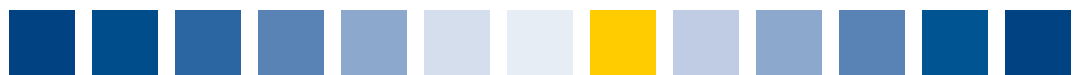


# **SCHEDULE TWO OF THE 2008 CONSTITUTION**

## **AVENUES FOR REFORM AND DECENTRALIZATION AND STEPS TOWARDS A FEDERAL SYSTEM**

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This research project differs from most because there was no difference on the subject matter between the experts and those selected for interviews. The target population was the experts themselves, most of who are also closely involved in decentralization and federalism. They range from MPs in state and regional parliaments to journalists reporting on their activities, NGOs providing training courses and the agencies that fund them. Although a study of opinions on this topic among the general population would be of great interest, it must be acknowledged that this was not the objective of the authors in researching for this paper.<sup>1</sup>

The opinions expressed in this paper are those of the authors.

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<sup>1</sup> For this, see: <https://www.pacemyanmar.org/public-opinions-citizens-democratic-aspirations/>

## Glossary

Amyotha Hluttaw	House of Nationalities, Upper House
BGF	Border Guard Force
CSO	Civil Society Organization
EAO	Ethnic Armed Organization
ENAC	Ethnic Nationalities Affairs Center
EMReF	Enlightened Myanmar Research Foundation
EPP	Ethnic Political Party
GAD	General Administration Department
Hluttaw	Burmese for “parliament”
KAS	Konrad-Adenauer Stiftung
KIO	Kachin Independence Organization
KNU	Karen National Union
MP	Member of Parliament
MPC	Myanmar Peace Center
NCA	Nationwide Ceasefire Agreement of October 2015
NGO	Non-Governmental Organization
NLD	National League for Democracy
NMSP	New Mon State Party
NRPC	National Reconciliation and Peace Center
Pyidaungsu Hluttaw	Assembly of the Union
Pyithu Hluttaw	House of Representatives, Lower House
RCSS	Restoration Council of Shan State
SAZ	Self-Administered Zone
SLORC	State Law and Order Restoration Council
SNLD	Shan National League for Democracy
UEC	Union Election Commission
UPDJC	Union Peace Dialogue Joint Committee
USDP	Union Solidarity and Development Party
Tatmadaw	Burmese for Myanmar armed forces



*"At the upcoming sessions of the Peace Conference, I urge all of you to finalize all the fundamental principles on Federalism. Once we have agreed on the fundamental principles, we can continue to discuss and elaborate on their details. We will need to continue our dialogue on the division of power, allocation of resources and revenue between the Union, States and Regions, and the powers as described in the additional tables to the Constitution. These are about how we will divide our state powers in our future Federal Union. If we are able to conclude the discussion on fundamental principles during the upcoming sessions of the Peace Conference, we would have a strong foundation for the Federal Union."*

Opening Speech by the Chairperson of the National Reconciliation and Peace Centre and  
State Counsellor of the Republic of the Union of Myanmar, Aung San Suu Kyi,  
at the ceremony to mark the Second Anniversary of the Signing of the Nationwide Ceasefire Agreement,  
15 October 2017, Nay Pyi Taw<sup>2</sup>

*"The 2008 Constitution is federal in form but unitary in substance"*

Khuensai Jayen, Executive Director, Pyidaungsu Institute<sup>3</sup>

*"If federalism is to be the end result of the current political and peace processes (two processes that it would be wrong to see as entirely separate), then such federalism will not appear overnight, out of thin air. On the contrary, it will be built on the foundations offered by the existing institutions logically relevant to federalism: the fourteen local parliaments and governments. Institutions have roots, they have a history, they have traditions, and these have already started being built. This is one message we would like to share with ethnic political organizations, and armed groups, in particular: one ignores the present political process at one's own risk. Federalism is not a train that has yet to leave the station. It's an already moving train that they'll have to get on board with at some point. The opposite message could then be sent to those involved in Myanmar's "mainstream" political process: the train of federalism is far from having reached full speed, and does not yet have all its passengers on board. In that sense, what happens in the local parliaments is shaping not only the present, but also the future of Myanmar, but it is happening in a context that is bound to evolve greatly if Myanmar is ever to be organized along the lines of a federal system."*

Tinzar Htun, Zaw Min Oo, Nyein Thiri Swe and Mael Raynaud<sup>4</sup>

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<sup>2</sup> Source : Myanmar State Counsellor Office.

<sup>3</sup> Interviews, October 2017.

<sup>4</sup> Researchers from Enlightened Myanmar Research Foundation (EMReF) consider the role of Myanmar's local parliament, in Tea Circle, May 17, 2017: <https://teacircleoxford.com/2017/05/17/local-parliaments-in-myanmar-key-institutions-but-too-often-overlooked/>



## Executive Summary

Ever since the Panglong Agreement was signed on February 12, 1947, only two weeks after the Aung San - Attlee Agreement on Burma's Independence of January 27, 1947, the issues of federalism, minority rights and self-determination have been central to Myanmar politics, conflict and military-civilian relations. Accordingly, relations between the center and the periphery are at the core of the constitutions of 1947 and 1974, as well as the 2008 Constitution. Yet, by any standards, the Myanmar state has been unitary, and indeed centralized to an extreme degree, since independence in 1948, leading to 70 years of conflict.

To a large degree, the conflict explains the other defining trait of the Myanmar state: for most of the last seven decades, it has been dominated by the military. Relations between the military and state institutions have been shaped by the relationship between the central government and Ethnic Armed Organizations (EAOs).

The issues of democracy, federalism and the role of the military cannot be separated, and together they form the basis for modern Myanmar politics. In this context, it is not surprising that organizations representing the interests of ethnic nationalities spent the last two decades of military rule, after the emergence of the democracy movement of 1988 and the NLD's victory in the 1990 elections, calling for a "tripartite dialogue" among the NLD, the military and themselves. It is no coincidence that these were also the decades when the military was drafting the 2008 Constitution.

The current peace process was initiated by President U Thein Sein in 2011, the year Myanmar embarked on its transition to democracy. Although democracy and the pursuit of peace are undoubtedly two of Myanmar's most pressing issues, the fact that two distinct processes – which will be referred to in this paper as the political process and the peace process – developed from there raises a number of issues.

Indeed, if democracy, federalism and the role of the military are the three pillars on which Myanmar politics rests, then the fact that the conversation about democratization and the conversation about federalism, a condition for peace, are taking place in two separate processes is in contradiction with the idea of a “tripartite dialogue” between the democracy movement led by the NLD, the Tatmadaw and organizations representing the interests of ethnic nationalities. Instead, it can be argued that the military is dealing with democracy, and those who promote it, in one process, and with federalism, and those who promote it, in the other.

It is the firm belief of the authors, and virtually everyone they interviewed, that the political process and the peace process are one and the same: the process through which Myanmar’s political future is being built.

In practical terms, the two processes are already overlapping to a large degree. The Nationwide Ceasefire Agreement (NCA) specifically aims to “establish a union based on the principles of democracy and federalism in accordance with the outcomes of political dialogue and in the spirit of Panglong”, and the framework of the peace process grants the states and regions the right to draft their own constitutions, and both decisions directly affect the political process. Organizations representing nearly all ethnic nationalities have had draft constitutions for their respective states for decades. On the other hand, when the 14 states and regions develop a political life of their own through their respective governments and parliaments, it is clear that federalism is already being built outside the peace process and without the participation of the very ethnic nationality representatives that have made federalism their ultimate objective.

In this context, although the big picture can be described as a conversation about Myanmar’s future among the military, the democracy forces (led by the NLD, probably for many years to come) and ethnic nationalities, it is possible to single out the section in the 2008 Constitution that epitomizes this conversation. It is Schedule Two, which details the powers of the state and regional parliaments and therefore, indirectly, the powers of the state and regional executives tasked with implementing the laws approved by those parliaments.

Just as the authors began researching this paper, Aung San Suu Kyi gave a speech marking the second anniversary of the signing of the NCA in October 2015. In the speech, for the first time, she specifically identified the “Tables” (read, Schedules One, Two, Three and Five of the 2008 Constitution) as the sections of the constitution her government wanted to amend. Amending the schedules, in the context of a professed policy of promoting decentralization and with the ultimate goal of establishing a federal system already agreed in the NCA, could only mean modifying

the balance between the powers of the Union Parliament, the Pyidaungsu Hluttaw (detailed in Schedule One), and those of the state and regional parliaments (detailed in Schedule Two) in favor of the latter. Although Schedule Three, the powers given to Self-Administered Zones (SAZs), may not be an immediate priority (but needs to be part of the conversation), Schedule Five, which deals with taxes and revenue collected by states and regions, will be of utmost importance.

Research has shown repeatedly that a broad consensus exists on the general objective of amending the constitution in a way that supports decentralization, with federalism being a clear long-term objective to be achieved gradually by decentralizing measures.

However, the consensus is far from absolute. Sections of both the democracy and ethnic nationalities movements oppose the strategy of “gradual decentralization”. In broad terms, it can be said that many in the democracy movement would favor a new constitution rather than amendments because they regard the powers granted to the military (25 percent of the seats in the parliaments and three ministries under direct control of the commander-in-chief) as contrary to democratization. Activists in the ethnic nationalities movement regard decentralization as inherently contrary to the ultimate goal of federalism, and they would also prefer to have a new constitution. Last but not least, many in the Tatmadaw and the USDP do not see such amendments favorably as they feel the constitution is better left untouched.

Although this paper documents these views, it takes the clear path of discussing potential amendments to the constitution as the only realistic option at this point, for three reasons.

- The first is that the authors have found a sufficient consensus to say that there is a mainstream movement among the military, the Bamar democracy movement and ethnic nationalities in support of amending the constitution, and specifically Schedule Two. Opponents of the process are on the margins of that mainstream movement. And at any rate, the NLD and Tatmadaw can, together, amend the constitution.
- The second is that all interviewees, analysts, politicians and activists seem to accept that it will be many years, probably well over a decade, before a new constitution is written, making amending the constitution an achievable step in the right direction.
- The third is that the authors firmly believe that even those who would rather see a new constitution should take a keen interest in the conversations about amending Schedule Two, because these are the same conversations they wish to have in the course of writing a new constitution.

The authors hope that this paper will serve as a useful tool to all involved in the discussion about the constitution, regardless of where they stand politically or whether they are from the military, the democracy movement and the ethnic nationalities, or from the media, civil society, the private sector or the international community. The authors believe that the issues discussed in this paper should be of interest to all citizens of Myanmar and anyone interested in the country's future.

The primary findings of the research can be summarized as:

- there is a consensus on amending the constitution, with special attention given to Schedule Two;
- the NLD government is committed to this objective, and the military may be ready to accept such amendments;
- this process should be gradual and develop through several rounds of constitutional amendments to move Myanmar closer to a federal system;
- the peace process and the political process overlap precisely on issues related to amending Schedule Two, providing a perfect opportunity to move the two processes closer to each other in what would be a much needed and widely desired political dialogue about the future of Myanmar;
- actors in the peace process need to take a keener interest in the political process and potentially start being integrated into it, regardless of whether or not they participate in the formal electoral process;
- actors in the political process need to take a keener interest in the peace process and potentially start being integrated into it (which means making the peace process more inclusive).

Beyond these general comments, it is clear that amending Schedule Two is easier said than done. Any such amendments cannot be successful without discussing some other issues, including that:

- the content of the other schedules, notably Schedule One and Schedule Five, also needs to be amended;
- a new mindset is needed in Nay Pyi Taw and throughout the country, in which politics will be less personalized and politicians and civil servants will learn how to delegate. Formal decentralization, even if written into the constitution, will be impossible if those working at the Union level do not relinquish some of their authority and power;
- if the state and regional governments are given more power and greater financial resources, then their governments can no longer function as they currently do, with "ministers without ministries". Meaning that the states and regions must be equipped with administrative

- departments, i.e. an entire new set of institutions, a daunting challenge in itself;
- if state and regional governments are given new powers, it will raise an issue about chief ministers being appointed by the Union government, as opposed to being elected;
- in the context of decentralization, the powers given to elected representatives in the country's 74 districts and 330 townships, as well as in the wards, village tracts and villages, must be redefined;
- if any form of local governance and democracy is to develop, the role of the General Administration Department (GAD), a centralized institution under the direct control of the military through the Ministry of Home Affairs, needs to be discussed. This paper advocates the granting of greater powers to elected councils at each of the levels listed above as a complement to a GAD that would gradually become more accountable to elected representatives and ultimately the citizens of Myanmar.

Another key element in the debates about amending the constitution is that they are based on the idea that parliaments play an important role in Myanmar politics. Sadly, many interviewees told the authors, confirming the views of most analysts, that although the parliaments had become key institutions in Myanmar politics under President U Thein Sein, this tendency seemed to go into reverse after the administration of President U Htin Kyaw and State Counsellor Daw Aung San Suu Kyi took office in the spring of 2016.

Such debates can only take place when the media are able to freely report on the views of all stakeholders and express their own opinions in editorials. Recent events have led to growing concern among large sections of the body politic about media freedom in Myanmar.

Last but not least, a key finding of this paper is that capacity is critically lacking at state and regional level and at local levels. The authors strongly reject any notion that the lack of capacity justifies objections to greater levels of decentralization, but stress that it would be unhelpful to underestimate the scale and the level of concern over this issue.

The authors believe that a gradual process of decentralization must accompany, and be accompanied by, a process to train a new generation of politicians and civil servants at the local level so that they have the capacity to perform the tasks associated with a decentralized – and eventually, federal – system. To build a stronger decentralized Myanmar is to build a stronger Myanmar.

This process cannot and should not ignore the reality that ethnic nationalities have developed

administrative capacity of their own or that ethnic service providers are a great asset for Myanmar. Greater levels of cooperation among the Union level in Nay Pyi Taw, newly decentralized institutions, and ethnic nationality organizations and their service providers (a process described in this paper as “asymmetrical decentralization”) are key to achieving peace, building democracy and a federal system, and strengthening the state itself.

In conclusion, this paper argues that Schedule Two is where the big debates about Myanmar’s future converge. Amending Schedule Two opens a multitude of other debates which, taken together, are necessary to build a successful Myanmar according to the definitions and dreams shared by the military, the democracy movement, ethnic nationalities and Myanmar’s 51 million citizens.

Change is needed at four levels:

- at the political level, a consensus is needed among the military, the democracy movement and ethnic nationalities;
- at the technical level, decentralization will require constitutional, legal, fiscal and administrative changes according to the political consensus so that the state can function effectively and citizens feel represented and protected by it and have a sense of ownership;
- at the capacity level, much needs to be done to ensure that those in charge of implementing these decisions have the ability to perform their tasks competently;
- and, perhaps most importantly, the mindset of all stakeholders will need to change for such a consensus to emerge. This will also involve change in the relationship between the center and the periphery, and changes in sharing and delegating power, as it becomes less personalized.

The challenges exposed in this paper are huge. Decentralization, and later, federalism, will be the work of a lifetime, and lasting solutions will probably be found over several generations. The people of Myanmar have no alternative than to face and, collectively, overcome these challenges. The debates over the myriad of issues discussed in this paper are an opportunity to do just that.



## **Research Methodology and Focus**

This paper builds on more than 20 years of cumulative experience by its two authors.

The first step was to write an initial paper, dated October 30, 2017, based on a desk review (which is largely reflected in the references cited at the end of this paper) and interviews with Myanmar and foreign experts. The initial paper elicited comments from a dozen of the experts acknowledged above that helped to draft a questionnaire and provided a general direction for the research. Between October and November, the authors conducted more than 50 interviews in Nay Pyi Taw, Mandalay, Mawlamyine, Yangon and Singapore. The interviewees included a former minister, a colonel in the Tatmadaw, Union, state and regional Members of Parliament (including the deputy speaker of a sub-national parliament), political party leaders, leaders of ethnic armed organizations, researchers from think tanks focusing on issues involving ethnic nationalities or state and regional parliaments, scholars, journalists, civil society activists, foreign analysts and members of international NGOs working on issues related to the constitution, and members of the Union Election Commission (UEC). The interviews were semi-structured, meaning that the authors asked all the questions on the questionnaire and depending on the answers, followed up with further questions.

Finally, the authors and Konrad-Adenauer Stiftung (KAS) convened a workshop in Yangon on December 1, 2017. It was attended by 24 Myanmar politicians, scholars and activists from Yangon, Mandalay and Mawlamyine, most of whom had previously been interviewed.

It is important to note that the focus of the paper evolved while it was being researched. Initial questions included “how can Schedule Two be amended” and “how would amending Schedule Two take Myanmar closer to federalism”. However, responses from interviewees and the literature on various issues related to amending Schedule Two (such as the peace process, ethnic demands for federalism, fiscal decentralization, and state and regional parliaments) led the authors to include

other questions. Examples are: “who supports and who opposes amending the constitution, and why”, “what actually happens if issues such as education, health care, the economy, labor rights, land rights, the environment, or social issues such as gender equality, are included in Schedule Two”, “what kind of process would this put in motion in terms of additional changes in the way power is distributed” (whether such changes necessitate constitutional amendments or simply laws or regulations), “what issues would the country face regarding the capacity of politicians, civil servants, local civil society, eco-systems and media”, “how does decentralization relate to the peace process”, and “how would decentralization be funded” (the issue of fiscal decentralization).

The authors do not claim to have successfully answered all of these questions; it would be too ambitious an objective because of time limitations and the scope of the project. They acknowledge that providing the answers should be the collective responsibility of all citizens of Myanmar. The authors reiterate their belief that this paper will be useful for anyone interested in decentralization and federalism in Myanmar, by which they mean all citizens.

## 1. Introduction

### 1.1 Background

In 2008, a new constitution was adopted after a widely criticized referendum.<sup>5</sup> The result of a process that had lasted 15 years since the National Convention had first convened in 1993, it was meant to provide a framework for the radical changes Myanmar has experienced in the last decade (Egreteau 2016/ Lall 2016/ Taylor 2009).

The most significant aspect of the constitution to be discussed,<sup>6</sup> internationally as well as in Myanmar, was the continued powers afforded to the military through the 25 percent of parliamentary seats reserved for military representatives nominated by the Commander-in-Chief and control over three key ministries (Defense, Home Affairs and Border Affairs), whose ministers are appointed by the Commander-in-Chief (Egreteau 2016/Raynaud 2016/Steinberg 2015).

In this context, a second aspect, which has become the topic of a growing body of literature (Egreteau 2016/Raynaud 2016), is the “hybrid” nature of government, divided between sectors transferred to an elected civilian government and sectors remaining under military control. Most analyses on Myanmar’s transition focus primarily on this uneasy division of powers. Often neglected in this analysis, and critical to the long-term rise of civilian power over the military, is an independent third sector – the judiciary (Crouch and Lindsey 2014/Cheesman 2015/Prasse-Freeman 2015).

Last but not least, all analyses of the transition have noted the importance of the ethnic question, from continuing conflict to an uncertain future where Myanmar would “achieve” federalism (Egreteau 2016/Lall 2016/Raynaud 2016/Smith 2015/South & Lall 2018). In recent years, such

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<sup>5</sup> The referendum took place on May 10, 2008, only a week after Cyclone Nargis had caused the death of almost 150 000 people.

<sup>6</sup> In addition to Article 59(f), which the NLD and Daw Aung San Suu Kyi circumvented with the creation of the position of State Counsellor

conversations have primarily been centered on the peace process.<sup>7</sup>

The issues that need to be resolved, in order for the peace process to succeed, run far deeper than many in the Bamar majority realize, and this is particularly so in Nay Pyi Taw among the leadership of the Tatmadaw and upper echelons of the civil service. Many experts and activists say the issue also exists within the NLD (Smith 2015/Walton 2008).<sup>8</sup>

James C. Scott (2009) tells us of the ethnic nationalities of Myanmar and the region that “such self-governing peoples (...) are seen from the valley kingdoms as ‘our living ancestors’, ‘what we were like before we discovered wet-rice cultivation, Buddhism, and civilization’. On the contrary I will argue that hill people are best understood as runaway, fugitive, marooned communities that have, over the course of two millennia, been fleeing the oppression of state-making projects in the valleys – slavery, conscription, taxes, corvée labor, epidemics, and warfare .(...) Virtually everything about these people’s livelihoods, social organizations, ideologies and (more controversially) even their largely oral cultures, can be read as strategic positioning designed to keep the state at arm’s length.”

Although Scott’s analysis is far from consensual among experts of Myanmar’s ethnic nationalities,<sup>9</sup> it is useful in the sense that it portrays the “hill people” of Myanmar as masters of their own fate who act according to their own perceived best interests and are people with agency. This is a vision that contradicts many of the prejudices that exist among many in the Bamar majority and which have been reflected in the vision of the Myanmar state since independence.

This explains why, at the crossroads between the political process and the peace process, i.e. at the center of any solution to the Myanmar political crisis, is the question of federalism,<sup>10</sup> an objective around which there now seems to be a certain consensus among the military, the two main parties (the NLD and the USDP), ethnic armed groups, parties representing the interests of ethnic nationalities, and civil society organizations. Organizations representing the interests of ethnic nationalities have long demanded that a “tripartite dialogue”, between the NLD, the Tatmadaw and themselves, would take place, according to the “Panglong Spirit” (ENSCC 2002). It is notable that the 2015 Nationwide Ceasefire Agreement contains a paragraph dedicated to federalism as an agreed objective. Indeed, one stated objective is to “establish a union based on

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<sup>7</sup> See Mael Raynaud: The Dynamics Behind Myanmar’s Political Consensus, June 29, 2017 -

<https://teacircleoxford.com/2017/06/29/the-dynamics-behind-myanmars-political-consensus/> <sup>8</sup> See also Matthew J. Walton: Lessons from Panglong, Tea Circle, June 2016 - <https://teacircleoxford.com/2016/06/23/lessons-from-panglong-part-i/>

<sup>9</sup> Interviews, October to November 2017.

<sup>10</sup> On federalism, see the reports by International IDEA in the bibliography.

the principles of democracy and federalism in accordance with the outcomes of political dialogue and in the spirit of Panglong". Last but not least, the NLD, a party that is set to govern Myanmar at least until 2021, and in all likelihood beyond, has promised to amend the constitution before its term in office ends in early 2021.<sup>11</sup>

In other words, there could be two major general fields for constitutional reform in Myanmar, with one linked to the continued powers granted to the military and the other linked to building a federal system. The NLD government seems to favor reforming the constitution on the latter aspect, rather than the former, at least for the time being.

In this context, the key institutions in all debates on these topics are the fourteen state and regional parliaments, and the key elements in the 2008 Constitution are article 188 and the associated Schedule Two.<sup>12</sup>

Indeed, Mael Raynaud has written<sup>13</sup> that "there can be federalism under the 2008 Constitution". As noted in the same article, the fact that the constitution provided for the creation of 14 state and regional parliaments attracted immediate comment from many analysts when the text was first circulated in late 2007.

This analysis has since been confirmed by David C. Williams (2014, p. 134), a constitutionalist working closely with ethnic nationality organizations, and by some of the analysts interviewed during the research for this paper.<sup>14</sup>

As Williams has observed: "For decades the ethnic minorities have been calling for federalism – a constitutionally guaranteed assignment of power over certain subject matters to the state governments. For decades the military government resisted on the grounds that federalism was tantamount to the break-up of the Union. A new day has now dawned, however. The 2008 Constitution actually creates state governments and guarantees them some (albeit highly limited) powers. In other words, the point has been conceded. Burma has a federal system, although government leaders still use the word only rarely. The question is no longer whether the states should hold legally entrenched powers but how broad they should be, and over what subject matters."

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<sup>11</sup> See : <https://www.mmtimes.com/news/nld-promises-constitution-change-term-expires.html>

<sup>12</sup> See: <https://teacircleoxford.com/2017/06/14/education-and-the-local-parliaments-legislative-competence/>

<sup>13</sup> See Panglong Spirit Under the 2008 Constitution, Tea Circle, August 2016 : <https://teacircleoxford.com/2016/07/22/panglong-spirit-under-the-2008-constitution/>

<sup>14</sup> Interviews, October, November and December 2017

Those powers, and those of the Pyidaungsu Hluttaw, the Union Parliament (detailed in Articles 74 to 160 of the constitution), are outlined in what Daw Aung San Suu Kyi calls the “additional tables” of the constitution. Schedule One lists the Union legislative powers, and Schedule Two the legislative powers of the states and regions. Schedule Three details the powers of the Self-Administered Zones, and Schedule Five the tax and revenue collection powers of state and regional governments.

Schedule Two will be examined in detail later in this paper. It is enough here to cite Article 188 of the 2008 Constitution (in which articles 161 to 195 deal with state and regional parliaments), which states: “The Region or State Hluttaw shall have the right to enact laws for the entire or any part of the Region or State related to matters prescribed in Schedule Two of the Region or State Hluttaw Legislative List.”

Schedule Two is more remarkable for the “matters” not prescribed than those prescribed.

Missing from the list are, most significantly, education, health care, labor laws and regulations, and gender equality, which according to a recent poll by the International Republican Institute are the issues that citizens most care about.<sup>15</sup>

It is clear that extending the powers of local parliaments and governments over some of these issues, such as education, would take Myanmar closer to being a federal system and would go a long way in promoting democratization and peace.<sup>16</sup>

In this context, the authors have tried to understand what amending Schedule Two would mean in practice. This has involved asking a host of stakeholders about their perceptions, identifying obstacles and challenges, and showing the pros and cons of such constitutional reform as well as the steps that the process would need to take for example by training local level officials, who would find themselves with new and broader responsibilities.

Indeed, and beyond the political issues discussed above, some analysts have showed how state capacity and indeed low capacity in all sectors of society are in themselves one of the key issues facing Myanmar (Mutebi 2005/Raynaud 2016). In all but three interviews out of more than 50, capacity was cited as a major issue in decentralizing Myanmar. (The three interviewees were involved in the peace process; none had a direct work connection with state

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<sup>15</sup> IRI: Survey of Burma / Myanmar Public Opinion, March/April 2017

<sup>16</sup> See: <https://teacircleoxford.com/2017/06/14/education-and-the-local-parliaments-legislative-competence/>

or regional parliaments and governments.)

Specific attention will also be paid to the broader political context of Schedule Two and how it might potentially be amended. For instance, any decentralization of such matters as land tenure, education, access to health, etc. will need to be designed within a broader frame that includes justice system reform, aspects of local governance (such as customary law) and local providers of services (such as ethnic providers of education, health care, etc.).

It must be noted that all of the conversations touching on any one of the issues discussed in this paper are necessarily based on the idea that the parliaments play an important role in Myanmar politics. Indeed, “Parliament remains a foundational pillar of democracy and the only hope for a genuine democratic transition” (KAS 2016). Although the parliaments became key institutions between 2011 and 2016 (Egreteau 2017/Kean 2014), and functioned relatively effectively (EMReF 2017), questions have sometimes arisen in recent years over the actual power exercised by parliaments.<sup>17</sup>

Yet, the parliaments have attracted significant interest among citizens. For example, most state and regional parliaments have created their own Facebook pages, which have thousands of followers, in one case up to 9, 000.<sup>18</sup> Two TV channels, one focusing on the Pyidaungsu Hluttaw and the other on the state and regional hluttaws, broadcast on cable networks. An increasing number of journalists in the states and regions are covering the activities of their respective sub-national parliaments.<sup>19</sup> Some civil society organizations have launched websites dedicated to the various parliaments.<sup>20</sup> The Enlightened Myanmar Research Foundation publishes a bi-weekly newsletter on sub-national parliaments.<sup>21</sup> The Myanmar Center to Empower Regional Parliaments also publishes a monthly newsletter in Burmese.<sup>22</sup>

However, interest in the parliaments is not universal and is generally limited to the intellectual elites, who are nevertheless the most likely to influence the process (Raynaud, 2018, forthcoming). One interviewee told the authors: “People don’t care. Most people do not even know their MPs.” As noted above, this paper considers two distinct processes taking place concurrently in Myanmar – the political process and the peace process – and shows how they relate to one another, how

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<sup>17</sup> Interviews, November 2017.

<sup>18</sup> See: <https://teacircleoxford.com/2017/05/17/local-parliaments-in-myanmar-key-institutions-but-too-often-overlooked/>

<sup>19</sup> As noted by EMReF researchers in the course of their field visits.

<sup>20</sup> See for instance: [www.mypilar.org/](http://www.mypilar.org/) / [www.openhluttaw.info/](http://www.openhluttaw.info/) / [www.omimyanmar.org/](http://www.omimyanmar.org/) / <http://www.mcerp.org//https://opendevelopmentmyanmar.net/>

<sup>21</sup> Available on [www.mypilar.org](http://www.mypilar.org)

<sup>22</sup> Available of MCERP’s Facebook page

they sometimes overlap and even sometimes contradict one another. Yet, it argues that they also represent two sides of a same coin, that of the political future of Myanmar.

By political process, the authors mean mainstream politics taking place according to the 2008 Constitution, through elections, with a specific role granted to the military. The most recent phase of the political process in Myanmar started with the 2010 general election, followed by by-elections in 2012, the 2015 general election, and by-elections in 2017. It has seen two different administrations and governments, the Thein Sein administration and the Htin Kyaw-Aung San Suu Kyi administration, as well as the associated first and second legislatures.

By peace process, the authors mean the process initiated by President U Thein Sein in 2011, coordinated by the Myanmar Peace Center and continued by the current administration under the leadership of State Counsellor Aung San Suu Kyi through the National Reconciliation and Peace Center, and within the frame of the 21<sup>st</sup> Century Panglong as detailed in the “short political history” below.

As one interviewee put it, “the peace process exists because some actors cannot join the political process yet”.

Although the peace process is the subject of specific studies some of which are cited in this paper, matters pertaining to the 2008 Constitution such as amendments to Schedule Two are by nature constitutive of the political process. The constitution can only be amended by political actors, namely members of Pyidaungsu Hluttaw, who do not need approval from actors in the peace process.

However, if Myanmar is to achieve peace and build the “Democratic Federal Republic” President U Htin Kyaw mentioned in his speech marking the 70<sup>th</sup> anniversary of independence<sup>23</sup> then the two processes need to converge and ultimately become one.<sup>24</sup> This means that actors in both processes need to be careful that the decisions they take do not contradict decisions taken in the other process. Specifically, amending the 2008 Constitution will require taking decisions that will make progress in the peace process easier.

On October 15, 2017 Aung San Suu Kyi also declared: “In the upcoming decades we need to think about what kind of country or what kind of Union we want our children to inherit. We need to

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<sup>23</sup> See: <http://www.president-office.gov.mm/en/?q=briefing-room/news/2018/01/04/id-8268>

<sup>24</sup> On this point, see also Kim Ninh in the preface to The Asia Foundation’s *The Contested Areas of Myanmar* (2017)



think whether we should leave a country besieged with armed conflicts and differences, which is deprived of happiness, due to lack of national reconciliation or peace, and looked down upon for lagging behind other countries.”<sup>25</sup>

The NLD has vowed to amend the 2008 Constitution, making clear that it wants to move towards greater levels of decentralization with the objective of establishing a federal system. The authors have observed a wide consensus behind this objective.

The aim of this paper is to provide a host of stakeholders with analysis that will inform their conversations and ultimately their political decisions on this matter.

## 1.2 A Short Political History of Myanmar

Myanmar has known a variety of political systems in its history. It is generally agreed that its feudal period can be divided in three distinct eras: the Bagan dynasty (1044-1287), the Taungoo dynasty (1486-1752), and most recently the Konbaung dynasty (1752-1885).<sup>26</sup> Then six decades of British colonization (1885-1948) followed.

In early 1947, two political agreements were signed within a fortnight on ending colonization and on constitutional arrangements for the newly independent nation. They were the agreement signed by General Aung San and British Prime Minister Clement Attlee on January 27, and the document known as the Panglong Agreement signed by General Aung San and representatives of “the Shan States, the Kachin Hills and the Chin Hills”, signed on February 12 and celebrated as Union Day. The 1947 Constitution was adopted in September, three months after General Aung San’s assassination on July 19.

At Independence on January 4, 1948, the “Union of Burma” (the country’s official name in the 1947 Constitution) became a parliamentary democracy headed by Prime Minister U Nu. The euphoria of independence was tempered by civil war. Conflict with the Communist Party of Burma and with a growing number of EAOs, beginning with the Karen National Union (KNU) in 1948, as well as the presence of Chinese Nationalist troops in Shan State, led to a military takeover in 1958 and the appointment of a caretaker government that ruled until 1960. It was followed by the coup d’état on March 2, 1962, which paved the way for nearly 60 years of military rule (Smith 1991).

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<sup>25</sup> Source: Myanmar State Counsellor’s Office

<sup>26</sup> See: <https://teacircleoxford.com/2017/01/30/towards-a-normalization-of-the-political-sociology-of-the-elites-in-myanmar-part-one/>

It is important to note that the parliamentary system of the “democratic era” from 1948 to 1958 and 1960 to 1962 – the success of which is often exaggerated by mainstream Burmese political actors – and the plight of ethnic nationalities were already closely linked. The civil war contributed to the end of the democratic era, and ethnic nationalities and parliamentary democracy both suffered because of the military.

Under General Ne Win (1962-1988) Myanmar embraced the Burmese Way to Socialism, and the 1974 Constitution established “the Socialist Republic of the Union of Burma”, under a single party system (the Burma Socialist Program Party).

In 1988, a popular uprising led to General Ne Win relinquishing power in July and for a few weeks Myanmar had no government. The military regained control on September 18 and appointed the State Law and Order Restoration Council (SLORC) to run the country. As stated in the Preamble to the 2008 Constitution: “The [1947] Constitution came to an end because of the general situation occurred [sic] in 1988”.

SLORC ruled from 1988 to 1997, when the junta changed its name to the State Peace and Development Council, which ran the country to 2011. Senior General Than Shwe headed the junta from 1992 to 2011.

The 2008 Constitution was adopted by referendum on May 10, 2008, and a general election was held in November 2010. Although the 2008 Constitution defines Myanmar as a multi-party democracy, stating that “the Union practices a genuine, disciplined multi-party democratic system”, it guarantees significant powers for the military. The Tatmadaw, as the military is known in Burmese, is not under the control of democratically-elected representatives, neither in the executive nor the legislative branch. Senior General Min Aung Hlaing, the Commander-in-Chief since 2011, names one of the three candidates for the presidency and appoints the ministers of Defense, Home Affairs and Border Affairs as well as the officers who hold 25 percent of the seats in the Union, state and regional parliaments.

The President is empowered under the constitution to appoint the chief ministers of the 14 states and regions as well as members of the Union Election Commission, members of the Constitutional Tribunal and the Chief Justice of the Union, who heads the Supreme Court.

In the 2010 general election, the military-backed USDP won a majority of seats and U Thein Sein was elected President, the first democratically elected leader Myanmar had known since 1962,

after the parliament convened in March 2011.

In the 2015 general election Aung San Suu Kyi led the NLD to a resounding victory and it formed a government that took office in March 2016. Aung San Suu Kyi was named State Counsellor, a position created on April 6, 2016 (Pyidaungsu Hluttaw Law No: 26/2016)<sup>27</sup>, and comparable to that of a prime minister. The President is the head of state.

The 2008 Constitution provides for a bi-cameral Union Parliament, or Pyidaungsu Hluttaw, composed of an upper chamber, the Amyotha Hluttaw, or House of Nationalities, and a lower chamber, the Pyithu Hluttaw, or House of Representatives.

As will be explained in further detail in Section II, the 2008 Constitution created 14 states and regions – based on the states and divisions established under the 1947 Constitution – as well as six SAZs. Most of the SAZs are the result of a first round of ceasefires negotiated between 1989 and 1995 (South 2008).

Following a first series of meetings between EAOs and Minister U Aung Min in November 2011,<sup>28</sup> a second round of ceasefires was signed in early 2012. A semi-official institution, the Myanmar Peace Center, was established in 2012 to coordinate the peace process launched by President U Thein Sein. The process led to the signing of the Nationwide Ceasefire Agreement by the Tatmadaw and eight EAOs in October 2015. However, in a country with about 20 separate EAOs (The Asia Foundation 2017), the NCA was far from inclusive.

It was in this context that the new NLD government convened the first so-called Union Peace Conference - 21st Century Panglong, in August 2016. The second conference took place in May 2017 and at the time of writing, the third was due to convene in late March 2018. The body coordinating the peace process, Myanmar Peace Center, was reformed and renamed the National Reconciliation and Peace Center. Two institutions were created to implement the NCA. They are the Joint Ceasefire Monitoring Committee and the Union Peace Dialogue Joint Committee, which is of direct relevance to this paper because it is an institution in which representatives of political parties (i.e., participants in the political process) are directly involved in the peace process.

Regardless of whether the 2008 Constitution is amended in the coming years, general elections are planned for 2020, and a new administration is due to take power in early 2021.

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<sup>27</sup> Unofficial translation of the law by Tinzar Htun

<sup>28</sup> See: <https://teacircleoxford.com/2018/01/02/remembering-nay-win-maung-year-after-year/>

### Box 1: Key Dates in Myanmar's Political and Constitutional History since Independence

- 27 January 1947: Aung San-Attlee Agreement on the Independence of Burma.
- 12 February 1947: Panglong Agreement.
- 9 April 1947: General election for a Constituent Assembly.
- 24 September 1947: Adoption of the Constitution of the Union of Burma.
- 4 January 1948: Independence of the Union of Burma. U Nu Prime Minister from 1948 to 1958.
- June 1951 to April 1952: General election.
- 27 April 1956: General election.
- 26 September 1958: Military "caretaker" government headed by General Ne Win is formed at the request of Prime Minister U Nu.
- 6 February 1960: General election. U Nu Prime Minister until 1962.
- 2 March 1962: Military coup. Creation of a Revolutionary Council, under the Chairmanship of General Ne Win. The 1947 Constitution is de facto suspended.
- 4 July 1962: Adoption by the Revolutionary Council of a party constitution enshrining the "Burmese Way to Socialism". Creation of the Burma Socialist Program Party (BSPP, initially known as Burmese Way to Socialism Party, BWSP).
- 15-31 December 1973: Referendum on a new constitution.
- 3 January 1974: Adoption of the constitution of the Socialist Republic of the Union of Burma, which takes effect on 2 March 1974.
- 23 July 1988: Resignation of General Ne Win.
- 18 September 1988: Military takeover. Creation of the State Law and Order Reconciliation Council (SLORC), the 1974 Constitution is suspended.
- 27 September 1988: Creation of the National League for Democracy (NLD).
- 18 June 1989: Burma officially becomes Myanmar through the "Adaptation of Expressions Law", which also saw Rangoon become Yangon, among other changes to place names.
- 27 May 1990: General election.
- 27 July 1990: SLORC Declaration No. 1/90 calling for a new constitution to be written.
- 16 September 1992: Adoption by SLORC of the 104 basic principles of the National Convention.
- 9 January 1993: Official start of the National Convention.
- 15 September 1993: Creation of the Union Solidarity and Development Association (USDA).
- 31 March 1996: The National Convention is adjourned.
- 18 November 1997: Creation of the State Peace and Development Council (SPDC), under the Chairmanship of Senior General Than Shwe.
- 25 August 2003: General Khin Nyunt is appointed Prime Minister; he presents a seven-step "roadmap to democracy"; the first step is reconvening the National Convention, followed by the drafting of a new constitution, its adoption through a referendum, the holding of free and fair elections, and the convening of the parliament, with the last step being the building of a modern, developed and democratic nation.
- 17 May 2004: The National Convention resumes.
- 7 November 2005: Nay Pyi Taw officially becomes the new national capital.
- 3 September 2007: The National Convention releases the text of the new constitution.
- 10 May 2008: Referendum on, and adoption of, the 2008 Constitution.
- 8 March 2010: Creation of the Union Election Commission (UEC) and promulgation of election laws.
- 2 June 2010: The Union Solidarity and Development Party (USDP), a party based on the USDA, registers with the UEC.
- 7 November 2010: General election.
- 31 January 2011: The two chambers of the Pyidaungsu Hluttaw convene.
- 4 February 2011: The Pyidaungsu Hluttaw elects U Thein Sein as President.
- 13 December 2011: The NLD's request to register as a party is approved by the UEC.
- 1 April 2012: By-elections; Aung San Suu Kyi and another 42 NLD candidates elected to parliament.
- 8 November 2015: General election.
- 1 February 2016: The new Pyidaungsu Hluttaw convenes.
- 30 March 2016: U Htin Kyaw is elected President.
- 6 April 2016: Aung San Suu Kyi is named State Counsellor.
- 31 August 2016: First Union Peace Conference - 21st Century Panglong begins.
- 1 April 2017: By-elections.
- 24 May 2017: Second Union Peace Conference - 21st Century Panglong begins.

## **2. Local Parliaments and the 2008 Constitution**

### **2.1 Parliaments under the 2008 Constitution**

The 2008 Constitution outlines the power-sharing arrangements among the executive, legislative and judicial branches. The legislative power of the Union is divided among the Pyidaungsu Hluttaw and region and state hluttaws.

Under the 2008 Constitution's bi-cameral system the Pyidaungsu Hluttaw (Union Parliament) combines the Amyotha Hluttaw (Upper House) and Pyithu Hluttaw (Lower House). The Pyithu Hluttaw comprises 440 members, of whom 330 are directly elected and 110 are appointed by the military. The Amyotha Hluttaw has 224 members, of whom 168 are elected to represent the states and regions (12 each) and 56 are appointed by the military. Each House is headed by a Speaker, who also presides over the Pyidaungsu Hluttaw in turn. Article 96 of the constitution states that the Pyidaungsu Hluttaw has the right to enact laws for all or any part of the Union related to matters outlined in Schedule One, the Union Legislative List.<sup>29</sup>

Each state and region has a unicameral parliament and each parliament is presided over by a speaker who is elected by MPs. The sub-national parliaments are comprised of two elected MPs from each township plus the 25 percent of seats for appointed military representatives. The size of the parliaments ranges from the 14-seat legislatures in Kayin and Kayah states, the smallest, to the 109-seat Shan State Hluttaw (excluding military representatives), the biggest. Unlike at the Union level, vacant seats in the sub-national parliaments are not filled by by-elections and many MPs have to undertake ambiguous dual roles as both lawmakers and cabinet members. Some studies have shown that this has a negative effect on the smaller parliaments, in which more than half of the elected candidates have executive roles (MDRI-CESD 2013/EMReF 2017). The state and regional parliaments have

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<sup>29</sup> For more information on the Union Parliament, see Renaud Egretieu: *Parliamentary Development in Myanmar*, 2017 and KAS: *Strengthening Parliament: Making the Parliaments more active and interactive*, 2016

the power to enact laws, as outlined in Schedule Two of the constitution.

The military representatives are nominated by the Commander-in-Chief and announced on a list issued by the UEC. Although there is no clear pattern for changes, military MPs are routinely replaced, usually by an officer of the same rank. In the Union Parliament, the military MPs range from captains to generals. At the sub-national level, the highest rank is a colonel who also serves as Minister of Security and Border Affairs.

The 2008 Constitution also establishes state and regional governments headed by a chief minister and a cabinet. The chief ministers are directly appointed by the President and as a consequence are regarded as being more accountable to the Union government than to their respective huttaws. Most regional cabinets comprise about six to ten ministers. The executive and the parliamentary branches have authority over matters listed in Schedule Two. However, the ministers do not have ministries but rather supervise or manage the activities of departments aligned with Union ministries (Jolliffe 2015). Although sub-national parliaments have the power to pass laws, their cabinets are the implementing institutions and it is critical that the power between the two institutions is balanced.

The 2008 Constitution also provides for the appointment of ethnic affairs ministers in sub-national governments.<sup>30</sup> The UEC establishes the constituencies for the elections, using data from the Ministry of Labour, Immigration and Population. Ethnic affairs ministers are elected in states and regions in which an ethnic community has a population equal to at least 0.1% of the national population. This does not apply to ethnic groups that form the majority in their state or region or that have a Self-Administered Zone. For example, Kayah State does not have a Kayah ethnic affairs minister and Shan State does not have a Danu ethnic affairs minister, as there is a Danu SAZ. Candidates must compete for the post of ethnic affairs minister. A total of 29 ethnic affairs ministers were elected in the 2015 general election. Although these ministers are supposed to represent their ethnic nationality constituencies their roles and responsibilities are not clear. In addition, they do not have their own ministries and it is not clear how they interact with sub-national departments.

## 2.2 Overview of the Second Sub-National Parliaments (2016-2021)<sup>31</sup>

The 2010 general election resulted in the first sub-national parliaments in the 14 states and regions since independence. Despite being at a nascent stage and having limited power, they are crucial institutions for decentralization and the objective of creating a federal Union.

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<sup>30</sup> Art. 15, 2008 Constitution.

<sup>31</sup> For analysis of the first legislatures (2010-2015) see: Enlightened Myanmar Research Foundation: Performance Analysis of the Local Legislatures, 2017.

**Box 2: Formation of State and Region Hluttaws (2016-2021)**

State/Region	Elected MPs	Military Representatives	Ethnic Affairs Ministers	Total Seats
Kachin State	36	13	4	53
Kayah State	14	5	1	20
Kayin State	14	6	3	23
Chin State	18	6	–	24
Sagaing Region	74	25	2	101
Tanintharyi Region	20	7	1	28
Bago Region	56	19	1	76
Magway Region	50	17	1	68
Mandalay Region	56	19	1	76
Mon State	20	8	3	31
Rakhine State	34	12	1	47
Yangon Region	90	31	2	123
Shan State	102 <sup>32</sup>	34	7	143
Ayeyarwady Region	52	18	2	72
Total	634	220	29	883

Source: Union Election Commission

The 2015 elections resulted in significant changes to the composition of sub-national parliaments, which are dominated by the NLD except for Shan and Rakhine states. NLD MPs hold all the elected seats in the Tanintharyi and Magway regional hluttaws. The NLD holds the position of speaker in all sub-national parliaments except Shan and Rakhine, where the speakers were chosen from the USDP and the Arakan National Party, respectively. This section provides an overview of the second sub-national parliaments.<sup>33</sup>

In 2015, women were elected to about 13 percent of the seats in state and regional parliaments, a big improvement over 2.3 percent after the 2010 elections, UEC figures show. Strikingly, there are no women MPs in the Chin, Kayah and Rakhine state hluttaws.<sup>34</sup>

Initially, the administration of state and regional parliaments was performed by borrowed staff from

<sup>32</sup> There were 96 seats before 2017 by-elections due to poll cancellations in seven townships in the 2015 general election.

<sup>33</sup> See: <https://teacircleoxford.com/2017/05/17/local-parliaments-in-myanmar-key-institutions-but-too-often-overlooked/>

<sup>34</sup> UEC



the General Administration Department. Since April 2017, the parliaments have been manned by their own personnel but the director general of the Pyidaungsu Hluttaw is in charge of appointing, promoting and transferring staff.<sup>35</sup> Although the GAD is no longer in charge of parliamentary administration, the administration of the sub-national parliaments is still centralized to some extent. The parliamentary staffs play a crucial role in supporting MPs and capacity building is much needed.

Furthermore, some interviewees expressed concern about the centralized nature of the Myanmar Parliamentary Union (MPU).<sup>36</sup> The MPU was created in 2011 and was chaired by Thura U Shwe Mann. The MPU was reconstituted in 2016 and said it would focus on enacting laws in the people's interest and improving the quality of parliamentary representation. A representative of a Yangon-based think tank said that the MPU was formed with the intention to avoid state and region hluttaws becoming too different from one another. But this might overlook different characteristics of the states and regions.<sup>37</sup>

During the interviews, some actors from civil society organizations (CSOs) expressed frustration with the performance of sub-national parliaments. One said, "When we go and observe the parliamentary session, the role of the parliament is not clear. MPs themselves are not clear with legislation and administration."<sup>38</sup> Despite constraints and a lack of resources, the state and regional parliaments are trying to function and assert their rights. An MP said, "Last year, we were asked to review the budget in a very short period of time. Plus we are not familiar with the budget review process at all. So we made a statement that we needed more time. This year we were given more time to review the budget. We are also invited to tender committee [meetings]. It is difficult for us to engage with the government. We still have to assert for our hluttaw's authority."<sup>39</sup>

Military representatives participate and contribute to parliamentary sessions. On January 12, 2017, during the 4th regular session of the Mandalay Region Parliament, Dr. Kyaw Oo (NLD, Aung Myay Thar Zan-1) submitted a motion urging the government to include sex education in the primary school curriculum with the objective of ending the sexual abuse of children. The motion was passed 35-34 and the major who cast the deciding vote said later his decision to vote for

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<sup>35</sup> The Voice Daily, 2 Feb 2017, Vol.4/No.255

<sup>36</sup> Workshop in Yangon, December 2017

<sup>37</sup> Workshop in Yangon, December 2017

<sup>38</sup> Workshop in Yangon, December 2017

<sup>39</sup> Interview, November 2017



the motion had been voluntary.<sup>40</sup> In the Mon state and Ayeyarwady region hluttaws, military MPs have been asking questions about the judiciary and schools in Tatmadaw areas. Despite a generally positive outlook, there have been cases of unhelpful debates and decisions. In the Shan State Hluttaw, where the USDP has 33 seats, more than in any other parliament in the country, USDP and military MPs voted on December 7, 2016 to declare the Kachin Independence Army, Myanmar National Democratic Alliance Army, Ta'ang National Liberation Army and Arakan Army as "terrorist organizations". The vote came after the four groups, none of which had signed the NCA in 2015, had launched coordinated attacks on Tatmadaw and police positions in Muse and Kutkai townships the previous month.<sup>41</sup>

The sub-national parliaments are not rubber stamp parliaments, however, struggling to influence their respective governments. Despite limited resources and capacity, and sometimes despite political dynamics, the sub-national parliaments are making efforts to become one of the key institutions in Myanmar.

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<sup>40</sup> The Voice Daily and Eleven Media, January 13, 2017

<sup>41</sup> See: <https://teacircleoxford.com/2017/05/17/local-parliaments-in-myanmar-key-institutions-but-too-often-overlooked/>

### Box 3: The 2008 Constitution and Decentralization

#### **Chapter I : Basic Principles of the Union – Articles 1 to 48**

In particular :

- Article 9 establishes the existence of seven states and seven regions
- Article 13 establishes that there shall be a parliament (Hluttaw) in each state and region
- Article 46 establishes the Constitutional Tribunal

#### **Chapter II : State Structure – Articles 47 to 56**

In particular :

- Article 49 lists the seven states and seven regions and the Union territories
- Article 51 details the administrative structure of Myanmar, including states, regions, districts, townships, village-tracts, wards and Self-Administered Zones (SAZs)
- Article 56 lists the five SAZs (Naga, Danu, Pa-O, Palaung and Kokang) and the Wa Self-Administered Division

#### **Chapter III : Head Of State – Articles 57 to 73**

#### **Chapter IV: Legislature / The Pyidaungsu Hluttaw – Articles 74 to 160**

In particular:

- Article 96 establishes that the powers conferred on the Pyidaungsu Hluttaw are outlined in Schedule One

#### **Chapter IV: Legislature / Region Hluttaw or State Hluttaw – Articles 161 to 195**

In particular:

- Article 188 establishes that the powers conferred on the state and regional hluttaws are indicated in Schedule Two.

#### **Chapter IV: Legislature / Additional articles – Articles 196 to 198**

In particular:

- Article 196 establishes that the powers conferred on the SAZs are indicated in Schedule Three

#### **Chapter V: Executive – Articles 199 to 292**

In particular:

- Articles 275 to 283 focus on the executive in the Special Administrative Zones
- Article 288 establishes the administration of districts and townships
- Article 289 establishes the administration of village-tracts and wards

#### **Chapter VI: Judiciary – Articles 293 to 336**

In particular:

- Articles 320 to 336 detail the work and powers of the Constitutional Tribunal

#### **Chapter VII: Defense Services – Articles 337 to 344**

#### **Chapter VIII: Fundamental Rights and Duties of the Citizen – Articles 345 to 390**

#### **Chapter IX: Elections – Articles 391 to 403**

#### **Chapter X: Political Parties – Articles 404 to 409**

#### **Chapter XI: Provisions of State of Emergency – Articles 410 to 432**

#### **Chapter XII: Amendments to the Constitution – Articles 433 to 436**

#### **Chapter XIII: State Flag, State Seal, National Anthem and the Capital – Articles 437 to 440**

#### **Chapter XIV: Transitory Provisions – Articles 441 to 448**

#### **Chapter XV: General Provisions – Articles 449 to 457**

#### **Schedule One: Union Legislative List**

1. Union Defence and Security Sector
2. Foreign Affairs Sector
3. Finance and Planning Sector (*including Union Budget and Taxes*)
4. Economic Sector
5. Agriculture and Livestock Breeding Sector (*including land*)
6. Energy, Electricity, Mining and Forestry Sector
7. Industrial Sector
8. Transport, Communication and Construction Sector
9. Social Sector (*including education, health, welfare, labour, social security and unions*)
10. Management Sector (*including general administration, local administration, citizenship*)
11. Judicial Sector

**Schedule Two: Region or State Legislative List<sup>42</sup>**

1. Finance and Planning Sector (*including state and regional budgets*)
2. Economic Sector
3. Agriculture and Livestock Breeding Sector
4. Energy, Electricity, Mining and Forestry Sector
5. Industrial Sector
6. Transport, Communication and Construction Sector
7. Social Sector (*including social welfare work in a state or region*)
8. Management Sector

**Schedule Three: Self-Administered Zones List <sup>43</sup>****Schedule Four: Form of Oaths of Affirmation****Schedule Five: Taxes collected by Regions or States <sup>44</sup>**

### 2.3 Overview of Schedule One, Schedule Two and Schedule Five

Schedule Two of the constitution lists the areas of legislative responsibility of the sub-national parliaments. Article 188 stipulates that state and regional hluttaws have the right to enact laws related to matters listed in Schedule Two. However, Schedule Two is not a stand-alone mechanism and is linked with Schedule One, which lists the legislative responsibilities of the Union Parliament, and Schedule Five, which lists the taxes and revenues that sub-national governments can collect. Articles 446, 447, 261 also have implications for Schedule Two.<sup>45</sup>

Schedule Five is important since decentralization in the public service shows a need for sub-national governments to have funding for implementation. An MP said, “as long as sub-national governments cannot generate their own revenue, they will have to continue to rely on the Union government.”<sup>46</sup>

Conspicuous by their absence from Schedule Two are matters such as education and resource management,<sup>47</sup> which are key topics in the decentralization and federalism dialogue.

While Schedule Two stipulates the legislative list for the sub-national parliaments, Schedule Five

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<sup>42</sup> See also Dickenson-Jones et al. 2016

<sup>43</sup> See the analyses in Ricky Yue (2015)

<sup>44</sup> See the analyses in Dickenson et al. (2016) and Minoletti (2016)

<sup>45</sup> Art. 446: Existing laws shall remain in operation in so far as they are not contrary to this Constitution until and unless they are repealed or amended by the Pyidaungsu Hluttaw.

Art. 447: Existing rules, regulations, by-laws, notifications, orders, directives and procedures shall remain in operation in so far as they are not contrary to this Constitution until and unless they are repealed or amended by the Union Government.

Art. 261: Appointment of Chief Minister

<sup>46</sup> Interview, November 2017

<sup>47</sup> <https://teacircleoxford.com/2017/06/14/education-and-the-local-parliaments-legislative-competence/>

lists the taxes and other sources of income they may collect to generate their own revenue. Art. 254(a) states: "The Region or State shall collect the taxes and revenues listed in Schedule Five in accord with law and deposit them in the Region or State fund". Although the list seems to provide state and regional government with a range of revenue sources, Schedule Two prevails over Schedule Five and it is not clear to what extent the governments can make adjustments (Dickenson-Jones et al. 2016). In addition, sub-national parliaments cannot enact laws unless the Union Parliament has revoked or passed a new law. For example: The land revenue law in Mon State (See details in Box 4).

## 2.4 Constraints under Schedule Two

Article 198 states that Union law takes precedence over laws passed by sub-national parliaments in the event of inconsistencies. In addition, the residual power, i.e., matters that are not included in the schedules, lies with the Union. During an interview an MP from a sub-national parliament said, "we have already enacted the Small and Medium Scale Electricity Production Law. But now the Union just passed the Union Electricity Production Law and we have to amend our sub-national law in order to avoid contradictions with the Union law."<sup>48</sup> This has frustrated lawmakers and discouraged the drafting of necessary legislation. The states and regions are very different in terms of their needs and priorities. In some cases, a sub-national parliament might need to pass a law urgently but is unable to do so because the Union is yet to pass related laws. For example, the parliament of Ayeyarwady region is unable to pass a much-needed In-shore Fishery Law for this reason.<sup>49</sup>

A Myanmar analyst told the authors that "most laws voted by the local parliaments are copied and pasted from the Pyidaungsu Hluttaw."<sup>50</sup> Local needs or context might not be taken into account. The Rakhine State Hluttaw, for example, passed a "Cinema Law", but there is no cinema in the state. There should be a guarantee stating that sub-national parliaments are able to pass laws that are yet to be passed by the Union, if such laws are needed in a state or region.

In addition, Art. 446 and Art. 447 blur the parameters of Schedule Two (EMReF 2017). For example: The Mon State Land Revenue Law became a pending law in 2012 although "Land Tax" is mentioned in Schedule Two.

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<sup>48</sup> Interview, November 2017

<sup>49</sup> Workshop in Yangon, December 2017

<sup>50</sup> Interview, November 2017

The confusion over Schedule Two also has an impact on state and regional executives. Although sub-national governments together with their parliaments also have executive authority in terms of the matters prescribed in Schedule Two, clarity is lacking for cabinet members and parliamentarians. During the 2<sup>nd</sup> regular session of the Shan State Hluttaw, MP San San Aye (SNLD, Hsipaw-1) submitted a question about two coal mining operations near Hsipaw that were the target of protests by nearby communities. She asked for information about the terms and conditions of the contracts under which the companies operated. Dr. Nyi Nyi Aung, the Minister of Natural Resources and Environmental Conservation, replied that the question should be submitted to the Union because the state government did not have authority over the issue. MP San San Aye said that it was not normal that issues affecting Shan State could not be raised in the Shan State Hluttaw.<sup>51</sup> It puts limits on the representation of MPs in the sub-national parliaments.

Sometimes MPs cannot raise questions or submit motions on issues faced by their constituents because either their respective hluttaws do not have authority over the issue raised or they lack the authority to ask questions. During the 3<sup>rd</sup> regular session of the second Shan State Hluttaw, MP Nang Khin Htar Yee (SNLD, Hseni-1) asked about six hydropower projects planned for the Thanlwin (Salween) River and their environmental impact assessments. State Minister of Planning and Economy U Soe Nyunt Lwin answered that the question should be submitted to the Union.<sup>52</sup> An MP from Mandalay said, "sometimes we prepare good questions and motions at the local Hluttaw, for example, a motion urging the government to provide civic education with assistance from local CSOs. Another example is the motion to provide safety for child workers at work places. It would not affect the work owners or the child laborers. The motion was to create a safe workplace for the child laborers. Both motions were rejected during submission. We were told that it is the Union Parliament's responsibility."<sup>53</sup>

Although Schedule Two limits lawmakers' efforts, there are political factors apart from the constitution that diminish the role of sub-national parliaments. During interviews some MPs expressed frustration with the centralized political culture.<sup>54</sup> An MP said, "We have a Chief Minister who has a very high position in the party. So the parliament cannot influence the government at all. We experienced severe frictions when we cut a lump sum from budget during the course of reviewing the budget since it did not provide details."

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<sup>51</sup> <http://www.7daydaily.com/story/70232>

<sup>52</sup> <http://www.7daydaily.com/story/76003>

<sup>53</sup> Interview, November 2017

<sup>54</sup> Interview, November 2017

## 2.5 Constitutional Tribunal<sup>55</sup>

The 2008 Constitution lays out the formation, functions and duties of the nine-member Constitutional Tribunal.<sup>56</sup> The constitution grants the tribunal the authority to interpret provisions in the constitution and also to rule on constitutional disputes between the Union and sub-national governments. According to Article 321, the President, the Speaker of the Pyithu Hluttaw and the Speaker of the Amyotha Hluttaw each choose three members of the tribunal.

The Constitutional Tribunal is not immune to differences in the political sphere. In 2012, the tribunal's nine members resigned en masse to avoid being impeached by the parliament.<sup>57</sup> Earlier in 2012, President U Thein Sein had asked the tribunal to rule whether parliamentary committees were Union-level organizations under the constitution. MPs were outraged when it ruled that the committees were not Union-level organizations. Parliamentarians denounced the ruling, which they interpreted as a constraint on their authority to act as a check and balance on the government.<sup>58</sup> When the parliament moved to impeach the members of the tribunal, they resigned en masse. In 2013, the Constitutional Tribunal Law was amended to remove the president's power to nominate the chair of the tribunal and limited its decision-making power to matters involving the judiciary. In 2014, the law was amended again and parliament reinstated the scope of the tribunal's decision-making powers to require its decisions to be respected through all parts of the government.<sup>59</sup> However, the tribunal never recovered fully from the dispute in 2012.

In reality, the tribunal does not have authority to determine which power lies where. The tribunal can only interpret provisions in the constitution. The position of the tribunal was weakened when the first Union Hluttaw amended the Tribunal Law with grievances (Htin Kyaw Aye, 2017).<sup>60</sup> In order to move forward to decentralization and federalism, institutions such as the Constitutional Tribunal are of great importance. A foreign analyst said, "The fact that the Constitutional Tribunal is not independent puts the states and regions at a disadvantage."<sup>61</sup> It is widely accepted that there is too much ambiguity between Schedule One and Two. Unfortunately, Myanmar does not have a strong and independent institution to resolve these kinds of disputes. The Constitutional Tribunal is political as opposed to what it is supposed to be, a neutral, and technical and judiciary institution.

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<sup>55</sup> Website available at: <http://www.myanmarconstitutionaltribunal.org.mm/en>

<sup>56</sup> From Art. 320 to 336

<sup>57</sup> <http://www.loc.gov/law/foreign-news/article/burma-resignation-of-constitutional-court-justices/>

<sup>58</sup> <http://www.rfa.org/english/news/myanmar/tribunal-09062012175748.html>

<sup>59</sup> Pyidaungsu Hluttaw Law no: (46/2014)

<sup>60</sup> <https://frontiermyanmar.net/en/how-the-nld-can-improve-myanmars-democracy>

<sup>61</sup> Interview, November 2017

#### Box 4 : 2012 Ruling on Schedule Two

In 2012, the Mon State Parliament was preparing to promulgate a State Land Revenue Law that set new tax rates. However, concerned departments claimed that the law was inapplicable due to Art. 446 and 447 of the 2008 Constitution, which state that Union laws shall prevail as long as they are not revoked by the appropriate Union-level institution. Later the Mon State Hluttaw Speaker submitted the case to the Constitutional Tribunal and asked it to provide a definition of sectors listed in Schedule Two. The detailed submission sought clarification on five provisions: development affairs, land revenue and excise duties, agricultural loans, small and medium scale electricity production, and salt production.

As development affairs is listed in Schedule Two, Ministers of Municipal Affairs are appointed at sub-national level. The submission by the Mon State Hluttaw said it was critical for the Union Parliament to revoke the 1993 Municipal Law in order for the state law not to contradict with the existing Union law. The tribunal determined that the Mon State Hluttaw could enact a Development Affairs Law because it was clearly listed in Schedule Two. Asked about the 1993 Municipal Law, President U Thein Sein said it would be revoked after the states and regions, and SAZs, had passed development affairs laws.

The submission also asked the tribunal to rule on whether the state hluttaw could pass a land revenue law. In its ruling, the tribunal said, "Despite land revenue and excise duty being in Schedule Two, according to Schedule One land administration and administration of town and village land shall be conducted by the Union, while land revenue shall be collected by the state or region. Concerning excise duty, the Union ministry determines different amounts for respective laws. In addition, the management of excise duty is not mentioned in Schedule One or Schedule Two. Therefore, if the state or region shall pass a land revenue law or excise duty law, it could cause contradictions or confusion with articles concerning land management and excise duty management." The tribunal decision on land revenue law was made in coordination with the President. The President's response suggests that the Mon State Land Tax Law shall be effective when all states and regions have passed land tax laws and the land registration process and issuance of Form 7 covers the whole country. Thus it became a pending law.

On agricultural loans and savings, a clear definition was requested because they are not mentioned in Schedule One. The submission also sought a ruling on whether the states and regions may conduct agricultural loans and savings according to the existing Myanmar Agricultural and Rural Development Bank Law.

The submission also stated that for the states and regions to pass a Small and Medium Electricity Production Law, the Union would need to pass a new electricity law or amend the 1984 Electricity Law so that it defines, small, medium and large-scale power generation.

Finally, the submission asked if the 1992 Salt Production Law needed to be revoked for states and regional parliaments to pass laws on making salt.

The tribunal ruled in respect of agricultural loans and savings, small and medium power production and salt production, that although existing relevant legislation was yet to be revoked or amended, the laws could be passed under Schedule Two as long as they did not contradict the constitution. However, only after the existing laws and articles are amended or revoked, the matters listed in the Schedule shall be enacted with the President's approval.

Meanwhile, the Union parliament was requested to prioritize reviewing, amending and revoking laws that could cause confusion or contradictions.<sup>62</sup>

It is evident that tribunal rulings are not respected across all levels of government. And the President is often requested for remark. A foreign analyst said, "if the tribunal is not given enough power to make decision, the schedules will have to be detailed and clear."

<sup>62</sup> Constitutional Tribunal Ruling No:3/ 2012





### **3. Amend the 2008 Constitution or Write a New One?**

#### **3.1 Pragmatists versus Idealists?**

Before considering the complicated questions associated with amending the 2008 Constitution, it should be acknowledged that any such effort will face challenges. They will come from those opposed to making any changes and those who regard any such move as undesirable because it is contrary to their objective of writing a new constitution.

There are others who do not regard amending the constitution as a priority, because they consider it to be an unattainable objective and would rather focus on bringing immediate improvements to people's lives. As an NLD MP told the authors, "it depends a lot on the political atmosphere. A consensus needs to be built between the NLD and the military in order to amend the constitution, one that is also acceptable for the people. I don't want to waste time asking to change the constitution since our country is fragile and we have to try very hard to develop our country."

Another interviewee thought priority should be given to using the constitution to its fullest, and said: "People complain about the limitations imposed by the constitution, but they have not even fully utilized it."

Finally, several interviewees did not think the constitution could be amended in the near future, regardless of whether they thought amendments were desirable. One interviewee said: "Nothing will happen in the peace process before 2025. And no major amendments will happen before that."

Generally, the authors have found that Myanmar political actors, civil society activists and analysts could be divided into six major groups, in terms of their attitude towards the constitution and potential amendments to Schedule Two. Although this categorization is far from perfect, it does

reflect political opinions that the authors have witnessed consistently in the course of researching this paper, as well as in their earlier work.

#### A – The military and the USDP

- 1) Individuals opposed to amending the 2008 Constitution, which they believe to be a good constitution, one with checks and balances and a general coherence that could be upset should the document be amended “improperly”.
- 2) Individuals with no objection to the idea of amending the 2008 Constitution, which, they believe, is a notion to which the military and the two successive administrations, and the associated parliaments, have already agreed in spirit, leading to the notion of a “federal system” being included in the NCA.

It must be noted that, based on interviews with high-level civil servants and military MPs, the concern expressed by many outside these circles that the military would object to amending Schedule Two seems to be overstated. Any such amendments do not seem to be a topic of particular interest among civil servants, military personnel and politicians in Nay Pyi Taw, an indication that they do not see them as a pressing matter, possibly not even reforms they anticipate will affect their work in coming years. But when asked whether further decentralization may be a possible scenario, none of the interviewees in these circles showed any concern that the military might block the process. The position of such individuals could be summed up as: “Of course the NLD will need to find a common ground with the military before they vote any amendments together,<sup>63</sup> but as long as they do, there’s no reason why the military wouldn’t be moving along”. Interviewees with connections to the military leadership have noted that although there has been no official position affirmed by the military on decentralization, it was clear that there was agreement on the general objective of establishing a federal system.

The issue, it seems, may have less to do with the military agreeing to decentralization, and later establishing a federal system, than with what one means when they discuss “decentralization” and “federalism”, and with the time frame.

#### B – The NLD, the 88 Generation, and other “pro-democracy” forces

- (1) Individuals uninterested in amending a constitution they see as fundamentally undemocratic

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<sup>63</sup> As will be needed, see Section IV.

and in need of replacement by a new constitution. Typically outside the NLD and involved in political activism taking place outside the realm of elections, parliaments, and government, their criticism of the 2008 Constitution usually focuses on the 25 percent of seats reserved for the military in the parliaments, and the three ministries under Tatmadaw control, even though they cite federalism as an objective they share with ethnic nationalities.

- (2) Individuals supportive of amending the constitution. The authors have found a broad consensus on this among members of the NLD, activists close to them, NGO leaders and staff, as well as many analysts and journalists. This consensus encompasses gradual decentralization through several rounds of amending the 2008 Constitution, with a concern for the practical implications of such reforms, not least in terms of capacity, and keeping in mind the ultimate objective of establishing a federal system.

#### C – EAOs, ethnic political parties (EPPs) and CSOs representing ethnic nationalities

- (1) Individuals opposed to decentralization, and therefore to amending Schedule Two, because they regard these processes as being contrary to the objective of establishing a federal system. Typically, these individuals also support the “eight states solution”<sup>64</sup> and do not see the peace process as being immediately related to the political process.
- (2) Individuals supportive of a gradual process of decentralization, with arguments similar to those of pro-democracy activists in favor of decentralization/ amending Schedule Two.

This debate, among members of ethnic nationalities, is not without similarities to the debates over the peace process, and notably, the NCA. While the lines are not perfectly identical,<sup>65</sup> the authors found that they largely overlap.

In conclusion, and beyond the existing political fault lines between the military-USDP-civil servants corps, the NLD and democracy forces, and ethnic nationalities, as the three elements of a “tripartite” dialogue, there are new fault lines within each of these groups that allow for a consensus between those supportive of further and gradual decentralization and those opposed to it. Although those supportive of decentralization largely have the same arguments, the views of those opposed to the process are very different from one group to the next.

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<sup>64</sup> The “eight states solution” refers to the demand made by a variety of ethnic actors, in recent decades, that Myanmar would be administratively divided between seven ethnic states (as is the case today) and one single Bamar State, made of the seven existing “regions”.

See: <https://teacircleoxford.com/2016/08/16/panglong-spirit-under-the-2008-constitution-part-ii/>

<sup>65</sup> This could be the topic of further research, but was beyond the scope of this paper.

In other words, Myanmar's body politic can be described as divided between a mainstream, made of individuals and organizations closely involved with the current political process, and the political margins, which can be described as a political opposition in formation. The creation of the "Four Eights Party" in December 2017 is potentially a major development in this direction.

The authors' analysis is that, as is the case in most democracies, the mainstream is bound to lead reforms from within the existing political process while the margins will try and influence it largely from outside the government and parliament. It is notable that the inclination of individuals to participate in the current political process or oppose it largely determines their level of knowledge about the intricacies of the 2008 Constitution. The more an individual is interested in the existing political process, the more they tend to know the 2008 Constitution in detail. Conversely, the more critical an individual is of the existing political process, the less they tend to know the details of the 2008 Constitution. This means that from the perspective of the authors or anyone interested in amending the 2008 Constitution, including the NLD government if it was to lead consultations on constitutional reform, there is significantly more expertise on the constitution among those who support amending it than among those opposed to changing it.

Practically, though, it must be noted that the NLD and military MPs, together, have the numbers in the Pyidaungsu Hluttaw to amend the constitution, regardless of the degree of opposition from the margins. There is every indication that were they to find common ground, the NLD and the military (and probably the USDP) would vote to amend the constitution with little concern for the voices of those opposed to the process.

This is not to say that the margins will not be able to influence the process. But any realistic forecast or prediction must focus on those actors who can vote for, or against, amending the constitution.

However, this paper should not be seen as being mainly useful to those willing to amend the constitution. Ideally, it would be equally useful to those opposed to such efforts, and to those aiming to write a new constitution. Indeed, the debates and the information associated to the issues discussed in this paper are relevant to anyone interested in Myanmar's constitutional process, regardless of where they stand politically.

The issues discussed here are, beyond the technical aspects linked to amending the constitution or writing a new one, the political conversations the people of Myanmar need to have with one another to solve the political issues facing their country as soon as possible in order to achieve peace.

Time is an important factor. It would probably take well over a decade to write a new constitution because it would involve convening a constitutional assembly, drafting a new constitution and putting it to a referendum. Amending the constitution would involve a vote in the Pyidaungsu Hluttaw. There is no particular optimism for short or mid-term success in the peace process.

During the interviews, the authors asked individuals or organizations with expertise on the peace process, particularly those identified as representing ethnic nationalities, to imagine a scenario in which they would have to bet on the year Myanmar's fourth constitution is adopted. So: "1947, 1974, 2008, and (insert your response here)". According to most responses, there is a broad consensus that no new constitution will be adopted for another 20 years. In which case, and provided the current cycle continues, the last general election to take place under the 2008 Constitution would be in ... 2035. No one to whom the authors put this question foresaw a new constitution being adopted in the next decade.

Khuensai Jayen of the Pyidaungsu Institute said: "It would be really hard to write a new constitution because everything the military has been working for, for 50 years, would collapse", adding: "We don't have anything yet to replace it".<sup>66</sup> In the same interview, Khuensai Jayen said: "What this constitution offers to you, you should take it. What it doesn't say yet, you can negotiate with the powers that be". A participant in the December 1<sup>st</sup> workshop said: "Only when both financial and human resources are stable can we move to federalism". Another said: "The constitution needs to be improved. There is a lot to be changed. Still, we can do a lot with what the constitution gives".

Somewhat surprised by this consensus, the authors asked several interviewees whether their choice of interviewees might be at fault (in the sense that they would be biased towards interviewing people supportive of one strategy over the other), or whether people were becoming more moderate. The answers are best summarized by one interviewee who said: "No. The change agents are seeing the reality and becoming pragmatic."

Last but not least, as noted in the introduction, Aung San Suu Kyi and her government seem to favor amending the constitution. At this stage, and beyond a decision taken within the frame of the peace process to allow states and regions to write their own constitutions, there have not been any official debates suggesting any serious work has been undertaken to draft a new constitution.

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<sup>66</sup> Interview, October 2017

Nevertheless, it is undeniable that some stakeholders, not least among ethnic political parties, ethnic civil society organizations, and ethnic armed organizations, will not settle for amendments to the constitution. As noted, many such stakeholders may see decentralization as contrary to their objective of establishing a federal system. A new constitution is needed, they say, and with this as their priority they will pay little attention to any amendments to the 2008 Constitution. Furthermore, the NCA itself recognizes that ultimately, a new, federal, constitution will need to be written.

It is an NCA objective to “establish a union based on the principles of democracy and federalism in accordance with the outcomes of the political dialogue and in the spirit of Panglong that fully guarantees political equality, the right to self-determination, and democratic practices based on the universal principles of liberty, equality, and justice while upholding the principles of non-disintegration of the union, non- disintegration of national solidarity and perpetuation of national sovereignty.”

In that sense, it is clear that efforts to amend the constitution need to take the peace process into account. Once again, this paper argues that the topic it discusses is precisely the point where the peace process and political process will necessarily converge at some point in the future. Aung San Suu Kyi has clearly indicated that this is also her opinion.

### 3.2 Amending the Constitution in parallel to the Peace Process

When the Nationwide Ceasefire Agreement specifically aims to “establish a union based on the principles of democracy and federalism in accordance with the outcomes of political dialogue and in the spirit of Panglong”, and when, within the frame of the peace process, the right is granted to states and regions to write their own constitutions, these decisions directly affect the political process.

Amending the 2008 Constitution while the peace process continues presents both advantages and risks. The main advantages are:

- 1) Debates relevant to both the political process and the peace process are taking place separately (many of the debates in the peace process would impact the political process directly, too), creating a common language that, supposedly, should make the convergence of the two processes easier, when the time comes. As Robert Taylor (2016) puts it: “Now that the word “federalism” is accepted as useful in the debate over how to establish an end to Myanmar’s persistent civil wars with ethnically designated armed groups, it was hoped

that some meeting of minds might take place.”

- 2) The political process already sees steps in the general direction favored by stakeholders in the peace process, i.e. decentralization and federalism.

Here, it is important to note that de facto, the peace process and the political process already interact in the sense that a third of the members of the Union Peace and Dialogue Joint Committee (UPDJC) are selected from representatives of political parties.

The main risk is that decisions taken within the political process would be seen as contrary to the objectives of stakeholders who are yet to participate in the political process, but who would join the mainstream political arena if the peace process were successful.

As seen above, the issue of federalism has been a key in both the conflict and the political-constitutional history of Myanmar since independence in 1948.

In an apparent echo to Khuensai Jayen and David Williams, Matthew Walton writes: “The 1947 constitution wasn’t exactly a federal constitution, but it wasn’t necessarily inconsistent with a federal structure. The constitution was implemented in a unitary way, which betrayed the expectations of non-Burman groups.”<sup>67</sup>

In that sense, more conversations about federalism seem to have taken place within the peace process than in the political process. Yet, amending the constitution, which seems to be an objective of the NLD government, is likely to be a process limited to existing mainstream political institutions led by representatives elected in the 2015 general election, in which none of the ethnic participants of the peace process participated.

One could go as far as saying that many of the issues relevant to any discussion about amending the constitution are already constrained by what has already been agreed in the peace process. For example, the UPDJC, a government-led body, agreed in May 2017 that the 14 states and regions would be granted the right to write their own constitutions.<sup>68</sup>

It is important to note that organizations representing ethnic nationalities have been working on drafting their own constitutions for well over 15 years.<sup>69</sup>

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<sup>67</sup> See: <https://teacircleoxford.com/2016/06/23/lessons-from-panglong-part-i/>

<sup>68</sup> See: <http://www.dvb.no/news/ethnic-states-can-write-constitutions-vows-state-counsellors-office/75499>

<sup>69</sup> Mael Raynaud, field notes 2002-2009





## 4. Amending Schedules Two and Five

### 4.1 Avenues for Amending Schedule Two within the Constitution

The 2008 Constitution lays out two avenues for constitutional amendments. Both avenues require an amendment proposal to be submitted to the parliament in the form of a bill supported by at least 20 percent of MPs before it can be debated. The first avenue requires a 75 percent vote in the parliament with approval to be decided by a national referendum.<sup>70</sup> The second avenue requires a vote of more than 75 percent of all members of the Pyidaungsu Hluttaw. Both avenues preserve the military veto over constitutional changes.

#### Box 5 : Avenues for Constitutional Amendments

434. The Bill to amend the Constitution shall be submitted to the Pyidaungsu Hluttaw. 435. If twenty percent of the total number of the Pyidaungsu Hluttaw representatives submit the Bill to amend the Constitution, it shall be considered by the Pyidaungsu Hluttaw.

436. (a) If it is necessary to amend the provisions of Sections 1 to 48 in Chapter I, Sections 49 to 56 in Chapter II, Sections 59 and 60 in Chapter III, Sections 74, 109, 141 and 161 in Chapter IV, Sections 200, 201, 248 and 276 in Chapter V, Sections 293, 294, 305, 314 and 320 in Chapter VI, Sections 410 to 432 in Chapter XI and Sections 436 in Chapter XII of this Constitution, it shall be amended with the prior approval of more than seventy-five percent of all the representatives of the Pyidaungsu Hluttaw, after which in a nation-wide referendum only with the votes of more than half of those who are eligible to vote.

(b) Provisions other than those mentioned in Sub-Section (a) shall be amended only by a vote of more than seventy-five percent of all the representatives of the Pyidaungsu Hluttaw.

<sup>70</sup> Sections 1 to 48 in Chapter 1, Sections 49 to 56 in Chapter II, Sections 59 and 60 in Chapter III, Sections 74, 109, 141 and 161 in Chapter IV, Sections 200, 201, 248 and 276 in Chapter V, Sections 293, 294, 305, 314 and 320 in Chapter VI, Sections 410 to 432 in Chapter XI and Sections 436 in Chapter XII.

However, amending Schedule Two has repercussions, and without preparation could have more negative impacts. Achieving meaningful decentralization firstly requires giving the states and regions more power to generate their own revenue through fiscal decentralization or amending Schedule Two. The implementing departments would need to be under the management of the state or regional cabinet and not aligned with Union ministries. If that was the case, the chief ministers should not be appointed by the President, but by their respective hluttaws. However, in the absence of significant reform of the bureaucracy, state and regional cabinets will need to continue to rely on the GAD, which is not only centralized but controlled by the military through the Ministry of Home Affairs.

Due to the military veto, any amendments to the constitution may seem nearly impossible. However, the constitution has been amended once in 2015 already, an indication that amendments are far from unthinkable.

#### 4.2 2015 Amendments

The constitution was amended in 2015 although it received little attention, as most attention was focused on proposed changes that were defeated. They involved attempts to lower the threshold of the military veto and to change the provision that made Aung San Suu Kyi ineligible for the presidency, and their defeat was described by some media as a failure of constitutional reform.<sup>71</sup> Although the amendments achieved had limited significance for the transition to democracy and decentralization, it is important to note that this was the first time the 2008 Constitution had been amended.

In 2013, the Union Parliament established a Constitutional Review Joint Committee.<sup>72</sup> Most of its 109 members were from the USDP, ethnic parties and the NLD, and the military MPs. In late 2013, the committee asked the legislature, the executive, the judiciary, political parties, civil society groups and the general public to submit proposals for constitutional amendments. In a report released in January 2014, the committee said it had received 28,247 submissions but failed to provide a detailed analysis of the proposals. It only listed the number of submissions that sought to amend different provisions of the constitution. Interestingly, one of the committee's decisions was to emphasize submissions seeking to amend the 75 percent threshold for amending the constitution.<sup>73</sup>

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<sup>71</sup> <https://thediplomat.com/2015/06/myanmar-fails-to-curb-its-militarys-power-ahead-of-elections/>

<sup>72</sup> Notification No (41/2013), dated July 25, 2013

<sup>73</sup> Committee report

In February 2014, a separate body, the Implementation Committee for the Amendment of the Constitution, was established with 31 MPs.<sup>74</sup> It was tasked to review submissions to the Constitutional Review Joint Committee and to draft amendments. In mid-2015, two bills were submitted to the parliament, one related to 436(a) and the other to 436(b).

<b>Box 6: Proposed Amendments and Results</b>				
No.	Section	Proposed Amendments	Result of Secret Ballot in Favor (percent)	Result of Secret Ballot Against (percent)
1.	59(d)	To change "military" to "defense"	95.37	4.63
2.	59(f)	To exclude "one of the legitimate children or their spouses" from the section.	55.06	44.94
3.	60(c)	The President shall be selected from elected MPs	66.21	33.79
4.	418(b)	To include "in order to resolve the state of emergency"	66.21	33.79
5.	436(a)	To lower the voting threshold for constitutional reform from 75 to 70 percent of MPs in the Pyidaungsu Hluttaw	66.55	33.45
6.	436(b)	To lower the voting threshold for constitutional reform from 75 to 70 percent of MPs in the Pyidaungsu Hluttaw	66.55	33.45

Source: Global New Light of Myanmar.<sup>75</sup>

The first bill included six proposals and only one proposal was approved. It was a proposal to amend the wording of 59(d), about the qualifications required of a candidate for the presidency. The change required a candidate to be familiar with "defense" (kar kwe yay) affairs instead of "military" (sit yay) matters. A referendum to approve the amendment is yet to be held. The proposals involved: 59(d), 59(f), 60(c), 418 (b), 436(a) and 436(b).

The second bill was intended to increase the power of the parliament. It included a proposal for chief ministers of the states and regions to be appointed with the approval of the respective state or region. The only proposal from the second bill that was successfully amended involved schedules Five and Two.<sup>76</sup> Thus, a longer list which grants marginally greater legislative and taxation powers was

<sup>74</sup> Notification No. (20/2014), dated February 3, 2014

<sup>75</sup> Global New Light of Myanmar (June 26, 2015/ Volume II, No: 66)

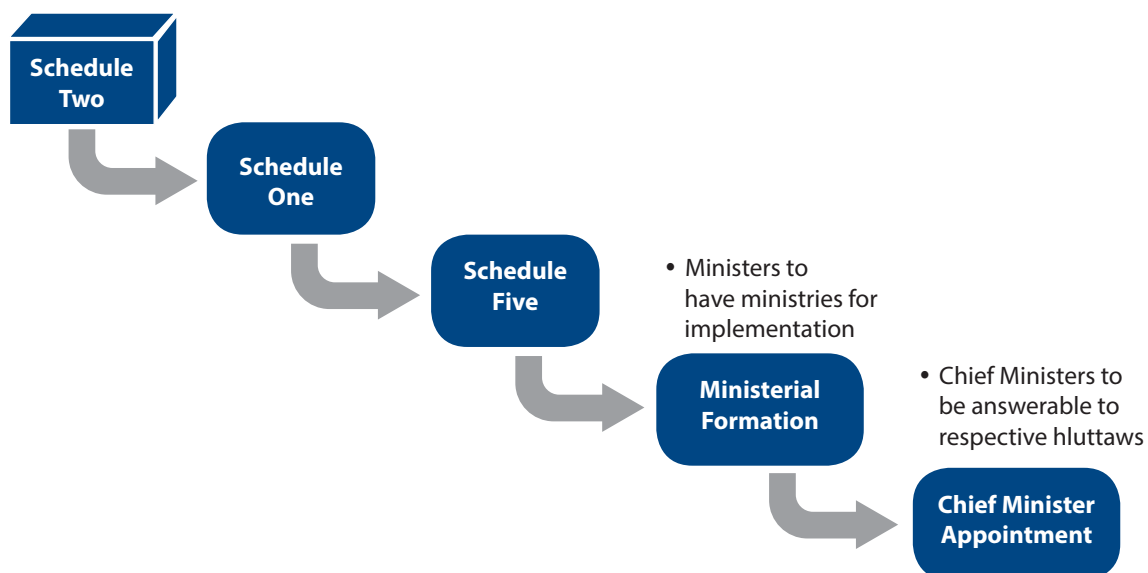
<sup>76</sup> Law No.45/2015

added to both schedules, which would allow the 14 states and regions to collect income tax, customs duties and stamp duty, and impose levies on services (tourism, hotels, private schools and private hospitals) and resources including oil, gas, mining and gems. However, all the amendments included the wording “in accordance with the Union Laws.”

The constitutional amendments in 2015 did not receive the attention they deserved, partly because they involved insignificant changes and also because attention was focused on the election due later that year. It was obvious that the military would not accept any proposal that challenged their power in the parliament. The research for this paper revealed that few people, including key stakeholders, were aware of the 2015 amendments. Constitutional reform will not be a one-time process in Myanmar and stakeholders need to think about strategy and what they most want and the issues on which they are prepared to compromise. A foreign expert said, “Maybe they may not reach the goal at one time. But the citizens should be informed that the changes is for the time being and more changes are coming.”

## 5. Amending Schedule Two : The Start of a Chain Reaction?

### 5.1 The Chain Reaction



Amending Schedule Two of the 2008 Constitution, this paper argues, is a good way to move Myanmar closer to a federal system. Yet, if this was to be done without making a number of additional changes to the political system, or without considering these amendments within the broader frame of decentralization and the agreed objective of establishing a federal system, the reforms would be unlikely to be complete, and new problems would likely arise.

Furthermore, political and administrative decentralization cannot take place without significant changes to the way the now decentralized institutions are funded, a process known as fiscal decentralization. What follows is a list, necessarily incomplete,<sup>77</sup> of such potential additional changes, as well as an overview of issues related to fiscal decentralization.

<sup>77</sup> For instance, interviewees have told the authors that decentralization should be accompanied by a change in the electoral system, from “first past the post” to “proportional representation”, to give ethnic parties a fairer chance at representation.

a) *Amending Schedule One and Schedule Five*<sup>78</sup>

As seen in Section II, amending Schedule Two to provide extended powers to the state and regional parliaments and indirectly to their respective governments needs to be accompanied by amendments to Schedule One, to establish a new balance of powers between the Union level and the state and region level. Such decentralization needs to include degrees of fiscal decentralization.

b) *Changes in state and regional governments*

If Schedule Two was amended and gave extended powers to the state and regional parliaments, their respective governments<sup>79</sup> would also need to be granted new powers to be able to implement the laws passed by their hluttaws. The changes needed in the way state and regional governments function are threefold.

The first issue is that if the powers of state and regional governments were to be strengthened, the drain in capacity arising from having to appoint most of the state and regional ministers from the respective parliaments would become more acute.<sup>80</sup> If sub-national governments have to choose ministers from among the most capable of the elected MPs in their respective parliaments, they weaken the capacity of the parliament by as much. A critical element of this issue is that while all sub-national governments have roughly the same number of ministers, in the less populated states and regions they are chosen from a smaller pool.<sup>81</sup>

The second issue is that none of the laws passed by state and regional parliaments could realistically be implemented by the current “ministers without a ministry”,<sup>82</sup> in their respective governments. For decentralization to work, state and regional governments would need to be equipped with a set of institutions in the form of ministries that currently do not exist, and the necessary staff. This alone may prove to be a formidable task.

The third issue involves the appointment of chief ministers. It would be a complicated scenario

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<sup>78</sup> And possibly Schedule Three, although this is less likely in the immediate future.

<sup>79</sup> See Nixon et al. (2013)

<sup>80</sup> This paragraph is based on research by EMReF, and this issue was kindly brought back again to our attention by EMReF’s Zaw Min Oo during the workshop the authors organized on December 1, 2017.

<sup>81</sup> See the number of MPs in each subnational parliament in Section 2.1

<sup>82</sup> See Section 2.1

if ministers chosen from among elected MPs were running ministries in state and regional governments that were headed by a chief minister who would not be elected but appointed by the President, as applies today. (Our interviews have shown that this is already a pressing issue.) The personalization of the relationship between chief ministers and the government in Nay Pyi Taw and how much sub-national governments rely and depend on them is an issue that needs to be addressed even if there are no amendments to Schedule Two.

Finally, in this new context the division of power between state and regional ministries and line ministries in Nay Pyi Taw would need to be clearly re-defined.

### *c) Reform of the General Administration Department*

The same is true of the relationship between state and regional ministries and the General Administration Department.<sup>83</sup> All decentralized institutions, and especially state and regional governments, will have little room to “do more than implementing decisions made in Nay Pyi Taw” as long as local power is held by the GAD, a centralized institution based in Nay Pyi Taw and directly controlled by the military through the Ministry of Home Affairs.

As Minoletti (2016) puts it: “GAD staff are appointed centrally, and in practice report upwards to the Union Ministry of Home Affairs, rather than horizontally to the Chief Minister.” Amending the constitution to provide a greater degree of decentralization without making changes to a very centralized territorial administration could be seen as extremely problematic.<sup>84</sup> As one interviewee told the authors: “if you keep the GAD centralized, you don’t have a federal system.”<sup>85</sup>

This issue, arguably more than any other discussed in this paper, is an area where a well-planned set of reforms could see all stakeholders achieve their primary objectives. A reformed GAD, and generally, territorial administration, would mean that a stronger State could contribute more efficiently to the development of Myanmar, while allowing more space for democratically-elected representatives at the local level, on the one hand, and existing administrative forms, namely those built by EAOs, on the other.

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<sup>83</sup> See the report: “Administering the State in Myanmar: An Overview of The General Administration Department”, by Kyi Pyar Chit Saw and Matthew Arnold, The Asia Foundation, 2014

<sup>84</sup> Interviews, October-December 2017.

<sup>85</sup> Mael Raynaud has argued that this was not necessarily true : <https://teacircleoxford.com/2016/08/16/panglong-spirit-under-the-2008-constitution-part-ii/>

As Mael Raynaud has argued<sup>86</sup>, reforming the GAD could be done in coordination with a process of developing local forms of democracy and governance. The authors acknowledge that such an idea may seem to many readers to be wishful thinking, as it arguably poses more challenges than any other topic discussed in this paper. However, there have been indications that GAD is willing to reform.<sup>87</sup> Since April 2017, the staffs at state and regional parliaments are under the Pyidaungsu Hluttaw.

d) *Decentralization, local governance and democracy*

Any discussion about the powers of states and regions needs to be seen in the broader context of local democracy. One interviewee told the authors: "In terms of identity, the village or ward level means more than states and regions, to most people". Whether this is true or not, at the very least local governance undoubtedly does matter to the citizens of Myanmar. Robert Taylor (2016, p. 20) has argued that instead of focusing on the state and region level, decentralization could give extended powers to the districts level: "Up to now, the consideration of federalism and decentralization has always been within the confines of the bitter debates about federalism and ethnicity. Those problems could be addressed at the same time as dismantling the General Administration Department's grip from the center on local government by decentralizing not to the states and regions, but to the country's seventy-four districts."

Any debate about decentralization needs to include discussion on the district and township levels, where GAD township administrators exercise near absolute control,<sup>88</sup> and local democracy and governance.<sup>89</sup> Again, this would mean a conversation about the role of the GAD and its complementarity with growing forms of local democracy.<sup>90</sup> Also, the issue of self-administered zones needs consideration, especially if extra zones were to be created as part of the peace process.

e) *Decentralization and the justice system*

Last but not least, there would also be a need for discussion (and further research) on reform of the justice system, which is extremely weak (Crouch and Lindsey 2014/Cheesman 2015). Under

<sup>86</sup> See: <https://teacircleoxford.com/2016/08/16/panglong-spirit-under-the-2008-constitution-part-ii/>

<sup>87</sup> See for instance : <http://www.mmmtimes.com/index.php/national-news/22213-home-affairs-ministry-invites-civilian-control-over-departments.html>

<sup>88</sup> From an unauthorized translation of the Territorial Administration Law, dated April 2017, and commissioned by Susanne Kempel, an independent consultant specializing in local governance and local democracy. A copy can be obtained by asking either Susanne Kempel or the authors.

<sup>89</sup> See: <https://frontiermyanmar.net/en/grassroots-candidates-fight-for-votes-in-local-government-elections>

<sup>90</sup> See: <https://teacircleoxford.com/2016/08/16/panglong-spirit-under-the-2008-constitution-part-ii/>



any scenario in which sub-national parliaments were granted greater powers there would need to be concomitant justice system reform so that the states and regions are equipped with a judicial branch as well as an executive and a legislative branch.

The 2008 Constitution establishes the courts of the Union.<sup>91</sup> The 2010 Union Judiciary Law establishes different levels of courts as follows:<sup>92</sup>

- Supreme Court of the Union
- High Courts of the Region, High Courts of the State,<sup>93</sup>
- Courts of the Self-Administered Division, Courts of the Self-Administered Zones,<sup>94</sup>
- District Courts,
- Township Courts<sup>95</sup>
- and other courts constituted by law.

The President, in co-ordination with the Union Chief Justice and the respective chief minister, shall nominate the chief justice of the sub-national High Court. The chief minister in co-ordination with the Union Chief Justice shall nominate the judges of the sub-national High Court. The nominations shall be submitted to the respective state or regional hluttaws,<sup>96</sup> but they have no right to refuse unless the nominee does not meet the qualifications prescribed in Article 310.

Under the 2008 Constitution, the sub-national High Court supervises district and township courts, courts of self-administered areas and other courts constituted by law.

If the states and regions were to create sub-national branches of the judiciary, then the division of power between the formal justice system and local, particularly, customary forms of justice, as well as the justice systems established by EAOs (McCartan & Jolliffe, 2016), would be organized practically.

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<sup>91</sup> Article 293

<sup>92</sup> The State Peace and Development Council Law (No: 20/2010)

<sup>93</sup> 306. High Courts of the Region or State shall have the following jurisdictions in accordance with the law:

- (a) adjudicating on original case;
- (b) adjudicating on appeal case;
- (c) adjudicating on revision case;
- (d) adjudicating on matters prescribed by any law.

<sup>94</sup> 315. District Courts, Courts of the Self-Administered Division, and Courts of the Self- Administered Zone, in accord with the law, have jurisdiction relating to original criminal cases, original civil cases, appeal cases, revision cases or matters prescribed by any law.

<sup>95</sup> 316. Township Courts, in accord with the law, have the jurisdiction relating to original criminal cases, original civil cases or matters prescribed by any law.

<sup>96</sup> Article 308 (b) (i)

#### f) *Decentralization and the economy*

As brought to the authors' attention during interviews, the process of decentralization is taking place in parallel with a process of economic liberalization, including privatizations (Moe Thuzar and Tin Maung Maung Than 2015 / Ford, Gillan & Htwe Htwe Thein 2016). As shown by Tin Maung Maung Than (2007), State-led industrialization in Myanmar took place for several decades in the context of a planned economy influenced by socialism and economic nationalism. As Lee Jones (2014) has stated: "One of the most important transformations in Myanmar since 1988 has been the constrained transition from state socialism to state-mediated capitalism."

Interviewees said this context allows for a concerted effort at economic development, in which local development, decentralization, and the liberalization of the economy, including privatizations, could be thought of in the same breath, which, as in so many cases, could help pave the way for peace.<sup>97</sup> This stands in sharp contrast to a widely criticized vision for development in ethnic areas held by the Union government and the Tatmadaw (Jones 2014/Woods 2011)<sup>98</sup>, and one of its corollaries, which Woods (2011) has termed "ceasefire capitalism".

Already, through loans and other means, sub-national governments are increasingly involved in economic development.<sup>99</sup> Bissinger and Linn Maung Maung (2014) have observed that "for SMEs, the majority of business-government engagement happens with subnational governments, including various local and state/region authorities".

### 5.2 State and Regional Revenue

Decentralization is based on three different pillars:<sup>100</sup>

- political decentralization, or the powers conferred to sub-national political institutions (such as parliaments and governments);
- administrative decentralization, or building administrative institutions capable of implementing decisions made at the political level;

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<sup>97</sup> Schedule Two, as it is, provides State and Region parliaments with the authority to support "cottage industries", and to grant loans to businesses. In the meantime, a SME Development Law was passed by the Union Parliament in 2015 - see: <http://www.mizzima.com/business-features/regulating-smes-supporting-or-strangling>

<sup>98</sup> Interviews, October-November 2017

<sup>99</sup> Interviews, November 2017

<sup>100</sup> See: Decentralizing government, what you need to know, DRI, 2017

- fiscal decentralization, or the revenue-generating ability given to sub-national political and administrative institutions to perform their duties.

This last aspect is absolutely key if decentralization is to be meaningful, and successful. According to Minoletti (2016): “An inappropriately designed decentralisation process can result in negative effects such as: subnational policy-making serving the interests of local elites; overspending by subnational governments resulting in large deficits and macroeconomic instability; increased corruption; and lower quality public services.”

It is not surprising that many political actors in Myanmar, and particularly those directly advocating for further decentralization and federalism,<sup>101</sup> have shown great interest in the seemingly very technical issue of fiscal decentralization and even more so in one of its key aspects, constitutional arrangements for sharing of natural resources and the revenue extracted from them (BEWG 2017/ENAC 2016).<sup>102</sup>

Most of the debates on this topic are expressed in terms of the percentage, or ratio, of the amount collected in taxes that should go to the sub-national budget. During the workshop held as part of this research project, a representative of the Natural Resources Governance Institute<sup>103</sup> downplayed the emphasis on numbers and said: “It is not necessarily the numbers that matter. Instead, revenue-sharing between the Union and states and regions should be determined by indicators such as population size, existing development gaps/development needs and revenue-generating capacity. Revenues allocated to states and regions should also be aligned with responsibilities delegated to local governments.”

Although the authors have not been able to contribute new research on this topic, a variety of sources exist which complement this paper and will be helpful to those interested in decentralization and federalism in Myanmar. One such source (Dickenson-Jones et al. 2016, p. 6) explains: “While by some measures, the speed of political and fiscal decentralization in Myanmar appears to have been significant, a legacy of central government control as well as uncertainties concerning the envisioned role of state and region governments, suggests that in practice their autonomy is still limited in many areas.”

Finally, it is important to note that EAOs, as militias, collect taxes independently from the State (see, respectively, Jolliffe 2016 and Buchanan 2016).

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<sup>101</sup> Included many of those interviewed by the authors.

<sup>102</sup> The title to one report, by a coalition of Karen organizations in Dawei, « We will manage our own natural resources », leaves little to the imagination.

<sup>103</sup> See: NRGi: Natural Resources Federalism: Considerations for Myanmar, published in January 2018.



## **6. Peace Process and Asymmetrical Decentralization**

Section 5 describes a chain reaction that could potentially be provoked and even be necessary if and when any process of amending Schedule Two of the 2008 Constitution starts and reflects on the issue of how to finance decentralization.

Section 6 acknowledges the limits to decentralization as a step towards federalism; the specificity, in the face of decentralization, of those “contested areas” (TAF 2018) where many among the various ethnic nationalities live; the consequences of this specificity for any process of decentralization; and the points where the political process and the peace process overlap or contradict one another.

One important fact must be noted immediately. Although decentralization is just one aspect of the political process, the peace process represents as wide a field of research, if not wider, than the entire political process. In that sense, having only a section of this paper dedicated to a topic much wider than its own scope is necessarily a perilous enterprise.<sup>104</sup> Nevertheless, as explained throughout this paper, it is absolutely fundamental for analysts, civil society activists, soldiers (on all sides) and politicians to think of these two processes in the same breath.

While some publications will be cited, most of the following is based on conversations with experts of the peace process and Myanmar’s decades-old conflicts, several of whom were acknowledged in the introduction to this paper.

Geography, first and foremost, is key to any understanding of how the political process and the peace process are connected.

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<sup>104</sup> The authors acknowledge as much, just as they acknowledge a second fact: they are specialists of the political process trying to write on the peace process, exposing themselves to the well justified criticism of the many experts of the peace process.

Myanmar, as far as its state civilian institutions are concerned, is far from covering the entire map of the country. In all seven states and in parts of the regions such as Bago, Tanintharyi or Sagaing, “Myanmar” really only means the cities and the roads that connect them, dotted with small towns and villages. Outside these areas, and even inside some of them a multitude of political, administrative and military arrangements exist (Jolliffe & Speers Mears 2016). They range from outright control by actors other than the Myanmar state, of which the extreme example is the Wa Special-Administered Division, to what Ashley South (2017) has termed areas of “hybrid governance”.

The lack of access by the Myanmar state sometimes represents a concern for local populations, for example if their community does not have a teacher sent and paid for by the Ministry of Education. However, improved access and control by the Myanmar state is often regarded by local people, and certainly by local ethnic political actors, as a loss of autonomy and an example of “Burmanization” (Jolliffe and Speers Mears 2016).

In many ways this geography informs our understanding of the peace process and the political process. To a degree, there is indeed a geographical frontier between the political process (that governs the life in the seven regions – not even entirely – and these cities and corridors), and the peace process, an attempt to bring peace to all areas not covered by civilian institutions of the Myanmar state.

However, this picture, although helpful in understanding the situation on the ground, is far from being completely accurate. For example, many MPs in sub-national parliaments as well as both chambers of the Pyidaungsu Hluttaw are senior members or leaders of Border Guard Forces (BGFs) or militias (Buchanan 2016). In many villages in “contested areas” teachers employed by the Union Ministry of Education are the first (and often the only) representatives of the Myanmar state.

It is impossible here to try and present a full picture of the situation, and the best experts of these areas are themselves more than happy to acknowledge that no one, beyond probably the Tatmadaw, has a complete grasp of this very complicated situation. However, it is enough to say that decentralization is a process that has no other option but to work around an existing situation, as much as it tries and improve it.

South (2017) and a recent article<sup>105</sup> both relate situations in 2017 in which the Chief Minister of Kayin state had to admit she had no power over leaders of BGFs and other local militia leaders,

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<sup>105</sup> See : <https://www.irrawaddy.com/news/burma/bgf-plans-large-city-expansion-project-karen-state.html>

who could act without her consent and even in opposition to her requests.

If geography is one element that helps to understand Myanmar's context at the crossroads of the political and the peace processes, so is history.

Oliver Wolters (1999) has shown how kingdoms in Southeast Asia, such as those in pre-colonial Burma, were organized in terms of their political geography according to a "mandala system", defined as "a particular and often unstable political situation in a vaguely geographical area without fixed boundaries and where smaller centers tended to look in all directions for security".

Mael Raynaud has shown<sup>106</sup> how "this political organization, it must be stressed, is easily recognized in some of the issues faced by present day Myanmar", and most notably in the peace process. EAOs, BGFs and militias behave as many centers, and people living in their areas can hardly be described as living under the control of the Myanmar state even if the latter has a significant impact over their lives through the conflict and otherwise.

This helps to explain the demands by ethnic nationalities (ENAC 2016/UNFC 2016)<sup>107</sup> that not only should Myanmar adopt a federal system, but also that it should be asymmetrical (DRI 2017)<sup>108</sup>. In concrete terms this would mean that each of the 14 states and regions would have a different status and different political, administrative and fiscal powers.

An extreme vision for the future of Myanmar is the so-called "eight states solution", in which the seven regions would be a single entity and there would be significant gains for the seven states in powers and representation in Nay Pyi Taw. Mael Raynaud showed<sup>109</sup> why this solution would be unacceptable to both the Tatmadaw and the Bamar majority and why it would be contrary to objectives expressed by organizations representing ethnic nationalities, by EPPs and by EAOs. This vision also ignores the important fact that political and intellectual elites, including civil society groups and the media, in places such as Dawei, Bago and Monywa are keen to retain the sub-national parliaments and governments granted to them under the 2008 Constitution.

Many demands made by ethnic nationalities are not only legitimate, they are the only viable

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<sup>106</sup> <https://teacircleoxford.com/2017/01/30/towards-a-normalization-of-the-political-sociology-of-the-elites-in-myanmar-part-one/>

<sup>107</sup> Corresponding demands were expressed by representatives of ethnic civil society organizations, EPPs and EAOs in interviews November 2017.

<sup>108</sup> Although DRI discusses "asymmetrical decentralization" rather than federalism in this report.

<sup>109</sup> See: <https://teacircleoxford.com/2016/08/16/panglong-spirit-under-the-2008-constitution-part-ii/>

option for Myanmar's immediate future. For instance, ENAC (2016) explicitly demands that "health governance systems set up by the EAOs must also be recognized and respected by the central government and other stakeholders". It also demands that "existing health departments in ethnic areas must have the right to maintain ongoing services and launch new services, as required". It also suggests that such health departments and state health departments should coordinate and work together. In the field of education, where similar dynamics apply, this is what South & Lall (2016) have termed "federalism from below", and which is also advocated by Jolliffe in both health care and education (Jolliffe & Speers Mears 2016/Davis and Jolliffe 2016). South (2017) argues that "such areas of overlapping 'hybrid governance' represent emerging political complexes in Myanmar".

An asymmetrical form of decentralization or federalism at the state and regional level could mean that while states exercise the right to draft their own constitutions (on which many ethnic civil society groups and EAOs have been working, sometimes for two decades)<sup>110</sup>, the regions may or may not decide to do the same.

At the crossroads between the peace process and the political process a number of specific questions need answers. Assuming that the 14 states and regions continue to exist according to their current borders and with existing sub-national parliaments and governments, one such question concerns their de facto identical status, a situation which may or may not evolve in the future.

Myanmar has 74 districts, 330 townships and more than 15,000 wards and village tracts, and some form of asymmetrical decentralization is likely to develop, not least because many areas are likely to continue being administered by local actors and not by the Union government.

Such an arrangement has been enshrined in the 2008 Constitution through the creation of the Naga, Danu, Palaung, Pa-O and Kokang SAZs and the Wa Self-Administered Division (although Schedule Three is often regarded from the ethnic side of the peace process as not granting any significant degree of autonomy).

Future peace agreements may extend similar, or different, versions of such arrangements for other areas under the control of EAOs, such as the KIO, KNU, New Mon State Party (NMSP) and Restoration Council of Shan State (RCSS). However, it is worth noting that when some EAOs

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<sup>110</sup> Mael Raynaud, field notes, 2002-2008



expressed interest in such arrangements in the past (such as during the National Convention), the Tatmadaw's response was that any ethnic group after which a state had been named could not also have an SAZ. Nevertheless, since the launch of the peace process in 2011 and the signing of the NCA by eight groups in 2015 the situation may have changed.

An objection that many EAOs have with this analysis is that they do not see their influence as being limited to the areas under their control. A case in point is the Kachin state capital, Myitkyina. To the KIO, Myitkyina is very much the capital of a future Kachin state to whose building they want to contribute.<sup>111</sup>

As South (2017) has argued, while it is difficult to assess the political support enjoyed by EAOs it is impossible and indeed it would be a mistake to underestimate it.

Furthermore, EAOs typically also claim some sort of extra-territorial legitimacy over members of their ethnic nationality. For example, the KIO would regard as its constituents not only the residents of Kachin state, but also the Kachin living in Sagaing region, Shan state and even those in Mandalay and Yangon. It would also regard Kachin living in Thailand, and as far away as Australia or the United States as its constituents. To the KIO all Kachin, even those across oceans, represent a reality of which they are part, an attitude that many other ethnic nationalities can understand.

As one interviewee put it, what ethnic nationalities want is: "Rights, recognition, representation, and resources." In that sense, political representation as far as it means "one man, one vote" cannot fully satisfy ethnic demands for equality. Political institutions based on such a "one man, one vote" need specific forms of decentralization as well as probably other institutions.<sup>112</sup> At any rate, new models need to be developed, and they can only be designed by actors of both the political process and the peace process.

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<sup>111</sup> Tinzar Htun, field notes, 2016-2017

<sup>112</sup> See: <https://teacircleoxford.com/2016/08/16/panglong-spirit-under-the-2008-constitution-part-ii/>



## 7. Building Capacity – Changing Mindsets

One of the most important findings of this paper is that if decentralization is to be taken further, then issues related to the capacity of politicians and civil servants as well as journalists, civil society activists and all citizens of the states and regions must be addressed.

It is also the case that issues related to people's understanding of the concept of political power and their ability (or lack thereof) to delegate would make any implementation of the decisions very difficult.

This section tries to address both aspects, which cannot simply be solved by amending the constitution or passing a law.

On ethnic nationalities, the general mindset on the Bamar/Nay Pyi Taw side and the ethnic side has been addressed earlier in this paper and in countless publications. A consensus needs to be built over what it means to be a citizen of Myanmar (South and Lall 2018). As Matthew Walton has argued,<sup>113</sup> Myanmar has yet to achieve a "Panglong Spirit" shared by all.

In terms of capacity, although there is no reason to believe that the administrative capacity of those serving under EAOs needs any less development than that of civil servants working for the Myanmar state, at the Union level and in the states and regions, the main issue discussed in this paper was to consider them as partners of the Myanmar state, not enemies. However, as one interviewee said, "it is not clear how well people who would have worked under EAOs could adapt to the ways of Myanmar's civil servants corps, not to mention that both sides would probably look at each other as coming from the side of 'the enemy'".

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<sup>113</sup> See: <https://teacircleoxford.com/2016/06/25/lessons-from-panglong-part-ii/>

If the mindsets pertaining to relations between the Bamar centre and the ethnic peripheries is one key issue for the future of Myanmar, then this is also certainly true of relations between the centre and the peripheries in all things related to decentralization. Convincing soldiers, politicians, and civil servants in Nay Pyi Taw to relinquish some of their powers in favour of counterparts in the states and regions will be even more of a challenge in practical terms than it will be at the constitutional and legal level.

As one sub-national parliament MP from the NLD told the authors: "Decentralizing the government will actually be easier than decentralizing the leadership of the NLD. These people simply don't know how, and don't want to, delegate". As another interviewee put it: "There is a three-tiered problem. A political problem, a capacity problem and a political culture problem". A third interviewee said: "The Union Parliament thinks they are superior to regional parliaments."

Beyond the issues related to existing mindsets are the very concrete and practical issues of capacity. Almost all the interviewees told the authors that the capacity of civil servants and lawmakers would be a huge issue, were Myanmar to witness any significant level of decentralization. As one Myanmar interviewee said:<sup>114</sup> "If you give more power to local parliaments, can they handle the work? I don't think so". This is consistent with the authors' experience.<sup>115</sup> The same interviewee added, discussing reform of the GAD: "It takes decades to train a new administration." Not to mention that "any reform of the GAD is a direct challenge to the power of the Commander-in-Chief."

However, capacity should never be the reason for not sharing power. At the same time, it is an issue that Myanmar cannot escape and should not be ignored. Former minister U Soe Thane touched on capacity constraints in a recently published book. He wrote, "However, it was clear that there were some weaknesses related to implementation, not least because we had not realized that there were no institutions in step with the introduction of a new democratic system in our country. The administrative mechanism had been conducted by the institutions centered on the Socialist system and the institutions in line with the past system of military administration for over four decades. We therefore gradually realized that we would not be able to solve the difficulties related to these institutions for years to come".<sup>116</sup>

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<sup>114</sup> Interview, October 2017

<sup>115</sup> The authors have researched state and region parliaments with the EMRef.

<sup>116</sup> U Soe Thane, pp.22

It is common to hear radical voices saying: "All key positions in the government departments are occupied by former military people. We have to get rid of them." Such sentiments ignore the fact that the role played by bureaucrats in building a state is as crucial as that of elected politicians. An NGO worker said, "We have a capacity crisis in Myanmar. Wherever you look, there is no capacity."

State and regional lawmakers have limited legal knowledge and are incapable of drafting laws. Even if they do, laws are copied from Union laws and are not based on evidence. Neither parliament nor government have a strong research department to conduct comprehensive research.



## **8. Potential Next Steps towards Decentralization**

Based on the findings presented in this paper, the authors make the following observations:

- Amendments to Schedule Two cannot ignore debates in the peace process.
- Decentralization and federalism are common objectives, but there is a need for more in-depth debates between political players on what this means.
- The logistical/technical aspects should not be underestimated, first and foremost the capacity of local civil servants and lawmakers.
- As a consequence, significant effort should be devoted to capacity building.
- Decentralization and federalism should not be rushed. Enduring solutions should be preferred to short-term solutions.

To further efforts towards decentralization, decision makers in Nay Pyi Taw (in the government, parliaments and military) should consider:

- Working towards amending Schedule Two, and, accordingly, Schedule One and Schedule Five, to increase political, administrative and fiscal decentralization.
- Keeping in mind the objective of establishing a federal system. Decentralization is a process that is meant to lead to federalism, as agreed in the NCA, an objective on which there is agreement among political actors on all sides.
- Including the process of writing and adopting sub-national constitutions for the states and giving the regions the opportunity to decide if they need their own constitutions.
- Delegating broader powers to the states and regions, and, if relevant, to other levels (districts, townships, village tracts and wards).
- Developing local democratic institutions in parallel with reforming the GAD.
- Modifying the process of selecting chief ministers so that they are democratically elected at the state and region level.

- Including amendments to Schedule Three within a broader process of designing an asymmetrical form of decentralization that fits the history and political traditions specific to Myanmar.
- Providing state and regional ministers with the necessary administrations in state and regional ministries.
- Training and hiring civil servants at the state and regional level.
- Training and, where relevant, hiring civil servants at the district, township, and village-tract and ward levels, according to newly-adopted forms of asymmetrical decentralization (including through cooperating with local administrations where relevant).
- Working towards a convergence between the peace process and the political process by allowing for a greater participation of actors in each of these processes into the other (MPs and EPPs in the peace process, as with the UPDJC, and creating the conditions for the eventual participation of EAOs in the political process through their political branches).
- Acknowledging and cooperating with local administrations and service providers including in, but not limited to, education, health care, welfare, justice, land rights, natural resources management and protection of the environment.
- Promoting greater participation of civil society organizations in the peace process and in designing gradual steps towards decentralization, because many are key to any convergence process as direct service providers.

Similarly, decision makers at the state and region level, in anticipation of decentralization, should consider:

- Developing specific plans and demands to send to the Union level concerning desired steps towards decentralization (so that decision makers in Nay Pyi Taw can design forms of decentralization that meet local expectations at the sub-national level).
- Developing local capacity among politicians, civil servants or political parties and promoting better understanding of the work of state and regional parliaments and governments among civil society, the media, the private sector and citizens.
- Developing relations with all local actors at the state and regional level (civil society, the media, the private sector), so that democracy can flourish at the state and regional level.
- Developing relations, in states or regions with at least one SAZ and the presence of EAOs, BGFs, militias and ethnic service providers, between these actors and the state or regional parliament and government, in particular within the frame of asymmetrical decentralization.



EAOs and EPPs, in this context, should consider:

- Developing a greater understanding of and interest in the political process, including the 2008 Constitution, and contributing to debates about gradual decentralization, such as amendments to Schedule Two as well as Schedules One, Five and Three. Practical demands for such amendments would help to keep federalism as a fundamental objective informing decentralization's general direction and avoid tensions between the political process and the peace process. The 2008 Constitution is likely to remain in force for more than a decade, and whatever form a future federal constitution takes (whether the 2008 Constitution is amended to a point that fits the demands for federalism, or a new constitution is written) will be significantly influenced by work being undertaken by state and regional parliaments and governments. If organizations representing ethnic nationalities wait until a federal constitution is adopted before they directly integrate, or at least participate through political dialogue, in the political process, they will find they have to work within a political, constitutional and legal frame they did not contribute to designing.
- In order to do so, EAOs and EPPs need to cooperate with each other, with decision makers in Nay Pyi Taw, with state and regional parliaments and governments, and other local actors (SAZ administrations, BGFs, militias and authorities at the district, township, village-tracts and wards levels).
- As key actors in the future web of an asymmetrical decentralized or federal system, EAOs and EPPs need to regard themselves as decision makers at the state and regional level and follow the recommendations made to such decision makers, as above.
- Developing the capacity of their own administrations and associated service providers (including, but not limited to education, health care, welfare, justice, land rights, natural resources management and protection of the environment) and hiring and training future generations of civil servants, teachers, doctors, lawyers and other professionals.

Civil society organizations should consider:

- Continuing to develop programs that enhance knowledge and understanding about the constitution and its amendments, constitutional debates, the work of state and regional parliaments, government policies and other matters so that citizens can better participate in democratic life.

Ethnic and non-government service providers should consider:

- Cooperating with government at the Union, state and regional, district, township, village tracts and ward levels. In the context of a developing Myanmar, and asymmetrical decentralization, ethnic and non-government service providers are and will remain a complement to government in sectors including, but not limited to education, health care, welfare, justice, land rights, natural resources management and protection of the environment.

The international community should consider:

- Continuing to support the political process, and in particular decentralization, through training and working with the government, the state and regional parliaments, and ethnic and non-government service providers.
- Continuing to support the peace process.
- Supporting gradual convergence between the political process and the peace process.
- Supporting initiatives aimed at building the capacity of all stakeholders mentioned above.

## **Annex 1: Addition to Schedule Two in 2015 Amendments**

### **Finance and Planning Sector**

- l. Investment that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- m. Insurance that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- n. Income that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- o. Commercial taxes that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- p. Domestic and Foreign loans that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- q. Acquisition of property have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- r. Foreign aid and financial assistance have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

### **Economic Sector**

- d. Hotels and lodging houses that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- e. Tourism that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

### **Agriculture and Livestock Breeding Sector**

- h. Reclamation vacant, fallow and virgin lands that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- i. Registration of documents that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- j. Agricultural research that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- k. Marine fisheries that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- l. Agriculture and Meteorology that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

### **Energy, Electricity, Mining and Forestry Sector**

- f. Setting rations on natural resources production that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- g. Small and artisanal mining that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- h. Safety of mine workers, environmental conservation and restoration that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- i. Small Jewelry and small jewelry businesses that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- j. Other Woods excerpt Teak and group (1) including Thitya, Ingyin, Pyinkado, Padauk, Thingan-net, Tamalan that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
- k. Environmental protection and conservation including wildlife, natural plants and natural area that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

**Industrial Sector**

c. Industrial activities that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

**Transport, Communication and Construction Sector**

d. Maintenance of waterways that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

e. Development of water resources and rivers and streams that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

f. Shipbuilding, repair and maintenance that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

g. Air transport that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

h. Housing and Buildings that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

**Social Sector**

h. Basic education school management that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

i. Philanthropic hospitals and clinics that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

j. Prevention from adulteration, manufacture and sale of foodstuffs, drugs, medicines and cosmetics that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

k. Welfare of children, youth, women, disabled people, the aged and homeless that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

l. Relief and rehabilitation that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

m. Literature, dramatic arts, music, traditional arts and crafts, cinematographic and videos that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

n. Management of excise tax that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

**Management Sector**

e. Border Area Development and Rural Development activities that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

Source: The Constitution of the Republic of the Union of Myanmar, Amending Law, Pyidaungsu Hluttaw, No: 45/2015; unofficial translation (Dickenson-Jones et al. 2016)

## Annex 2: Addition to Schedule Five in 2015 Amendments

20. Tax on Investment that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
21. Tax on Insurance that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
22. Tax on Income that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
23. Commercial taxes that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
24. Customs duties that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
25. Tax on Hotels and lodging houses that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
26. Tax on Tourism that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
27. Tax on Registration of documents that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
28. Tax on Marine fisheries that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
29. Tax on oil and gas that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
30. Tax on Mineral and Mining that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
31. Tax on Jewelry that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
32. Tax on Other Woods except Teak and group (1) including Thitya, Ingyin, Pyinkado, Padauk, Thingan-net, Tamalan that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
33. Tax on Industrial activities that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
34. Tax on shipbuilding, repair and maintenance that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
35. Tax on air transport that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
36. Tax on Housing and Buildings that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
37. Tax on Private schools and training that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
38. Tax on Private hospitals and clinics that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;
39. Tax on Literature, dramatic arts, music, traditional arts and crafts, cinematographic and videos that have the right to be undertaken in the Region or State in accordance with the law enacted by the Union;

Source: The Constitution of the Republic of the Union of Myanmar Amending Law, Pyidaungsu Hluttaw, No: 45/2015; unofficial Translation (Dickenson-Jones et al. 2016)

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