadership agreed to political transformation.

At the heart of political culture also lies a question of legitimacy. In the long run, governments need the support of citizens who believe the government has the right to govern and can be trusted. Where citizens believe that, they are able to live more harmonious and safer lives. This also allows those who govern to do so more securely and with less need for coercive force.

(j) Social Culture

For citizens to draw the benefits of a democratic culture, education is vital so that individuals are empowered to understand what democracy might mean for them. It also depends on real lived social experience. People will not support democratic legal arrangements unless they believe they are truly democratic and not just rhetoric. They must also be able to see the benefits for them in their ordinary social lives. One way to begin this process as a lived experience is to develop forms of public involvement in constitutional change.

(k) Public Involvement in Constitution Making

A degree of public involvement in constitution-making is today widely accepted as necessary to the future legitimacy of a new or reformed constitution. This may take the form of representation of interest groups, including ethnic nationalities, in a national constitutional assembly, or a public consultation or referendum process. In ethnically divided societies, where the point of the Constitution is to provide a secure framework for future inter-group co-operation, constitutional principles may be agreed by an all-inclusive political process operating through consensus rather than majority vote. While detracting from democracy in the sense of pure majoritarianism, such a constitution-making procedure ultimately provides a more secure basis for long-term democratic health than a procedure through which a dominant group uses its majoritarian power to control the constitution-making process.

(l) Moving to a Political Settlement

Ultimately, Myanmar will only have a chance of peace if an inclusive political settlement is reached and embodied in a new or reformed Constitution. Such a political settle-

ment can only be reached if all parties develop sufficient trust in each other. The type of trust necessary is multi-faceted, and consists of respect for difference, a commitment to non-domination and the non-violent resolution of disputes, submission to the decisions of independent tribunals, and a shared commitment to the long-term prosperity of Myanmar rather than the short-term advantage of any one group.

(m) Incremental or One-Off Constitutional Change?

Once sufficient trust is built through such initiatives as the 21st Century Panglong Conference, the major question will be how to embody the emerging political settlement in an amended or new Constitution. For this, there are two main international models: the two-stage constitution-making process which was used in South Africa, and the incremental process used in Indonesia and Chile.

In the South African case, constitutional negotiators agreed on a set of constitutional principles that were attached to an interim Constitution enacted by the outgoing Parliament. These principles were then embodied in a new Constitution enacted by a democratic Constitutional Assembly, and the Constitutional Court was given the task of ensuring that the new Constitution conformed to the agreed principles.

Indonesia is a reasonably successful example of the second method: incremental constitutional change. This was initiated by an amendment process from 1999-2002 proceeded in four stages as trust was built. During the first and second stages, limited presidential terms and a bill of rights were introduced, and the Constitution provided for regional autonomy and parliamentary control of military. Subsequently, the third stage provided for the direct election of a President and established the Constitutional Court, Judicial Commission and regional senate. Finally, the fourth stage redesigned the People's Consultative Assembly. While the framework of the 1945 Constitution was maintained, in the end it was fundamentally overhauled and democratised.

Myanmar's path will necessarily be different, but Indonesia illustrates that incremental change can be effective and durable. It seems more likely at this stage that Myanmar will follow the Indonesian route of gradual constitutional amendment as trust is built.

Community of Democracies

AMCDP
AUSTRALIA-MYANMAR CONSTITUTIONAL DEMOCRACY PROJECT

Contact Us

The Permanent Secretariat of the Community of Democracies
Al. Ujazdowskie 41, 00-540 Warsaw, Poland

Tel. +48 22 375 90 00
Fax. +48 22 319 56 28

E-mail: info@community-democracies.org
Website: community-democracies.org

Social networks

facebook.com/CommunityofDemocracies

twitter.com/CommunityofDem

youtube.com/user/CommunityDemocracies

flickr.com/people/communityofdemocracies