

Representation and legitimacy in Myanmar's quest for a federal democratic constitution

Abstract

This chapter highlights some of the connections and interrelations between the debate on constitutional federalism, in particular the manner in which this concept has framed much of the debate about state-building in Myanmar, and democratic principles, in particular representation, genuine elections and equal citizenship. Some of the debate about federalism is about an apparent dichotomy between 'coming together' and 'holding together' federalism, and the question what role the state of Myanmar, that was captured by the military on 1 February 2021, plays in the context of rebuilding the country as a federal union.

The chapter anchors the debate about democratic legitimacy in Myanmar in the wider context of political philosophy and international law, and conclude with concrete and tangible recommendations for how to approach the federal constitution-building process while maintaining a necessary level of unity among stakeholders, preserving a level of democratic legitimacy for the process and the new arrangements to be agreed and ensuring that common citizens do not suffer from continued uncertainty and conflict.

Keywords

Democracy, legitimacy, representation, citizenship, constitutional design

Introduction

Myanmar is in a transformation process with uncertain outcomes. This scenario preferred by most is the establishment of a civilian-led federal democracy that provides stability and security to all people. In the process of making this vision a reality, the question of representation and legitimacy is central. Who gets to decide the rules of the process? Who gets to decide on a future federal constitution? Who's leadership is likely to be considered the most legitimate and effective?

The illegitimate military regime currently in control of central state structures is opposed by a diverse but nominally pro-democratic movement, which comprises elected representatives and a wide array of civil society and minority ethnic group actors, in particular ethnic resistance organisations (EROs) with a long history of fighting the state as non-state armed groups. One of the main assets of the loose anti-military coalition of forces is the claim to democratic legitimacy, with the union parliament - elected in 2020 but prevented by the military from convening - at its core. They have formed interim governance institutions at the union (national) level under a Federal Democracy Charter (FDC) as a basis for developing an inclusive alliance between all stakeholders opposed to the coup. At the regional and local level, where military control has been pushed back to a significant extent, governance actors

are only loosely linked to the FDC and often claim to exercise quasi-state control on the basis of 'de facto' legitimacy.¹

A widely shared goal among diverse stakeholders is to rebuild the state based on democratic and federal principles, drawing a clear line under the historic era of centralized military domination. The FDC already stipulates that the new state structure is to provide a large degree of self-governance to the constituent member states of a new federation. However, the degree of continuity and the shape and form of the new state structures remain uncertain and contested. Questions of identity, ethnicity and belonging loom large in a debate about 'bottom-up vs top-down' state building.²

The democratic legitimacy and sources of authority for the emerging actors, in particular at the sub-state level is disputed. At the same time, the democratically legitimate elected representatives struggle to provide effective governance and exercise their role as long as they largely lack access to and control over state resources. As the military-imposed 2008 Constitution has been declared inapplicable and obsolete by the elected MPs and other revolutionary forces, there is also debate about the balance between continuity with the previous system and revolutionary change, in particular the status of the legal framework, territorial-administrative and institutional arrangements that predated the coup. Some analysts and activists even question the existence of Myanmar as a state, and argue that a new federation of sovereign member states has yet to emerge from a future state-building process. In all of this, the question on who represents whom, at the national, state and local level, and who can decide on fundamental issues such as citizenship and state borders on behalf of the respective populations poses a significant challenge, that is likely to weaken the coherence of the resistance movement and to protract the negotiation process even if military rule can be overcome. Pragmatic requirements for managing a smooth transition appear to run counter to the more ambitious and often mutually exclusive aspirations of some of the ethnic groups' claims. Claims to legitimacy sometimes compete, rather than reinforce each other.

Conceptual background and theory of political legitimacy (1500)

The question of political legitimacy has captured the attention of the classic political philosophers since ancient times. Several leading thinkers in political philosophy have significantly influenced the concepts of political legitimacy and the law. In the Western world, the most prominent include John Locke (1632–1704), who argued³ that legitimate government derives from the consent of the governed and emphasized the importance of natural rights (life, liberty, and property) and the social contract as the basis for political legitimacy, as well as Thomas Hobbes (1588–1679) who viewed⁴ the legitimacy of government as stemming from the necessity of order and protection, which could only be achieved through a strong sovereign authority. He believed that individuals consent to this authority to escape the anarchic "state of nature." Jean-Jacques Rousseau (1712–1778) argued⁵ that legitimate political authority rests on the general will of the people. He believed that laws are legitimate if they are created

¹ The current revised version of the FDC does not clearly specify which institutions or actors have authority for substate-level governance. It broadly states that the three branches of power can be exercised in accordance with the principle of self-determination (refer to Art: 52 and 53 of FDC Part II), which is emphasized throughout the FDC. While the FDC leaves it open who exactly is to exercise this right to self-determination and in what form, the approach in practice enhances the influence of EROs in their respective states, and it had the effect of reducing the mandate of elected MPs at the substate level. The first version of FDC explicitly gave mandate to elected MPs from substate level for legislation and forming government at their respective state/region.

² Some perceive that the FDC favors a "coming-together" (con-)federation (regardless of its feasibility) because the FDC makes reference to the historical independence of member states before the Panglong Agreement and mentions constituent states as the original sources of sovereignty. (Chapter 4, Section II, Article 1, and Section III, Article 1,2 and 4, Part I)

³ John Locke, "Two Treatises of Government" (1689)

⁴ Thomas Hobbes, "Leviathan" (1651)

⁵ Jean-Jacques Rousseau, "The Social Contract" (1762)

by the collective will and serve the common good. Immanuel Kant (1724–1804) emphasized⁶ the rule of law and moral autonomy. He argued that legitimate laws are those that individuals, acting as rational agents, would consent to under a system of universal law.

Among the more contemporary authors on the subject, John Rawls (1921–2002) stands out with this contribution.⁷ He introduced the concept of justice as fairness and the “original position” as a thought experiment to derive principles of justice. He argued that a legitimate government is one that individuals would consent to under conditions of fairness and equality. Similarly, Jürgen Habermas (1929–present) emphasized the role of communicative action and discourse in legitimizing law and political authority.⁸ He argued that legitimacy arises from democratic processes where laws are the outcome of rational deliberation in the public sphere. These thinkers have profoundly shaped discussions on the legitimacy of laws and governments, each providing distinct perspectives based on consent, justice, social contracts, and moral principles. The classical political philosophers influenced early codifications of constitutions and fundamental rights charters and later the documents that are nowadays considered universal human rights principles, in particular the Universal Declaration of Human Rights.

John Rawls⁹ offers a framework that connects elections, human rights, and political legitimacy through the principles of justice as fairness and the legitimacy of democratic institutions. Rawls proposes two principles of justice: (1) Each person has an equal right to equal basic liberties, which includes political liberties like the right to vote and run for public office. (2) Social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged and attached to positions open to all under conditions of fair equality of opportunity. Elections are crucial in ensuring that these two principles are respected within a just society. Fair and free elections are a practical manifestation of these principles, ensuring that all citizens have an equal say in political decision-making.¹⁰

Rawls views human rights as a necessary condition for the legitimacy of any political system, even beyond democratic societies. Human rights form the basic structure that any society, whether liberal or not, must respect to be considered legitimate in the international arena. These rights include fundamental freedoms such as the right to political participation, freedom of speech, and equality before the law. For Rawls, a government is politically legitimate if it operates under a constitution that citizens, as free and equal, would agree to under fair conditions, specifically the original position under the veil of ignorance.¹¹

Rawls argues that democratic elections are integral to political legitimacy because they embody the principle that government power derives from the consent of the governed, expressed through fair electoral processes. Elections serve as a mechanism for ensuring that laws and policies are shaped by the collective deliberation of the citizenry, aligning with the requirements of public reason.¹² Legitimate political power is exercised according to a public conception of justice that all citizens can endorse. This public conception is best realized through democratic institutions, of which elections are a cornerstone. Democratic elections ensure that government policies reflect the general will of the people and maintain a just society where human rights are upheld. Rawls connects elections to human

⁶ Immanuel Kant, “Groundwork for the Metaphysics of Morals” (1785)

⁷ John Rawls, “A Theory of Justice” (1971)

⁸ Jürgen Habermas, “Between Facts and Norms” (1992)

⁹ Especially in “A Theory of Justice” (1971) and “Political Liberalism” (1993).

¹⁰ Rawls, “A Theory of Justice” (1971), pp. 52-56

¹¹ Rawls, “The Law of Peoples” (1999), pp. 65-68

¹² Rawls, “Political Liberalism” (1993), pp. 217-225

rights and political legitimacy by grounding the legitimacy of a government in democratic processes that respect the principles of justice as fairness.¹³

Whereas these Western concepts of liberal political philosophy are well-known and form the basis of the democratic political order in much of the Western world, it could be argued that in the Myanmar context there are distinctly Asian traditions and ideas that offer distinct approaches to legal and political legitimacy.

For instance, the philosophical basis of Confucianism emphasizes moral virtue, hierarchical relationships, and harmony. A legitimate ruler, according to Confucian thought, is one who governs with benevolence (*ren*) and adheres to ritual propriety (*li*), ensuring the moral and social order. While Western theories emphasize consent and individual rights, Confucianism focuses on moral responsibility and communal harmony. However, the idea of a benevolent ruler resonates with the Western notion of a government that promotes the common good. Confucian legitimacy is therefore less about procedural democracy and more about the ruler's ethical conduct and the maintenance of societal harmony.¹⁴

The tradition of Legalism, influential in ancient China, prioritizes strict laws and enforcement over moral considerations. The state's legitimacy comes from its ability to maintain order and enforce laws effectively. Legalism parallels Hobbes' idea of a strong sovereign to avoid chaos, but it diverges by focusing less on social contracts and more on state power and discipline. The emphasis on rule by law rather than rule of law contrasts with Western liberal traditions that stress the protection of individual rights and procedural fairness.¹⁵

In Buddhist traditions, the legitimacy of rulers is tied to their moral and spiritual qualities and their ability to foster the welfare of the people. The concept of the *dharmaraja* (righteous king) reflects this, where rulers are expected to act in accordance with *dharma* (cosmic law and order). The Buddhist emphasis on moral leadership can be linked to Rawls' idea of rulers acting under a public conception of justice. However, the focus on spiritual virtues is distinct from the secular nature of most Western theories. Buddhist political thought often emphasizes non-violence, compassion, and the spiritual well-being of subjects, offering a more holistic view of legitimacy beyond material and legal frameworks.¹⁶

In ancient Indian political thought, political legitimacy is tied to the ruler's ability to maintain *dharma* (moral law) and *artha* (statecraft and economic prosperity). The ruler's duty is to ensure justice and prosperity for the people. Similar to the social contract, Indian political thought often involves the ruler's obligation to uphold *dharma* as a basis for legitimacy, akin to the Western idea of rulers deriving legitimacy from their adherence to justice and law.¹⁷

Many modern Asian states have adopted democratic frameworks, blending Western concepts of elections and human rights with local traditions. Unlike the individualism prevalent in many Western theories, Asian traditions often stress collective welfare, social harmony, and the role of the state in

¹³ Rawls, "Political Liberalism" (1993), pp. 137-143 and Rawls, "A Theory of Justice" (1971), pp. 52-56

¹⁴ Daniel A. Bell and Hahm Chaibong (eds.), *Confucianism for the Modern World* (Cambridge University Press, 2003), pp. 1-30 and Xinzhong Yao, *An Introduction to Confucianism* (Cambridge University Press, 2000), pp. 50-75.

¹⁵ Benjamin I. Schwartz, *The World of Thought in Ancient China* (Cambridge, MA: Harvard University Press, 1985), pp. 321-350; Zhengyuan Fu, *China's Legalists: The Earliest Totalitarians and Their Art of Ruling* (Armonk, NY: M.E. Sharpe, 1996), pp. 17-45.

¹⁶ Patrick Olivelle (ed.), *The Arthashastra: Selections from the Classic Indian Work on Statecraft* (Cambridge: Hackett Publishing, 2013), pp. 5-30; Trevor Ling, *Buddhism and the Political Order* (London: Palgrave Macmillan, 1981), pp. 95-120.

¹⁷ Patrick Olivelle, *Manu's Code of Law: A Critical Edition and Translation of the Manava-Dharmasastra* (Oxford: Oxford University Press, 2005), pp. 15-40; Kautilya, *The Arthashastra*, trans. L.N. Rangarajan (New Delhi: Penguin Books, 1992), pp. 100-125.

maintaining these. Legitimacy often hinges on the moral qualities of leaders, contrasting with the procedural legitimacy emphasized in Western liberal democracies. In some Asian contexts, legitimacy is closely tied to economic success, pragmatic governance, and the ability to deliver stability, sometimes at the expense of individual political freedoms.

Therefore, while there are intersections between Western and Asian theories - particularly in concepts like justice, moral leadership, and public welfare - Asian traditions often emphasize moral authority, collective harmony, and pragmatic governance, offering distinct perspectives on legal and political legitimacy. Applying these concepts to the recent history and current situation in Myanmar, it is obvious that this hybridity of sources of legitimacy can also be found in the debate about political authority and institutions. The history of elections and electoral mandates of Myanmar's historical leaders can be viewed from these different angles of political legitimacy. It is necessary to also trace back the debate about the federal nature of the state to its origins, coinciding with the formation of Burma as an independent state and full subject of international law.

Myanmar's inexorable path towards "federalism" (1500 words)

From the beginnings of Burma as a modern, independent state, the question of federalism has loomed large over its constitutional and political history. During the British colonial period Burma was governed in an asymmetrical manner, distinguishing between Burma Proper, mainly Bamar-populated lowland areas, and Frontier Areas mainly populated by non-Bamar groups. The famous Panglong Conference of February 1947, which brought together Aung San, representing the majority Bamar population, with hereditary Shan, Kachin and Chin leaders promised "full autonomy in internal administration" and substantial financial assistance for the ethnic states. It preceded the formation of Burma under its first constitution and continues to be referred to especially by those favoring a loose "coming-together" federation or a confederation of sovereign entities.¹⁸

Federalism can be defined as a particular form of constitutional arrangement which includes the division of powers between central and regional/sub-state governments, constitutional entrenchment of sub-state autonomy, and mechanisms for sub-state representation in national decision-making.¹⁹ The 1947 Constitution, established at independence and drawn up by an elected Constituent Assembly claimed legitimacy for the "people of Burma" as a whole and incorporated certain federal principles.²⁰ It provided for the creation of constituent units with a degree of autonomy and included provisions for secession for some states after a ten-year period.²¹ However, in practice, the central government,

¹⁸ See Maung Maung, *Burma's Constitution*. Martinus Nijhoff, 1961 and Sakhong, Lian Hmung. In *Defence of Identity: The Ethnic Nationalities' Struggle for Democracy, Human Rights, and Federalism*. Orchid Press, 2010. See also Williams, David C. "A Second Panglong Agreement: Burmese Federalism for the Twenty-First Century." In *Constitutionalism and Legal Change in Myanmar*, edited by Andrew Harding and Khin Khin Oo, 136-162. Hart Publishing, 2017.

¹⁹ The definition draws on the significant works by Ronald L. Watts, one of the foremost scholars on federalism. His works provide deep insights into the principles, practices, and comparative aspects of federal systems worldwide. Some key publications by Ronald L. Watts on federalism are listed in the References.

²⁰ Robert Taylor in "The State Of Myanmar" (2009) highlights that the preamble to the 1947 constitution set forth the liberal basis of the claims to legitimacy by the postcolonial state and represented the predominant thinking of Burma's leaders at the time: "WE THE PEOPLE OF BURMA including the Frontier Areas and the Karenni States, determined to establish in strength and unity a SOVEREIGN INDEPENDENT STATE, to maintain social order on the basis of eternal principles of JUSTICE, LIBERTY AND EQUALITY and to guarantee and secure to all citizens JUSTICE social, economic and political; LIBERTY of thought, expression, belief, faith, worship, vocation, association and action; EQUALITY of status, of opportunity and before the law ... ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

²¹ The right to secede was explicitly granted to Shan State and Karenni State, which had been treated as an independent protectorate under British rule, under article 201 of the 1947 Constitution. A resolution had to be passed by a two-thirds majority of the members of the State Council and ratified by a referendum of the people of the state. Kachin and Chin (which was not given the status of "state" at the time) did not have that right to secede.

elected in a nation-wide election, maintained predominant authority, and the promised state autonomy was limited, leading to tensions with ethnic minorities.

A 1962 federal conference, organized by ethnic leaders seeking to expand the powers of federal units served as a pretext for the military to intervene and take power in a coup, abolishing the 1947 Constitution. The 1974 Constitution, imposed by the military regime of Ne Win, further centralized power, establishing a unitary state under the Burma Socialist Programme Party, despite its use of quasi-federal terminology akin to the Yugoslav and Soviet constitutions enacted around the same time. It eliminated the limited autonomy that had been granted to ethnic states under the previous constitution, consolidating authority within the central government and suppressing ethnic minority aspirations for self-governance.²² Although the 1947 Constitution could claim some democratic legitimacy, both constitutions fell short in terms of implementing genuine federalism, and they failed to provide meaningful autonomy to regional entities and maintained centralized control over governance.²³ The 1974 Constitution and subsequent one-party 'elections' aimed to restore legitimacy, but neither the people of Myanmar nor the international community ever fully bought into this, especially after the military ignored the 1990 election, won by the NLD in a landslide, and continued to rule autocratically until 2011.

The 2008 Constitution was imposed by the military regime, which attempted to give it the mantle of legitimacy in a questionable 'referendum'. While the constitution introduced elements of quasi-federalism, it stopped short of establishing a fully federal system.²⁴ The 2008 Constitution divided authority between the Union government and 14 States and Regions, suggesting a federal arrangement. However, the hybrid military/elected central government retained significant control, particularly through the General Administration Department, which was under the military-controlled Union Ministry of Home Affairs until 2018. Public finance and natural resources remained under strict centralized control. This central oversight limited the autonomy of state and regional governments, characterizing the system as quasi-federal rather than fully federal. Myanmar's 2008 Constitution incorporated certain federal principles but maintained a strong central authority, resulting in a quasi-federal system that limited genuine democracy and regional autonomy.

The 2008 Constitution of Myanmar was criticized for several significant shortcomings, particularly in terms of constitutionalism, the rule of law, and the independence of the judiciary, including the Constitutional Tribunal. Its restrictive rules on citizenship and political participation affected the legitimacy of its institutions. The military's entrenched role in governance was incompatible with the emergence of genuine democracy and federalism. The 2008 Constitution entrenched military power, giving the military 25% of parliamentary seats and control over key ministries (Home Affairs, Defense, and Border Affairs). This structure limited possibilities for civilian oversight and accountability, thus undermining constitutionalism. Moreover, the constitution required over 75% parliamentary approval for amendments, effectively granting the military veto power over constitutional reforms.²⁵

The judiciary was heavily influenced by the executive and military, lacking autonomy in interpreting and enforcing the law. The Constitutional Tribunal, established to interpret the constitution, had limited authority and was subject to political pressures. Its judgments were often disregarded, and it

²² Steinberg, D. I. *Burma: The State of Myanmar*. Georgetown University Press, 2001.

²³ Taylor, R. H. *The State in Myanmar*. Hurst & Co., 2009

²⁴ Brand, M. "Institution-Building and Reform in Myanmar: The Role of the 2008 Constitution" in *Constitutionalism and Legal Change in Myanmar*, edited by Andrew Harding and Khin Khin Oo, 163–185. Hart Publishing, 2017.

²⁵ Crouch, M. *The Constitution of Myanmar: A Contextual Analysis*. Hart Publishing, 2019. Another significant factor limiting civilian oversight was the military's exemption from parliamentary budget scrutiny and civilian court jurisdiction, as stipulated in Article 20(b) of the 2008 Constitution: "The Defence Services has the right to independently administer and adjudicate all affairs of the armed forces."

lacked enforcement power. The military's influence extended to the appointment of judges, compromising the impartiality and independence of the judiciary.²⁶

The 2008 Constitution reinforced discriminatory citizenship laws, particularly the 1982 Citizenship Law, which excluded Rohingya and other minorities from full citizenship. This exclusion severely impacted their political rights and access to justice. The constitution effectively denied certain ethnic minorities and groups, like the Rohingya, the right to vote and stand for election, leading to widespread disenfranchisement, in particular in Rakhine State, where most of the Rohingya habitually reside. The constitution barred individuals married to foreign nationals or those with foreign children from the presidency, notably targeting Aung San Suu Kyi, the leader of the National League for Democracy (NLD) since 1989. Such provisions restricted political participation and were seen as undemocratic. The dominance of the military and the exclusion of significant portions of the population from political processes thus undermined the democratic legitimacy of Myanmar's institutions. The exclusionary policies fueled ethnic divisions and conflicts, weakening national unity and the legitimacy of the state. The 2008 Constitution's failure to uphold democratic principles and human rights led to criticism from international bodies, questioning the legitimacy of Myanmar's governance.²⁷

The 2008 Constitution's entrenchment of military power, weak judicial independence, and exclusionary policies on citizenship and political participation significantly undermined constitutionalism, the rule of law, and therefore the legitimacy of Myanmar's institutions. In certain areas, ethnic armed groups and para-state local regimes maintained quasi-autonomous control. These issues contributed to ongoing political instability and conflict in the country. However, as will be discussed further on, the practice of governance under that constitution in most parts of the country led to its gradual legitimization and the repeated participation by large segments of the population in elections, and the formation of political institutions based on the will of the people, paradoxically, led to the emergence of a legitimate elected parliament that would outlast the constitution under which it had been elected.

Democracy and elections

Myanmar has had elections in various forms since the colonial period. Even the one-party dictatorship under Ne Win practiced fake electoral exercises, and the military notoriously staged a largely falsified referendum in 2008 to endorse the 2008 Constitution and elected the first parliament and state and regional assemblies under it in 2010. What matters is not whether a voting performance is staged, but how credible and genuine such an election is, to determine whether it can be considered a source of political legitimacy.

International human rights law establishes a clear link between the legitimacy of governments, the conduct of elections, and the protection of human rights. The Universal Declaration of Human Rights (UDHR), in Article 21, states that everyone has the right to take part in the government of their country, directly or through freely chosen representatives. It also emphasizes that the will of the people, expressed through periodic and genuine elections, is the basis of governmental authority. The International Covenant on Civil and Political Rights (ICCPR), Article 25, guarantees the right of every citizen to participate in public affairs, to vote, and to be elected in genuine periodic elections, which

²⁶ Crouch, M. (2017). *Myanmar's Transition to Federalism? The Need for Constitutional Reform*. In A. Harding (Ed.), *Constitutionalism and Legal Change in Myanmar* (pp. 155-176). Bloomsbury Publishing.

²⁷ Saffin, Janelle. "Constitutional Reform and the Future of Federalism in Myanmar." In *Debating Democratization in Myanmar*, edited by Nick Cheesman, Nicholas Farrelly, and Trevor Wilson, 83-102. ISEAS-Yusuf Ishak Institute, 2014

should be conducted by universal and equal suffrage and by secret ballot, ensuring the free expression of the will of the electors.²⁸

A government's legitimacy is often judged by its adherence to democratic principles, including the conduct of free and fair elections. These elections must allow for genuine choice, be free from coercion, and be conducted transparently. When a government comes to power through elections that are deemed free, fair, and transparent, its legitimacy is bolstered both domestically and internationally. Free and fair elections are essential for and depend on the protection and promotion of various human rights. They ensure that citizens can express their political will and hold their leaders accountable.

The absence of free elections often correlates with the suppression of civil liberties, such as freedom of expression, assembly, and association, which are fundamental to a functioning democracy. Legitimate governments, as established through democratic elections, are expected to uphold the rule of law and protect human rights. The accountability mechanisms provided by democratic institutions ensure that human rights violations can be addressed, and remedies can be sought. International human rights law therefore underscores that the legitimacy of a government stems from its democratic nature, particularly its adherence to the principles of free and fair elections. These elections enable the exercise of other human rights, contributing to a government's legitimacy and its obligation to protect human rights.

In Myanmar, these principles have never been upheld fully. But different elections were held under relatively free conditions that can be considered sources of democratic legitimacy. The 1990 elections resulted in the NLD, led by Aung San Suu Kyi, winning a landslide victory taking 392 of the 492 seats. Despite the overwhelming victory, the military refused to transfer power, and the results were effectively annulled and the elected MPs persecuted. The 2010 elections, the first held under the provisions of the 2008 Constitution, saw the military proxy party Union Solidarity and Development Party (USDP), winning the majority of seats. However, the elections were widely criticized for lack of transparency, with many opposition parties, including the NLD, boycotting them, thus questioning their legitimacy. Following an unexpected turn of events under the new USDP-administration under President Thein Sein, the NLD participated in and won 43 of the 45 contested seats in the April 2012 by-elections, including a seat for Aung San Suu Kyi. This election was seen as a significant turning point and a step towards democratic reform, gained more international acceptance. It also signaled a significant boost of legitimacy for the parliament in Naypyitaw, both in the eyes of many people in Myanmar and the international community.

In the 2015 elections, the NLD won a landslide victory with 390 of the elected 491 seats in the combined union houses of parliament. It also carried a majority in most of the state and regional assemblies. That election was considered free and fair by international observers, marking a milestone in Myanmar's democratic transition and constituting the first legitimate national parliament since the 1960s, at least with regard to its elected members.²⁹ Finally, the 2020 elections were again won by the NLD again securing a landslide victory with 396 of 476 elected seats. Despite the military's facetious claims of election fraud, international observers and many in the international community recognized

²⁸ The ICCPR has never been signed or ratified by Myanmar. The National Unity Government has however committed to ratify, fully and unreservedly, the ICCPR and to uphold the rights contained therein on 16 December 2022.

²⁹ See European Union Election Observation Mission. (2015). Myanmar final report: General elections 8 November 2015.

the results as credible and legitimate. The military later used these allegations as a pretext for the coup on February 1, 2021.³⁰

The validity and legitimacy of these elections as expressions of the people's will can be analyzed based on several factors. The 1990 and 2015 Elections were widely viewed as legitimate by both domestic and international observers, reflecting the popular will despite the military's reluctance to transfer power in 1990. Due to conditions hostile to the exercise of political rights and freedoms and boycotts, the legitimacy of the 2010 election was questioned. The 2012 by-elections were seen as a move towards democratic reform and were broadly accepted as legitimate. Despite military allegations, independent observers considered the 2020 elections credible, with high voter turnout reflecting public support for the democratic process.

Overall, elections in Myanmar, in 1990, 2015, and 2020, are considered valid and legitimate expressions of the people's will based on the scale of participation and the general acceptance by both the population and the international community. However, the military's interference has often undermined these democratic processes.³¹ By allowing voters and candidates to participate freely in the 2012, 2015 and 2020 elections, mostly without fear or repression, the governance system set up by the 2008 Constitution gradually gained political legitimacy in the eyes of the people that it probably lacked initially. This ex-post endorsement may have been hesitant and tentative, and it depended on the continued goodwill of the military's acceptance of the people's will and choice of elected representatives. When the military overthrew the 2020 election results and chose to ignore the people's will, the political legitimacy the 2008 Constitution may have gained over the years quickly dissipated.³²

The elections of November 2020 can be considered a milestone for several reasons. Never before have so many voters in Myanmar cast their votes. Whereas in 2015 about 23.5 million people voted, in the 2020 general elections around 27.5 million people voted. In 2015, the voter turnout was approximately 69.7% of the registered voters, whereas in 2020, the voter turnout was higher, reaching approximately 71% of the registered voters. This was all the more remarkable, as the election took place during the Covid-19 pandemic, with severe restrictions on the freedom of movement and bearing significant health risks for both voters and election administration staff, but also amidst continued security concerns in several parts of the country due to armed conflict. All in all, however, elections

³⁰ See The Carter Center. (2020). Preliminary statement on Myanmar general elections, and Asian Network for Free Elections (ANFREL). (2020). Interim report on the 2020 Myanmar general elections. International IDEA has also produced several publications related to Myanmar's 2015 and 2020 elections. Notable among these are: "2020 General Election in Myanmar: Fact Sheet" (July 14, 2020). "Running Elections under Stringent Covid-19 Measures in Myanmar" by Michael Lidauer and Gilles Saphy, which discusses the challenges and adaptations in conducting the 2020 elections amid the Covid-19 pandemic. "Considerations for Electoral Design in Post-Coup Myanmar" by Lidauer examines the military junta's justifications for the 2021 coup, the proposed electoral changes, and offers recommendations for establishing a legitimate electoral framework in a post-coup context.

³¹ For more, see Statement by International IDEA at the briefing by the UN Special Envoy on Myanmar, UN General Assembly, delivered 13 June 2022 by Marcus Brand, available at <https://www.idea.int/speech/statement-international-idea-briefing-un-special-envoy-myanmar>

³² Josef Raz's essay On the Authority and Interpretation of Constitutions: Some Preliminaries (2009) explores the legitimacy of constitutions, particularly how they derive and sustain legitimacy through practice. Raz argues that the legitimacy of a constitution is not solely determined by its origins (e.g., ratification or adoption) but is deeply influenced by how it is applied and respected over time. Continuous practice by institutions, courts, and the public contributes to its authority. For a constitution to gain legitimacy, it must be widely accepted by the society it governs. This includes adherence by both political authorities and citizens. Constitutions that fail to serve as effective guides lose their normative force over time. The legitimacy of a constitution is not static. It evolves as societies change, and the practices associated with the constitution must adapt to new circumstances without abandoning core principles. By focusing on the interplay between practice, interpretation, and societal acceptance, Raz provides a nuanced account of how constitutions gain and maintain legitimacy beyond their formal origins.

were held in 95 percent of all constituencies, and the turnout can be considered a clear expression of trust in the elected institutions by a large segment of the population in all states and regions, including in ethnic minority areas. The election was generally applauded by domestic and international observers, and the result can therefore claim to bear a large degree of legitimacy as the expression of the will of the people of Myanmar to be represented by the elected representatives.³³

The NLD led by Aung San Suu Kyi won a landslide victory in the general elections, securing approximately 83% of the total contested seats in the Union Parliament.³⁴ The military-backed USDP performed poorly compared to the NLD, winning only 33 seats in the Pyithu Hluttaw and 7 in the Amyotha Hluttaw. The NLD also dominated the state and regional assemblies, again winning the majority in most regions and states. The performance of ethnic minority parties varied significantly across different ethnic states. Ethnic minority areas showed a mix of outcomes, with some ethnic parties performing well in their respective areas. In Shan State, the Shan Nationalities League for Democracy (SNLD) was the most successful ethnic party, coming second after the NLD winning a significant number of seats in both the Union and state assemblies.³⁵

In Rakhine State, the Arakan National Party (ANP) performed strongly, winning many seats in the Rakhine State Assembly and becoming the largest party in the state assembly.³⁶ In Kachin State, the Kachin State People's Party (KSPP) and other ethnic Kachin parties had moderate success, while the NLD still performed well. In Mon State, the Mon Unity Party (MUP) won a number of seats, but the NLD maintained a strong presence. In Chin State, the Chin National League for Democracy (CNLD) made some gains, although the NLD won the majority of seats. While some parties, like the SNLD, ANP, and MUP, managed to secure a strong foothold in their respective states, others struggled against the NLD's sweeping popularity. Many ethnic minority voters were divided between supporting their local ethnic parties and the NLD, which also promised greater inclusion and federalism. While several ethnic parties maintained or increased their influence in specific ethnic regions, the NLD's victory was dominant nationwide including in Myanmar's ethnic states.

The results in terms of total votes received rather than seats won reflect a slightly different picture of popular support across the country. The NLD received around 59% of the total votes cast nationwide, securing a significant majority. The USDP received approximately 28% of the total votes nationwide. Despite receiving more votes than any other party besides the NLD, this did not translate into a proportional number of seats due to the first-past-the-post system. The SNLD garnered around 2% of the total votes with concentrated support in Shan State. Despite this lower national vote share, the SNLD was able to convert these votes into a relatively higher number of seats. The ANP received

³³ See International IDEA, "Interim Electoral Management and Electoral System Design in Myanmar". This report examines the interim period following the 2021 military coup, focusing on the necessity of establishing an interim electoral management body to support the restoration of democracy. The Joint Statement by International Election Experts and Organizations on Myanmar of January 2023, co-signed by various election experts and organizations, denounces the planned elections by Myanmar's military junta as illegitimate and calls for international support for Myanmar's pro-democracy movement. "Considerations for post-coup Myanmar: 8 November 2024" discusses the challenges and implications of the military junta's plans for elections, emphasizing the need for genuine democratic processes.

³⁴ In the Pyithu Hluttaw (Lower House), which represents one MP per township, the NLD won 258 out of 315 contested seats. In the Amyotha Hluttaw (Upper House), which allocates an equal number of 12 seats for each of the states and regions, therefore overrepresenting smaller, ethnic minority dominated states, the NLD secured 138 out of 168 contested seats.

³⁵ The SNLD won more seats than the USDP despite receiving fewer total votes due to the distribution of votes across constituencies and the nature of Myanmar's first-past-the-post (FPTP) electoral system. The SNLD's support was highly concentrated in Shan State, where it had a strong base among the Shan ethnic population. This concentration allowed the SNLD to win a significant number of seats in areas where it had substantial local support.

³⁶ However, elections were not held in areas controlled by the Arakan Army which prevented the NLD from campaigning and detained several candidates.

around 1% of the total votes, mostly from Rakhine State, where it performed strongly and won several seats in both the Union and state assemblies.³⁷

Other ethnic parties collectively accounted for about 10% of the total votes, representing various ethnic groups across different regions. This included the Kachin State People's Party (KSPP), Mon Unity Party (MUP), and Chin National League for Democracy (CNLD). The NLD dominated in terms of both total votes and seats, reflecting widespread national support. The USDP had a significant share of the vote but failed to translate it into a proportionate number of seats due to its dispersed support. The result was a resounding success and a clear mandate for the NLD, which would have been able to form a parliamentary majority on its own, even though the 2008 Constitution reserved a quarter of the seats to the military. The 2008 Constitution, however, still required the government to be a power sharing arrangement between elected representatives and the military, which was constitutionally guaranteed to control the key security-related ministries.

The military implausibly and without presenting any credible evidence alleged widespread electoral fraud, particularly concerning voter lists. These claims were dismissed by the Union Election Commission (UEC) and international observers. On 1 February 2021, the day the newly elected parliament was set to convene, the military staged a coup, arresting key political leaders, including Aung San Suu Kyi and President Win Myint, and in violation of the 2008 Constitution declared a state of emergency for one year, later extending it indefinitely.

Many elected MPs were detained or placed under house arrest. The military established a State Administration Council (SAC) to take over control of central state institutions, but hundreds of thousands of civil servants refused to go along, denying it legitimacy. In response to the coup, the NLD MPs who avoided arrest formed the Committee Representing Pyidaungsu Hluttaw (CRPH) on 5 February 2021, which aimed to act as the legitimate legislative body representing the people of Myanmar. The CRPH later declared the 2008 Constitution inapplicable while maintaining continuity for all other legislation in place at the time, adopted the first version of the Federal Democracy Charter (FDC), and established the National Unity Government (NUG) in April 2021, consisting of elected MPs, ethnic group representatives, and civil society leaders, positioning it as the legitimate government.³⁸

The CRPH, with the support of the NUG, has continued to operate, partly from within the country and partly in exile, issuing laws and policies and seeking international recognition. The CRPH and NUG have gained a level of recognition and support from some international entities, though not universally.

International recognition of the 2020 elections and the mandate of the parliament

Various international bodies, including the United Nations, ASEAN and the EU have issued statements and resolutions on the legitimacy of Myanmar's 2020 general elections and the illegitimacy of the

³⁷ The percentages for the share of the popular vote in Myanmar's 2020 general election are derived from the official election results published by the Union Election Commission (UEC) of Myanmar. These results are based on the total number of valid votes cast for each party across all constituencies. However, it's important to note that the UEC did not provide a comprehensive breakdown of the popular vote percentages for all parties at the national level. The percentages mentioned here are estimates commonly referenced in analyses by election observers, political analysts, and organizations that monitored the election, such as the Asian Network for Free Elections (ANFREL) and local civil society groups. These estimates are derived from constituency-level data and aggregated to provide a national overview. The CRPH has published the official results tallies originally released by the UEC, which include detailed constituency-level data. This information is primarily available in Burmese language and provides insights into the total votes received by each party and candidate in specific constituencies.

³⁸ For a list of laws enacted by the CRPH and more on its activities and international relations, see <https://crphmyanmar.org/legislation/>

subsequent military coup in February 2021. The UN has addressed the 2020 elections and the coup through various resolutions and statements by both the General Assembly (GA) and the Security Council (SC).

In June 2021, the UN GA adopted a resolution³⁹ condemning the military's actions following the February 2021 coup. The resolution called upon Myanmar's armed forces to cease violence against peaceful demonstrators and to respect the will of the people as expressed in the November 2020 general election.⁴⁰ In December 2022 the SC adopted Resolution (S/RES/2669), its first-ever resolution on Myanmar, demanding an immediate end to all forms of violence and urging restraint and de-escalation of tensions.⁴¹ The resolution called for the release of all political prisoners, including those detained following the 2020 elections, explicitly naming the elected president, Win Myint and State Councilor Aung San Suu Kyi, and reiterated the need to respect democratic institutions and processes. These UN actions reflect the international community's concern over the disruption of Myanmar's democratic transition following the 2020 elections and underscore the call for the restoration of democratic processes and the protection of human rights in the country.

The Inter-Parliamentary Union (IPU) has consistently supported the legitimacy of Myanmar's elected MPs following the November 2020 elections. In response to the military coup, the IPU condemned the overthrow of the democratically elected government, describing it as a significant setback for democracy and a subversion of the people's will. The IPU has expressed particular concern for the welfare of parliamentarians involved in the CRPH. The IPU has been monitoring reports of human rights violations against these MPs, including threats, intimidation, and arbitrary arrests. In its regular assembly meetings since 2021, the IPU affirmed that the CRPH is the legitimate interlocutor for Myanmar and allowed its members to participate in official IPU activities as observers. Through these actions, the IPU has demonstrated its recognition of the legitimacy of Myanmar's elected MPs and its commitment to supporting democratic institutions in the country.⁴²

An ASEAN Foreign Ministers' Statement (February 2021) expressed deep concern over the political developments in Myanmar, calling for dialogue, reconciliation, and the return to normalcy in accordance with the will and interests of the people of Myanmar.⁴³ ASEAN's Interparliamentary Assembly (AIPA) has largely ignored Myanmar's duly elected MPs contrary to democratically elected parliaments around the world and even the IPU.

The European Parliament in its first post-coup resolution on Myanmar (February 2021) condemned the military coup, calling for the immediate and unconditional release of all detainees, including President Win Myint and State Counsellor Aung San Suu Kyi. The resolution urged the military to respect the results of the 2020 elections and called on EU institutions to impose targeted sanctions against the military leadership. In its Resolution on the Human Rights Situation in Myanmar (October 2021), the European Parliament reiterated support for the CRPH and the NUG as the only legitimate representative of the democratic aspirations of the people of Myanmar. These international responses

³⁹ UN GA Resolution on Myanmar, June 2021

⁴⁰ In December 2022, another GA Resolution (A/RES/78/219) emphasized the importance of inclusive democratic processes in Myanmar. It stressed ensuring equal opportunities for all, including minorities and internally displaced persons, to participate in free and fair elections. The resolution underscored that all individuals should be able to cast their votes and that candidates should have the opportunity to contest elections fairly.

⁴¹ A March 2021 SC Presidential Statement (S/PRST/2021/5) had also expressed support for Myanmar's democratic process, condemned the violence following the coup, and emphasized the need for dialogue and reconciliation.

⁴² IPU Resolutions on Myanmar

⁴³ In its so-called Five-Point Consensus (April 2021), the leaders of the nine other ASEAN member states reached a consensus on five points: immediate cessation of violence, constructive dialogue among all parties, appointment of a special ASEAN envoy to facilitate mediation, provision of humanitarian assistance, and a visit by the envoy to Myanmar. However, implementation has faced challenges, with ongoing violence and limited progress.

reflect a broad condemnation of the military coup in Myanmar and a call for the restoration of democratic processes as reflected in the 2020 elections.

Historical precedents for the continuation of the mandate of the elected MPs

How long can the mandate of an elected parliament be extended? How much beyond the formal constitutional limit can political legitimacy last? Given that it was elected in November 2020 for a 5-year mandate under the now-defunct 2008 Constitution, this is a question the Myanmar parliament will increasingly face in the context of decision-making about its future constitutional set-up, including questions pertaining to federalism. There are some notable historical precedents where parliaments reconvened, at least in part, after the end of occupation or dictatorship.

After the liberation of Europe from Nazi occupation during World War II, provisional assemblies were formed in 1944 and 1945, sometimes consisting of former members of parliament, representatives of the resistance, and various political factions (France) or restoring parliaments in full (Belgium, Netherlands, Norway, Czechoslovakia). In these cases, the reconvened parliaments were often transitional, providing continuity and legitimacy during the shift back to democratic governance. They usually served only until new elections could be organized to restore the full democratic process.

Nepal offers another more recent example of a parliament reconvening after the end of a dictatorship and political turmoil.⁴⁴ After a decade-long civil war between the royal autocratic regime and Maoist rebels, the previously elected House of Representatives, which had been dissolved in 2002, was partially reinstated in 2006 as part of a peace agreement and the end of the monarchical autocracy. The reinstated parliament included a majority of former MPs, as well as representatives of the Maoist rebels who had led a decade-long insurgency, as well as other smaller parties and independent members to ensure broad representation and inclusivity. It acted as Interim Legislature-Parliament which adopted an Interim Constitution in 2007, declared Nepal to be a secular federal republic, and prepared the election of a Constituent Assembly in 2008. Nepal is therefore a good recent example of partial reconvening of its parliament as part of transitional arrangements toward full democracy.⁴⁵

The Federal Democracy Charter and interim institutions

While there is a significant level of international recognition and some historical precedent for parliamentary legitimacy surviving disruption and autocratic intervals, what matters more is how legitimate the elected MPs are perceived by the people of Myanmar who elected them. For this, it is important to understand how the elected parliament can continue to claim legitimacy even though its MPs are persecuted and are either underground or in exile and after the parliament has already declared the constitution under which it was elected as defunct and inapplicable. Also, how can a parliament that was elected as a bicameral union institution claim to represent a union of federated states, that have yet to form a new union constitution in a legitimate democratic process?⁴⁶ Moreover,

⁴⁴ Nepal was under the Panchayat system, an autocratic regime led by the king, from 1960 to 1990, during which political parties were banned, and the parliament was replaced by a system of indirect elections controlled by the monarchy. After a popular movement in 1990, known as the Jana Andolan People's Movement, the monarchy agreed to reinstate multiparty democracy, which restored the parliamentary system.

⁴⁵ There are other relevant examples for parliamentary mandate extensions from around the world including Syria, Zimbabwe, Lebanon and Kuwait.

⁴⁶ The Union Legislature (Pyidaungsu Hluttaw) has repeatedly claimed that it will retain its mandate. For instance, it issued a statement on 1 Feb 2024 in which it stated that it will continue the mandate given by people until a new parliament is formed through a free and fair election.

what legitimacy to the elected state and region assemblies have in representing their respective units, while the de facto situation on the ground has already shifted significantly in recent years?

The illegitimate military regime in control of centralized state structures is opposed by a diverse and nominally pro-democratic movement, which comprises most elected representatives as well as a wide array of civil society and minority ethnic group actors, in particular ethnic resistance organisations with a long history of fighting the state as non-state armed groups. They have formed interim governance institutions at the union (national) level under a Federal Democracy Charter (FDC).⁴⁷

The FDC makes specific reference to claims of legitimacy as a combination of the electoral mandate of 2020 and the participation in the struggle against military dictatorship. It emphasizes that the legitimacy of its institutions is rooted in the 2020 elections. The FDC asserts that sovereignty resides with the people of Myanmar and that the interim union institutions, including the legislature-parliament, derive their legitimacy from the will of the people expressed in these elections. At the same time, the FDC denies any legitimacy to the military coup and the institutions and bodies formed by the military leaders as lacking any democratic mandate.⁴⁸ The institutions generally deliberate and take decisions online using zoom as the preferred platform.

The National Unity Consultative Council (NUCC) is supposed to be the embodiment of the coalition formed to unite various ethnic and political groups in Myanmar, aiming to establish a federal democracy. The FDC outlines the composition of the NUCC, categorizing its members into five primary stakeholder groups:

1. Elected Members of Parliament, including the CRPH. So far, only the NLD MPs and a few smaller ethnic parties have taken up this role, while the SNLD and the ANP MPs have not participated. The FDC defines members of the current legislature those MPs elected in 2020, except those that openly supported the military coup, which excludes the USDP MPs.⁴⁹

2. (Other) Political Parties: This allows other political parties that did not win any seats in the 2020 elections but still oppose the military coup and want to work towards a genuine federal democracy to participate. In practice, this comprises mostly the Democratic Party for a New Society (DPNS), a social democratic party.⁵⁰ The NLD as a party originally participated, but later left this group.

⁴⁷ The FDC was originally adopted by the CRPH in agreement with the NUCC stakeholders in the wake of the coup and endorsed by the People's Assembly in its current version in January 2022. For a comprehensive analysis see International IDEA. (2022). "Myanmar's Federal Democracy Charter: Analysis and Prospects." This analysis explores the Federal Democracy Charter adopted by Myanmar's pro-democracy forces, discussing its implications for the country's future political structure and the challenges ahead.

⁴⁸ The FDC outlines the features of a new federal framework. It mentions "constituting states" and "member states" but does not list or name them. It reserves the rights of these member states to draft and ratify their own constitutions, but does not require them to do so prior to adopting a transitional union constitution. It states that the members states and the people in these states are the original sources/owners of sovereignty, but pools this sovereignty and endows legislative, executive and judicial powers to the Federal Democratic Union, and that the federal constitution is the supreme law of the union. It makes clear that "the legislative power of the Federal Democratic Union for the interim period is vested with Union level members of parliament elected in the 2020 multi-party general elections who are not cooperating with the terrorist military coup clique." Chapter 5, Part 2 of the FDC.

⁴⁹ In addition, a few members of parliament elected in 1990 have formed an association of MPs, which also participates in NUCC meetings. However, these MPs cannot substitute the elected MPs of 2020, who are mandated by the FDC to form the interim legislature.

⁵⁰ The Democratic Party for a New Society (DPNS) was established in 1988, in the aftermath of the 8888 Uprising. Founded by leaders of the All Burma Students League (ABSL), the party aimed to continue Burma's democratic struggle but was suppressed by the military regime. In 2014, the DPNS re-registered as a political party. It participated in the 2015 and 2020 elections but failed to win any seats.

3. Spring Revolution Group and Civil Society Organizations (CSOs): Groups such as labor unions, women's organizations, youth groups, and other civil society entities that advocate for democratic principles and human rights. This is numerically the largest and most vocal group within the NUCC and the People's Assembly, but their representational legitimacy has been questioned.

4. Ethnic Armed/Revolutionary Organizations (EAOs/EROs): Ethnic resistance groups and armed organizations representing various ethnic communities in Myanmar, including the Karen National Union (KNU), Karenni National Progressive Party (KNPP), and others. The relationship between some of the EROs and the NUCC and People's Assembly has been fragile and obscure, and the EROs can only partially claim to carry democratic, representative legitimacy, often preferring to refer to 'de facto' control of territory.

5. Interim State/Federal/Ethnic Representative Committees: Interim bodies formed to represent the interests of different states, federal units, and ethnic groups within Myanmar, ensuring their participation in the governance process. This could in principle be a group representing the emerging federal units. However, in practice the elected state and region assemblies⁵¹ have not participated in this platform, but instead new bodies formed at the state and local levels, some including elected representatives, have composed this group.⁵² In some states (Chin being a notable example) the question of who represents the federal unit in the NUCC/People's Assembly has been fiercely contested.⁵³

In some key areas of its mandate, such as drafting the Transitional Constitution, progress in the NUCC has stalled, largely due to disagreements about membership, legitimacy and the shape of the future decision-making process. The NUCC is not supposed to replace the elected legislature-parliament but relies on the elected members as one of its five stakeholder groups. While the NUCC was formed to develop the design for a federal democratic structure, its internal composition and the extent of participation from various groups have not been fully transparent. The NUCC has faced challenges regarding its representation of all ethnic groups and political factions equally. Additionally, the decision-making processes within the NUCC are often opaque, and it remains unclear how certain factions or groups influence key decisions. The NUCC's ability to engage in open, democratic deliberations has been questioned, as well as the accountability of its actions toward the broader public.

Whereas the NUCC is designed as a permanent body an extended People's Assembly is to be called by the NUCC on a six-monthly basis to take more strategic decisions such as amending the FDC or adopting a transitional constitution. From 27 to 29 January 2022, the first People's Assembly convened, with 388 delegates participating, including elected MPs, political parties, civil society organizations, ethnic resistance organizations, and interim state/federal/ethnic representative committees.⁵⁴ The assembly

⁵¹ In all of the seven regions, and in all states except Rakhine have elected MPs formed state and region assembly committees, in analogy with the CRPH. In the 2020 elections, the NLD was able to increase the proportion of seats won in the state assembly from 45 to 52 percent. The NLD performed particularly well in Chin State, where it won 89 percent, but also increased its share in Kachin and Kayin states. Only in Shan and Rakhine State it did not win a majority of seats. In the seven regional assemblies, the NLD won all seats except all but two in Sagaing and all but 3 in Yangon.

⁵² These are the Karenni State Consultative Council (includes elected MPs), the Mon State Federal Council, and the ICNCC at the level of pre-existing states. In addition, the Ta'ang Political Consultative Council, and the Pa-O National Federal Council (PNFC), which seek to carve out separate entities from Shan State, are formally represented under this category. Only ICNCC and KSCC indicated that they included elected MPs elected in 2020.

⁵³ The dispute is essentially between the Chinland Council, formed on the basis of a so-called Chinland Charter and dominated by the Chin National Front (CNF) and its armed wing, the Chin National Army (CNA), and the Interim Chin National Consultative Council (ICNCC), which was among the founders of the NUCC and NUG. Both include some elected MPs, claim some level of allegiance to the FDC and both collaborate with the NUG.

⁵⁴ A detailed list of participants was never published.

adopted the current, revised version of the FDC. Due to internal disagreements, it took more than two years to reconvene the People's Assembly. It held its second meeting on 4 to 9 April 2024, which aimed to unite various ethnic and political groups in Myanmar to discuss the country's future. 204 delegates and 230 observers attended but only a few of them were MPs elected in 2020.⁵⁵ The assembly concluded amid controversy. Delegates from the NUG and the CRPH declined to participate on the final day, citing procedural irregularities such as digressions from the agreed agenda and the toleration of disrespectful conduct, as well as disagreements over priorities.

The assembly's composition and the subsequent disputes highlight the ongoing challenges in achieving unity among Myanmar's diverse political and ethnic groups, in particular in the quest for political legitimacy. Regarding the representation proportions within the NUCC and the People's Assembly, specific details have not been publicized. It is not known who exactly attended and in what proportion different entities were represented. Voting is supposed to occur by block. Each of the five groups needs to be represented. And the majority of three of the five groups can adopt the decision.⁵⁶ This means that the elected MPs could be out-numbered and outvoted by other NUCC members, whose identity and affiliation remains unknown to the public.

The NUCC and the People's Assembly present a more opaque picture than the CRPH, which draws its mandate and legitimacy from the 2020 election. While the NUCC is known to include a broad coalition of ethnic groups, political organizations, and civil society actors, the identities of many of its members are not publicly disclosed. This lack of transparency is problematic for several reasons. Without knowing who the members of the NUCC are, it is difficult to hold them accountable for their actions. Citizens and international observers may question how decisions are made, who is making them, and whether all groups are fairly represented. The opacity reduces the NUCC's legitimacy in the eyes of the public. Given Myanmar's diversity, it is crucial for all ethnic and political groups to feel represented in these bodies. Without transparency, it is hard to assess whether the interests of marginalized communities or smaller factions within the broader opposition movement are truly being considered. The absence of publicly identifiable members also opens the door to potential internal disputes within the NUCC or the People's Assembly. If the public is unaware of who holds influence within the institution, there is a risk that powerful factions may dominate decision-making in ways that don't reflect the interests of the wider public or marginalized groups.

The lack of public identification of NUCC members is therefore a significant issue, particularly when the body claims to be a representative of the people of Myanmar that decides on a future constitutional framework and the structure of a federal system. Transparency around membership, roles, and decision-making processes would go a long way in improving trust and legitimacy among both the domestic population and international allies.

The CRPH, formed in response to the 2021 military coup, serves as an interim legislature to represent the elected MPs. While its mandate is to reclaim democratic authority, its decisions also often lack the transparency and public consultation that would typically be expected from a legitimate government body. The CRPH's members are known publicly as they consist of MPs elected in 2020. The names of these MPs are well-documented, and they continue to claim legitimacy as the representatives of

⁵⁵ Again, no detailed list of participants was ever published, as many of the participants in the online meeting declined to disclose their identity.

⁵⁶ The Charter is actually unclear about the voting arrangements. It mentions a sufficient consensus of 65% but leaves it open what this percentage refers to. The internal rules of procedure go a bit more into detail but it is questionable to what extent that can be grounded in the FDC's provisions. Ultimately, there is no way of constitutional interpretation that can clarify this, as disputes are to be settled by the NUCC by consensus, rather than through judicial constitutional review.

Myanmar's people. Only some are able to have in-person interactions with their constituencies inside Myanmar and they mostly operate online.

The CRPH's membership is drawn from mostly NLD MPs, but the selection process, internal structure, and specific decision-making processes are not always clear to the public in the same manner as a normal parliamentary process would be. Despite representing the people of Myanmar according to all available surveys conducted in recent years, as well as in the eyes of many in the international community, there have been criticisms about the limited opportunities for public consultations (with the women MPs making efforts to make up for this through townhall meetings⁵⁷) and the absence of clear, documented decision-making procedures within the CRPH.⁵⁸

De facto rule, representation and legitimacy competition in the post-coup period

At the regional and local level, where military control has been pushed back to a large extent, governance actors are often only loosely linked to the FDC and often claim to exercise quasi-state control on the basis of 'de facto' legitimacy. The formation and activities of these interim bodies vary across different states and regions, reflecting the diverse political and ethnic landscape of Myanmar. The kaleidoscope of interim administrative arrangements differ from region to region and has been described in its degrees of formality, effectiveness and legitimacy by various analysts.⁵⁹ The territorial administrative structure of Myanmar is uncertain and may be in flux at this stage. On the one hand, the parliament's clarification on the continuity of the applicable law, certain references in the FDC, and the practice of the NUG indicate that the pre-coup arrangements of the 14 states and regions prevails, albeit with the new terminology of states/federal units.⁶⁰ On the other hand, various armed groups have created a de facto situation and have entertained claims that amount to the creation of new territorial boundaries or state entities.⁶¹

At the national level, the CRPH played a pivotal role in establishing the National Unity Government (NUG) in April 2021, which includes representatives from various ethnic groups and political parties. Mandated by the FDC, the NUG aims to serve as the legitimate union government of Myanmar, opposing the military junta and seeking international recognition. However, the formation of de facto

⁵⁷ The Myanmar Women Parliamentarians Network (MWPAN), formally established on November 2, 2022, is a cross-party alliance comprising over 100 women Members of Parliament (MPs) elected in Myanmar's 2020 general election. This network includes representatives from 13 ethnic groups, with 60% re-elected and 40% serving their first term. MWPAN organizes town hall meetings to listen to constituents and promote inclusive dialogue. These meetings serve as platforms for MPs to hear directly from citizens, understanding their concerns and needs.

⁵⁸ Surveys show consistently high levels of support for the NUG and the CRPH and NLD. See, for instance, International Republican Institute. (2024). National Survey of Myanmar: January – February 2024. Also, International IDEA. (2022). Identities and Politics of Ethnicity in Post-Coup Myanmar. Also, Institute for Strategy and Policy - Myanmar. (2024).

⁵⁹ See for instance, the analysis by Ardeth Thawngmung, in "Agents" of the State or Revolution? Resistance, Accommodation, Violence and the Role of Local Administrators in Post-Coup Myanmar," which examines the complex roles of local administrators in Myanmar following the military coup of February 2021. Published in the journal Democratization in 2024, the study delves into how these administrators navigate their positions amidst nationwide resistance movements.

⁶⁰ The Myanmar version of the FDC contains a footnote to Chapter 8 of Part II (Administration, Legislation and Judiciary of the States/Federal Units (omitted in the official English translation), which can be translated as "The boundaries of State and Region shall be regarded as State and Federal Unit in the interim period given the current political and administrative situation."

⁶¹ This includes the KNU's "Kawthoolei", which purports to include under its districts all or parts of the states and regions adjacent to what used to be defined as Kayah State, but also Karenni State and Kachin State, (which cover part of Shan State), Rakhine/Arakan, which controls and appears to claim the Kaladan valley in Southern Chin State, as well as several entities in Shan State, which as Wa State, Kokang and Taang Palaung.

administrations at the local and regional level is not specifically defined in the FDC and has been left to local dynamics and circumstances.

In addition to the CRPH and NUG, some state and region assemblies formed interim committees to represent their constituencies and continue governance activities. These interim bodies have been involved in organizing local administration, providing public services, and coordinating with resistance groups opposing the military regime. Their roles have been crucial in maintaining a semblance of governance and supporting the pro-democracy movement within their respective regions.

A widely shared goal among diverse stakeholders is to rebuild the state based on democratic and federal principles, drawing a clear line under the historic era of centralized military domination. The FDC already stipulates that the new state structure is to provide a large degree of self-governance to the constituent member states of a new federation. However, the degree of continuity and the shape and form of the new state structures remain unclear and contested. Questions of identity, ethnicity and belonging loom large in a debate about 'bottom-up vs top-down' state building.

The democratic legitimacy and sources of authority for the emerging actors, in particular at the sub-state level is disputed. There is also debate about the balance between continuity with the previous system and revolutionary change, in particular the status of the legal framework and institutional arrangements that predated the coup. Some even question the existence of Myanmar as a state and argue that a new federation of sovereign member states has yet to emerge from a future state-building process. In all of this, the question on who represents whom, at the national, state and local level, and who can decide on fundamental issues such as citizenship and state borders on behalf of the respective populations poses a significant challenge, that is likely to weaken the coherence of the resistance movement and to protract the negotiation process even if military rule can be overcome. Pragmatic requirements for managing a smooth transition appear to run counter to the more ambitious and often mutually exclusive aspirations of some of the ethnic groups' claims.

Towards a Transitional Constitution and a democratic constitution building process

A critical issue in Myanmar's ongoing political struggle is the lack of clarity and transparency in the process for drafting and adopting a future constitution, especially with regard to federalism and democratic legitimacy. The process has become even more complex because of the stalled progress on the FDC and the shift toward a bottom-up federalism process.

The FDC gives the NUCC the mandate to lead the process of adopting a Transitional Constitution, that is to be in effect following the end of military junta rule. This includes the framework for transitional federal governance and ensuring that the process is inclusive of all ethnic groups and political factions. The NUCC set up a Transitional Constitution Working Group that has been stalled for much of the time since its establishment. Its members are not publicly known. As already pointed out above, there is significant opacity around the NUCC's membership and decision-making. The lack of publicly identified members and clear structures has led to concerns about accountability. Without transparency, it becomes difficult for the people of Myanmar to trust that the process is being carried out in their best interest, especially considering that the NUCC claims to represent the citizens of Myanmar.

The process of drafting and adopting a new constitution through the NUCC has been largely stalled. This is due to several factors, including ongoing conflicts, the absence of key stakeholders from the process, and the military's continued control over parts of Myanmar. The inability to move forward with the FDC has left a gap in leadership and decision-making, with no clear way for the elected

representatives (from the CRPH) to drive the process forward. The elected MPs have essentially withdrawn from the process and have been attending TCWG meetings only as observers. The bottom-up federalism process is seen by some as an alternative approach to building a federal system. In September 2024, a group of actors stepped forward announcing an alternative process that has become to be known as “bottom-up” federalism, which aims to adopt Articles of Federal Transitional Arrangements (AFTA), essentially a confederal framework, to be adopted in a Federal Conference. This method is claimed to promote local-level participation, often involving ethnic armed organizations, regional councils, and other grassroots groups in developing the framework for a federal Myanmar.

However, democratic legitimacy of this process is a major concern. Elected representatives have been largely excluded from these discussions. While the bottom-up approach aims to ensure that communities have a say in their future governance, it lacks a centralized, transparent framework to ensure that all groups are equally represented and that the process is genuinely democratic. Local groups and armed organizations may have significant influence, but this could lead to fragmentation or domination by stronger, better-organized groups, especially ethnic armed organizations. If the process is conducted solely at the local level without clear coordination, it risks leaving out important voices from urban centers, smaller ethnic groups, or other marginalized communities.

The democratic legitimacy of the bottom-up process is questioned for several reasons. If the local-level meetings or processes are dominated by specific factions (especially armed groups), it could lead to an outcome that does not reflect the broader population’s preferences and needs, especially those who are not part of these groups. Moreover, without a cohesive central authority overseeing the process, the risk is that Myanmar will end up with a fragmented and inconsistent vision of federalism, where different regions or ethnic groups adopt different models of governance, without clear mechanisms for cooperation at the national level. Finally, the lack of coordination between various groups makes it difficult to establish a common vision for the future of the country as a whole. This disjointed approach can erode public confidence in the process.

To enhance democratic legitimacy, the NUCC and the so-called bottom-up process could benefit from better coordination, communication, and accountability. On both levels, the full involvement at all stages and inclusion in decision-making of elected representatives is crucial. Ensuring that the process remains transparent, that all groups are equally represented, and that the broader public is involved in shaping the future constitution is essential for the credibility of the outcome of this process. In particular, external stakeholders, including international organizations, could play a role in helping to facilitate this process, providing technical support, mediation, and frameworks for inclusivity and transparency.

The bottom-up federalism process has potential at least in a complementary way, and in application of a more flexible approach to state building that implies both a coming-together and holding-together form of federalism, in recognition of the asymmetrical realities of governance and state-society relations across the country. But for it to be democratically legitimate, it needs to address representation gaps, ensure equal participation, and provide clear accountability mechanisms. The lack of transparency in the NUCC, the People’s Assembly and the bottom-up process is a significant barrier to this legitimacy, and until these issues are addressed, the broader public will likely continue to question the process.

Findings and Conclusion

There is an apparent tension between the quest for federalism and democratically legitimate representation. This does not need to be a conflict within the democracy movement, but it bears risks of internal divisions and controversies. Efforts need to be made to bridge the gap and to bring actors with different views and perspectives together and help them to avoid the pitfalls of zero-sum thinking, which surely will be exploited by the military and the opponents of democracy. Legitimacy comes in many forms and can be combined, it does not have to be mutually exclusive. Concepts of “de facto” legitimacy are unhelpful and fall short of satisfying a need for accountability and representation.

The CRPH, the NUCC and the People’s Assembly claim to represent the will of the people of Myanmar, but without clear, publicly available processes for decision-making, accountability, and transparency, questions arise about their legitimacy. Many citizens, especially those in ethnic regions or underrepresented groups, may feel disconnected from these interim institutions or doubt that their interests are adequately reflected. The lack of a formal, participatory decision-making framework can lead to alienation and reduced trust among the broader population, especially with the ethnic diversity in Myanmar, ensuring that the voices of all stakeholders are heard is crucial for building legitimacy and support for these organizations.

While both the CRPH and the NUCC are crucial bodies in Myanmar’s political struggle, their decision-making processes and internal structures, including the relationship between them, need to be more transparent to ensure accountability and inclusivity, and therefore political legitimacy. Moving forward, efforts to clarify membership, decision-making, and the inclusivity of representation would be important to enhance their legitimacy and foster wider support.

Basic transparency is an essential element of representational legitimacy. Citizens ought to know who is taking decisions on their behalf. This is a fundamental aspect of democratic legitimacy, and the lack of transparency regarding the membership and decision-making processes of both the NUCC and the People’s Assembly has indeed been a subject of criticism, especially considering that these bodies claim to represent the people of Myanmar in the context of post-coup governance and on taking major decisions on the road to a federal system. This is different from the CRPH, whose members are publicly known (and often criticized), despite the personal security risks these elected MPs have had to accept in this capacity.

Based on the above analysis, some concrete and tangible recommendations could be drawn for how to approach the federal constitution-building process while maintaining a necessary level of unity among stakeholders, preserving a level of democratic legitimacy for the process and the new arrangements to be agreed and ensuring that common citizens do not suffer from continued uncertainty and conflict.

For any discussions and constitution-making processes, both at the union and at the federal unit level, to be considered democratically legitimate, several steps need to be taken:

1. **Clear Representation:** There must be public clarity on membership and representation in the decision-making bodies. This includes ensuring transparency about who is involved, how decisions are made, and how all stakeholders, including smaller ethnic groups and marginalized communities, are represented.
2. **Inclusive Participation:** The process must be truly inclusive, involving a wide range of political parties, civil society groups, and ethnic factions. Importantly, it should include those outside the ethnic armed organizations, ensuring that urban populations, women, and youth have a strong voice.

3. Public Consultation: While local participation is important, there must be mechanisms for feedback from the wider public. This could take the form of public forums, referendums, or community consultations to ensure that the decisions made at the grassroots level align with the desires of the broader population.

4. Accountability Mechanisms: There should be accountability mechanisms in place that ensure the process is carried out with transparency, and the final decisions reflect the collective will of the people of Myanmar.

At this stage, it is important for the various stakeholders to avoid preemptive strikes and forcing through design solutions out of a temporary tactical advantage, while ignoring larger and longer-term legitimacy questions. Expediency can have a significantly negative effect on the level of legitimacy of the outcome. The stakeholders in the democracy movement and the anti-junta resistance need to accept the need for more inclusive and diverse representation, in particular focusing on the representation of women and young people. Increasing the number of women in the CRPH to the 30 percent already stipulated by the FDC would be a good step in that direction. The focus should be on a legitimate process to design a new constitutional order in the future, under democratic conditions, while focusing on providing effective state services for recovery in the meantime, especially during a challenging transition period. At the same time, there is an urgent need in investing in capabilities for dialogue, negotiation and consensus building.

Altogether, the various groups and forces opposing the military regime can draw on a significant level of representational and democratic legitimacy. But this valuable asset is perishable. Simply referring to past elections and leaders' popularity will not be sufficient to guarantee enduring popular support. At the same time, excluding those who hold elected mandates from actual decision-making is likely to terminally harm the legitimacy of any decisions and structures agreed to by de-facto actors. Any future federal state structure needs a strong democratic legitimacy to function and deliver. Genuine federalism in Myanmar can only succeed if it based on genuinely democratic representation.

Great! Can do a hard edit to reduce overlap with intro and other chapters and a bit of the political theory. Also some footnotes. Some online appendix is possible if necessary. Some of the recommendations very specific to existing institution – can make more general? How would they read in five years – or in 2026 when book is out?

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