

Constitutionalism Before Constitutions: Burma's Struggle to Build a New Order

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In the wake of the constitutional fiasco in Iraq, many have come to believe that constitutional processes should begin only after the essential wounds have been healed.¹ If the wounds have not been healed, the constitutional regime will simply break down. Worse, the constitution might give the world and some inhabitants of the country the illusion that the mission has been accomplished. Perhaps worse still, once one constitutional experiment has gone awry, people might lose their faith in constitutionalism, and future constitutions might become more difficult. The moral of the story is that social integrity should precede constitution making—drafting should not begin too soon.

That conventional wisdom implicitly adopts a particular, fairly narrow conceptualization of the constitutional process: a state-supported, nationwide, formal process of constitution drafting undertaken in the expectation that the resulting document will govern the country in the relative near term.² But the experience of Burma suggests that a different conceptualization is useful in some contexts: the social integration that precedes formal drafting should itself be conceived as a constitutional process.

In at least some cases—and Burma is one—seeking trust, integration, and unity in the abstract may be neither useful nor even possible. Instead, a reconciliation process should seek, quite specifically, to find constitutional common ground well before drafting begins; it should be oriented toward developing a shared constitutional vision that will provide the warring sides with reason to commit to the new proposed regime. As the contending sides come to realize that they might share specific and concrete constitutional desires, they also come to realize that cohabitation might be possible. The

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1. See, e.g., Feisal Amin Rasoul al-Istrabadi, *A Constitution Without Constitutionalism: Reflections on Iraq's Failed Constitutional Process*, 87 TEXAS L. REV. 1627 (2009) (lamenting that premature constitutional drafting in Iraq was "devastating" and arguing that an interim "modus vivendi" should have been put in place to allow "the political elites to engage in confidence-building measures" rather than immediately forcing the parties into a constitutional negotiation "for all the marbles").

2. *Id.* at 1631.

moral of the story is that constitution making (broadly defined) is part and parcel of the creation of social integrity and not merely its consequence.

For years to come, Americans will inevitably mine the experience in Iraq for lessons learned. However, it is possible to overread these lessons. Some, for example, might insist that the imbroglio in Iraq means that Americans should never seek to promote democracy abroad. In fact, though, the experience of the Iraqi War might more realistically suggest that America should find better ways to promote democracy abroad. Similarly, for constitution writing, the lesson of Iraq is not merely that the narrow version of constitutional process should not begin too soon; it is also that the broader version of constitutional process should not begin too late.

In a sense, this Article is a report from the field—reflections based on experience working with the Burmese democracy movement since 2000 and intensively since 2003. At this point, the constitutional-design literature contains fairly elaborate analyses of various substantive topics including the likely effects of different electoral systems,³ of degrees of judicial independence,⁴ and of styles of executive government.⁵ But the literature contains much more limited examinations of the process of constitution making, particularly on securing the participation of all major stakeholders, developing widespread agreement on constitutional fundamentals, encouraging good faith negotiation, and, above all, sustaining a sense of possibility. To help add to the knowledge base, this Article offers a description of the current constitutional process in Burma. My observations are limited to Burma; others may decide whether they are applicable in other contexts.

Part I offers an overview of the constitutional history of Burma to the year 2000. Part II explains the constitutional processes going on today—not only the military government’s “roadmap to democracy” but also the democracy movement’s alternative process (or processes, depending on your perspective). As will become plain, the two processes are very different: the junta’s roadmap has yielded a written constitution that will shortly become the law of the land but which lacks all legitimacy.⁶ By contrast, the democracy movement’s alternative will not become sovereign law anytime soon, but it has set in train social dynamics that might, in the long run, build

3. See, e.g., BENJAMIN REILLY, DEMOCRACY IN DIVIDED SOCIETIES: ELECTORAL ENGINEERING FOR CONFLICT MANAGEMENT 10–12 (2001) (arguing that ethnically fragmented polities can achieve political stability through constitutional electoral-engineering mechanisms that provide incentives for political leaders to reach across ethnic divides and offer more moderate policy choices).

4. See, e.g., TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003) (examining constitutional courts in Taiwan, Korea, and Mongolia and concluding that these courts have become a real constraint on government).

5. See, e.g., CINDY SKACH, BORROWING CONSTITUTIONAL DESIGNS: CONSTITUTIONAL LAW IN WEIMAR GERMANY AND THE FRENCH FIFTH REPUBLIC (2005) (studying the semi-presidential systems of Weimar Germany and the French Fifth Republic).

6. See *infra* subpart II(A).

the conditions necessary for genuine constitutional rule.⁷ Part II also describes the involvement of the Center for Constitutional Democracy (CCD),⁸ which I direct, in the process so that the reader can have a sense of the experience on which the Article rests.

Part III argues that the democracy movement's process should rightly be understood as constitutional in nature—even though the movement is not a sovereign government and cannot conduct a systematic, nationwide canvass of the popular will. To be sure, in all likelihood, none of the draft constitutions currently in circulation will ever become the sovereign law of Burma. Nonetheless, the process of writing, reading, and negotiating over constitutional language allows the movement to undertake certain vital tasks that are part of the constitutional project and that make other parts possible.⁹ The process has undertaken the following tasks:

- To allow elites from different groups to develop relationships oriented around ideas rather than solely around power—relationships that can help make a constitutional settlement possible and preserve it in difficult times;
- To build up consensus piecemeal across groups, beginning with uncontroversial common ground, so as to nurture trust before entering contested territory;
- To discourage symbolic politics and encourage focus on substantive governance issues;
- To ensure the participation of stakeholders who, though a minority, will nonetheless have the power to wreck a constitutional settlement if they have felt sidelined;
- To educate the democracy movement in constitutionalism so that it can effectively negotiate a settlement when it comes time to go to the bargaining table;
- To build democratic structures, practices, and knowledge at the grassroots level so that resistance groups—who are de facto governing parts of Burma right now and who will be even more significant after a nationwide transition to democracy—can become more open, democratic, and accountable;
- To help coordinate resistance to the junta through a clear, long-term, shared vision of what Burma might become;
- To provide support, companionship, and, above all, to sustain hope.

7. See *infra* subpart II(B).

8. Further information about the CCD can be found on our Web site, <http://ccdps.indiana.edu/>.

9. See *generally* Center for Constitutional Democracy, *Democratic Constitutionalism in Burma*, <http://ccdps.indiana.edu/projects/burma.shtml> (describing the vision of moving Burma closer to democracy).

I. Burmese Constitutionalism Before 2000

The mass media commonly portray the conflict in Burma as a simple struggle between the forces of democracy (embodied by Daw Aung San Suu Kyi) and those of military dictatorship (embodied in the State Peace and Development Council, or SPDC, and especially its head, Senior General Than Shwe).¹⁰ This portrait allows for a story that is both morally compelling and easily comprehensible. Unfortunately, it is so oversimplified as to be dangerously misleading.

The roots of Burma's problems go back much further than the military takeover. Upon independence, Burma adopted a democratic constitution that concentrated power in the central government.¹¹ Some of Burma's ethnic groups then took up arms against the powers in Rangoon, demanding either independence or federalism, and civil war erupted.¹² Only then did the army seize power, on the grounds that only military government could save the country from dismemberment.¹³ In other words, Burma's problems do not originate in a simple contest between democracy and autocracy; instead, they grow from a struggle among identity groups concerning constitutional power sharing. And Burma will have neither democracy nor peace unless a new constitution successfully addresses that struggle. The ethnic minorities profoundly believe that only constitutional reform will offer them a better future, and they have been actively engaged in a decade-long discussion about the best constitutional structure for Burma.

Before the arrival of the British, no regime had ever successfully integrated the whole area now covered by the Union of Myanmar.¹⁴ Instead, the people in that area had been divided into identity groups defined by a mélange of elements such as descent, language, religion, political affiliation, and, above all, mutual recognition.¹⁵ Many Burmese people consider these identities ethnic in nature. The political history of these groups is very complicated, but three elements of that history are especially important for modern constitutional purposes. First, people tended to live in polities identified with particular identity groups.¹⁶ Second, the people in southern and central Burma—particularly the Burmans, Mon, Rakhine, and Shan—

10. See, e.g., Editorial, *Democracy, Burma-Style*, WASH. POST, May 4, 2008, at B6 (characterizing the political situation in Burma as a conflict between proponents of democracy, such as Aung San Suu Kyi, and the military junta); Seth Mydans & Mark McDonald, *Court Case of Dissident Under Way in Myanmar*, N.Y. TIMES, May 19, 2009, at A6 (reporting on the currently ongoing trial of Suu Kyi for violating the terms of her house arrest and casting her as the symbolic leader of all opposition to the government).

11. MARTIN SMITH, *BURMA: INSURGENCY AND THE POLITICS OF ETHNICITY* 79–80 (2d ed. 1999).

12. BERTIL LINTNER, *BURMA IN REVOLT: OPIUM AND INSURGENCY SINCE 1948*, at 210 (1999).

13. *Id.* at 29.

14. SMITH, *supra* note 11, at 38–39.

15. *Id.*

16. *Id.* at 30–31.

generally organized themselves into kingdoms,¹⁷ but other ethnic groups—such as the Karen, Karenni, Chin, Kachin, Pa-O, Wa, and many others—generally governed themselves at the tribal level.¹⁸ Third, the various kingdoms strove against each other for dominance, and they frequently sought to dominate the village-based groups on their borders.¹⁹ In the last several centuries, the majority group, called the Burmans, was most active in seeking to extend its rule.²⁰ The SPDC frequently associates itself with great Burman generals who brought new areas into the Burman kingdom.

Different Burmese groups tend to tell different constitutional stories with different morals, and the role of the British is an especially divisive subject. In three separate, relatively short wars, the British conquered all of Burma except the Karenni, with whose leaders they concluded separate agreements.²¹ Initially, all Burmese people fought against the British, but after the conquest, the different groups had different experiences and now have different memories of the time.²² The British directly ruled central Burma—“Burma Proper.”²³ By contrast, they ruled the “Frontier Areas” only indirectly, allowing local leaders to remain in place.²⁴

The Burmans lived primarily in central Burma.²⁵ Their leaders tended to see themselves as the proud inheritors of an ancient civilization and the natural overlords of the region.²⁶ They had been seeking to assert control over neighboring groups, whom they regarded, for the most part, as inferior.²⁷ Indeed, the British first invaded in response to Burman forays into the area now covered by Assam and Manipur in northeastern India.²⁸ Burman leaders characteristically strove against each other for preeminence, but, at the same time, Burmese authority patterns were strongly hierarchical with all lines leading upward to the king.²⁹ And then the British, who tended to be arrogant and condescending, had easily conquered the country and planted their boots firmly on Burman necks, even invading the royal palace

17. *Id.* at 32.

18. *Id.* at 33.

19. *See id.* at 32 (describing both the way in which power oscillated with “great frequency” among the kingdoms and the way in which the kingdoms imposed taxes, levies, and slave raids on the hill peoples).

20. *Id.* at 109–12.

21. *Id.* at 42.

22. *Id.* at 41–42.

23. *Id.*

24. *Id.* at 42–43.

25. LINTNER, *supra* note 12, at xiv.

26. THANT MYINT-U, *THE RIVER OF LOST FOOTSTEPS: HISTORIES OF BURMA* 62 (2006).

27. *Id.*

28. *Id.* at 109–13.

29. CHRISTINA FINK, *LIVING SILENCE: BURMA UNDER MILITARY RULE* 15–16 (2001).

and exiling the king.³⁰ The experience of humiliation was devastating, and the Burmans burned to throw out the oppressor.³¹

By contrast, the ethnic minorities tell much more positive stories of their time with the British. Most minorities lived in the Frontier Areas, so they experienced only indirect rule. And many now recount that the arrival of the British felt like liberation from the hated Burman overlords.³² Even the Karen, who lived in Burma Proper and whom the British therefore ruled directly, much preferred the British gavel to the Burman yoke.³³ The British disproportionately enlisted ethnic minorities into the army, so Burmans daily witnessed ethnic minorities consorting with the British oppressors.³⁴ English-speaking Protestants evangelized some minority groups,³⁵ who now attach great significance to their faith. As a result of these encounters, many ethnic minorities have traditionally looked to the outside for help, support, and advice. By contrast, the Burmans turned inward, becoming more and more suspicious of outside influences.³⁶

The Burmans and some other Burmese people became increasingly restive during the 1920s and 1930s,³⁷ but World War II changed everything. The Japanese invaded and drove out the British, who retreated to India with the help of ethnic minorities.³⁸ Later, the minorities fought guerrilla campaigns against the Japanese—the Japanese imperial expansion met its very first impasse anywhere when it ran into the Kachins—and helped the British and American armies prepare for a counterinvasion.³⁹ By contrast, the Burmans, including Major General Aung San, joined forces with the Japanese, in line with the Japanese contention that Asians should unite to fight European colonialism.⁴⁰ They accordingly saw the minorities as traitors, and there is good evidence that the Burmese army committed atrocities against them, at times being restrained only by the Japanese governors who wanted to pacify the population.⁴¹ But the Japanese occupation turned out badly for the Burmans: like the British, the Japanese tended to be

30. MYINT-U, *supra* note 26, at 18–22.

31. *Id.* at 28.

32. See SMITH, *supra* note 11, at 43 (referring to what has been called the “*pax Britannica*” or British pacification).

33. MYINT-U, *supra* note 26, at 211.

34. SMITH, *supra* note 11, at 44.

35. *Id.* at 44–45.

36. *Id.* at 45–46.

37. CLIVE J. CHRISTIE, A MODERN HISTORY OF SOUTHEAST ASIA: DECOLONIZATION, NATIONALISM, AND SEPARATISM 59 (1996).

38. See WILLIAM SLIM, DEFEAT INTO VICTORY 89–110 (Cassell & Co. Ltd., 2d ed. 1956) (chronicling the evacuation from Burma to India).

39. See CHRISTOPHER BAYLY & TIM HARPER, FORGOTTEN ARMIES: THE FALL OF BRITISH ASIA, 1941–1945, at 204–06, 279, 352–53 (2004) (recounting the Kachin resistance to the Japanese as allies of the Allied nations).

40. MYINT-U, *supra* note 26, at 228–30.

41. SMITH, *supra* note 11, at 62–63.

arrogant and condescending, and they increasingly ignored the puppet government.⁴²

Finally, after the Allies had commenced their long drive back to Rangoon and the Japanese army had fallen into disarray, the Burmese army and Aung San switched sides and donned British uniforms.⁴³ The SPDC now claims that the Burmese army drove out the hated Japanese, but in fact, the Burmans joined the British only after the Japanese had been broken.⁴⁴ There is no evidence that the Burmese army participated in any significant military encounter, but there is evidence that atrocities against minorities continued.⁴⁵ The Karen were special victims.⁴⁶

Immediately after the War, it became plain that the British intended to leave;⁴⁷ the only questions were how soon and what they would leave behind them. The Burmans favored an immediate departure,⁴⁸ but the ethnic minorities wanted the British to stay long enough to develop a constitution that would protect them against the Burmans.⁴⁹ Some British officials apparently promised the minorities that they would not abandon their wartime allies.⁵⁰ The British government encouraged Aung San to negotiate with the minorities, especially those outside Burma Proper.⁵¹ At Panglong, Aung San offered some of them a degree of local government under a federal constitution, although what was said at Panglong and what was meant have been endlessly parsed and debated.⁵² The Karen did not participate in the Panglong conference or subsequent negotiations in part because they were in Burma Proper, so federalism for the scheduled areas would not have helped them much.⁵³ Many preferred independence in any event.⁵⁴ For similar reasons, the Mon and the Rakhine also played only a limited role in the process.⁵⁵ In addition, some Burmans thought that the Mon and the Rakhine

42. MYINT-U, *supra* note 26, at 234–35.

43. SLIM, *supra* note 38, at 484, 515–20.

44. *See id.* at 479–85 (reporting the demise of the Japanese and the subsequent development of the British recruitment of the Burma National Army); *see also id.* at 518 (retelling a conversation between Slim and Aung San in which Aung San admitted only coming to the British because they were winning).

45. SMITH, *supra* note 11, at 62.

46. *Id.*

47. *Id.* at 65.

48. *Id.* at 66.

49. LINTNER, *supra* note 12, at xiv.

50. SMITH, *supra* note 11, at 72.

51. MYINT-U, *supra* note 26, at 247–48.

52. SMITH, *supra* note 11, at 78.

53. *Id.* at 79.

54. *See* MYINT-U, *supra* note 26, at 253 (stating the Karen leaders wanted a separate Karen state in the British Empire, similar to Pakistan); SMITH, *supra* note 11, at 85–87 (discussing demands by the Karen National Union (KNU) for a Karen Autonomous State and the KNU's military preparations for independence).

55. SMITH, *supra* note 11, at 79.

were really part of an extended Burman race,⁵⁶ so Aung San might have been less open to their pleas for home rule.⁵⁷

Aung San poured most of his energy, however, not into constitution making but into efforts to hasten the British departure and to secure his own preeminence in the Anti-Fascist People's Freedom League (AFPFL) Party.⁵⁸ The 1947 AFPFL draft constitution did, however, promise some degree of federalism to some of the ethnic minority states;⁵⁹ whether the government would have made good on that promise is less clear.⁶⁰ In any event, Aung San and some of his close associates were assassinated,⁶¹ and the new Burman leaders substituted a constitution with very little federalism except for a guarantee that after ten years, the Shan state and Karenni state could secede from the union.⁶²

World opinion has repeatedly decried events in Burma since 1962—particularly developments since 1988⁶³—but the die was already cast in 1948. Looking backward, one feels a great desire to warn the Burmese leaders that their new Constitution will lead directly to decades of civil war. Rehearsing these events again is like watching a train wreck in slow motion, with neither the passengers nor the crew having any idea what is about to befall them.

Subsequent events are more familiar. As leaders struggled for preeminence, Burmese political parties split.⁶⁴ The other parties barred the

56. *See id.* at 30 (citing the 1931 census, which included the Rakhine as part of the Burman ethnic family); *id.* at 31 (“Much of the Burman population in Lower Burma consists of assimilated Mons and Karens.”).

57. *See id.* at 80 (recounting that Aung San persuaded certain Rakhine leaders to join his “united national organisation” because of the “urgency of the situation”); *id.* at 82 (noting that while Aung San claimed to “accept Arakanese demands for statehood,” he argued against Rakhine demands for autonomy because they might “create the impression of disunity” and “delay the declaration of independence”).

58. *See* SLIM, *supra* note 38, at 519 (arguing that Aung San’s bargaining position “was obviously not altogether the solicitude of a general for his men, but the desire of a politician to retain personal power in postwar Burma”).

59. SMITH, *supra* note 11, at 78.

60. *Id.*

61. LINTNER, *supra* note 12, at xiii.

62. *See, e.g.,* 2 UNIVS. HISTORICAL RESEARCH CTR., THE 1947 CONSTITUTION AND THE NATIONALITIES 170–71 (1999) (describing a resolution adopted by the Elders of the Karenni State that the Karenni people would have the right of secession “from any union if it fails to safeguard” their welfare); *see also* FINK, *supra* note 29, at 22 (noting that, under the original constitution, “the Karenni and Shan states were accorded the right to secede after ten years if they were not happy with their status in the union”); SMITH, *supra* note 11, at 79 (“The result was a Constitution as lopsided and riddled with inconsistencies as any treaty drawn up in the era of British rule. In short, it was a recipe for disaster.”).

63. *See, e.g.,* SMITH, *supra* note 11, at 1–26 (discussing the causes and unfolding of the Burmese Crisis of 1988 in which an uprising of students on August 8, 1988 led to a harsh government response and an eventual “coup” by the army, killing around 10,000 people); Mydans & McDonald, *supra* note 10 (noting that, in response to the junta’s trial of Suu Kyi, Western countries are continuing or even tightening their economic sanctions on Burma).

64. SMITH, *supra* note 11, at 107.

Communist Party of Burma from office, so it went into armed resistance.⁶⁵ Because the constitution granted them no self-rule, the Karen also took up arms,⁶⁶ and at one point, their forces came almost within sight of Rangoon.⁶⁷ More Karen joined the resistance when the Burmese army purged its Karen officers.⁶⁸ As the 1950s wore on, more groups went into resistance.⁶⁹ In 1957, at the civilian government's invitation, the military took control for a period of months.⁷⁰ In the late 1950s, the Rangoon government declared Buddhism the state religion (remember that many of the ethnic groups were and are heavily Christian), and in response, ethnic leaders met in Taunggyi to demand greater federalism and to call for disestablishment.⁷¹ Then, in 1962, the military took control again—this time for good and at its own initiative.⁷² The army commander, Ne Win, came to dominate the government and the country.⁷³ Many Burmans in central Burma accommodated themselves to the new regime,⁷⁴ but the ethnic groups went on fighting even after the demise of the Communist Party of Burma.⁷⁵ Eventually, every major ethnic group would field a significant resistance force.⁷⁶ Most demanded independence from Burma.⁷⁷

From 1962 until 1973, the military governed without a constitution. In 1973, it adopted a socialist constitution, borrowing from the Yugoslavian Constitution but purportedly exemplifying the distinctively “Burmese way to socialism.”⁷⁸ The players remained the same, but the economy got worse. In the 1980s, the military dictator demonetized a number of currency notes, and because many Burmese kept their savings in currency, they were financially wiped out.⁷⁹ Unrest began to grow in central Burma, and it erupted in 1988 after an altercation between students and soldiers.⁸⁰ Protests spread across all sectors of society and most cities and towns.⁸¹ Aung San's daughter, Aung

65. *Id.* at 106.

66. *Id.* at 110.

67. LINTNER, *supra* note 12, at 15.

68. SMITH, *supra* note 11, at 118; Win Min, *Looking Inside the Burmese Military*, 48 *ASIAN SURVEY* 1018, 1021 (2008).

69. SMITH, *supra* note 11, at 188.

70. LINTNER, *supra* note 12, at 143–45.

71. SMITH, *supra* note 11, at 192.

72. LINTNER, *supra* note 12, at 169.

73. SMITH, *supra* note 11, at 196–97.

74. *Id.* at 203–04.

75. *Id.* at 273–76.

76. *See, e.g., id.* at 94, 93–94 (chronicling the Kachin Independence Organisation insurrection, the Kayan nationalist movement, and the Lahu rebellion, among other “internal wars”).

77. *See, e.g.,* FINK, *supra* note 29, at 28 (describing the difficulty of negotiating with the Shans and Karennis who were threatening secession).

78. SMITH, *supra* note 11, at 28, 199.

79. *Id.* at 25–26.

80. LINTNER, *supra* note 12, at 373.

81. *Id.*

San Suu Kyi, who had been living in the United Kingdom but had returned to Rangoon to visit her mother, became a leader of the protests.⁸² Eventually, to general surprise, the military government allowed one election in 1990, which it lost overwhelmingly to Suu Kyi's National League for Democracy (NLD).⁸³ At that point, the military declared that the point of the election had been to choose members of a constituent assembly, not a legislature.⁸⁴ It convened the newly elected representatives as its National Convention to write a constitution, but when the government refused to allow the assembly to speak, discuss, and draft freely, the NLD and others walked out.⁸⁵ At that point, the Convention became a sham, completely controlled by the government.

After the 1990 election, many democratic activists fled Burma or went underground. Some Burman democrats sought refuge with the ethnic resistance groups, who had gone on doggedly fighting.⁸⁶ For the first time, some Burman and non-Burman opponents of the regime joined hands, found common ground, and tried to work together,⁸⁷ though deep divisions remained.⁸⁸ At the same time, the regime has suffered intense international opprobrium for its responses to the Saffron Revolution and Cyclone Nargis,⁸⁹ but it remains in control of much of the country.⁹⁰

II. Burmese Constitutional Processes Since 2000

Burma has struggled with almost every constitutional issue at one time or another, but two have dominated for decades: the role of the military and the role of the ethnic minorities. Both the SPDC and the pro-democracy groups have created processes to produce a draft constitution for the country.⁹¹ The processes have often been portrayed as rivals to each other, as the SPDC and the democracy movement have sought the favor of the

82. *See id.* at 374 (recounting how the pro-democracy movement organized as the National League for Democracy and appointed Aung San Suu Kyi as general secretary).

83. SMITH, *supra* note 11, at 412–14.

84. *Id.* at 414–15.

85. MYINT-U, *supra* note 26, at 337–38.

86. *Peace of a Sort: Myanmar*, *ECONOMIST*, Oct. 9, 1993, at 36.

87. *Id.*

88. *See id.* (describing the military government's success in fracturing the alliance between students and ethnic rebels).

89. *No Shelter from the Storm: Cyclone in Myanmar*, *ECONOMIST*, May 10, 2008, at 49.

90. *See id.* (describing how, following Cyclone Nargis, the military government remained committed to its scheduled vote on the proposed constitution and was expected to coerce a yes vote on its ratification).

91. *See* SMITH, *supra* note 11, at 416, 415–16, 438–39 (recounting the SPDC's establishment of the National Convention in the mid-1990s to draw up guidelines for a new constitution and to deal squarely with the "ethnic question," and describing the NLD's proposal for an alternative process to return to the spirit of the 1947 AFPFL draft constitution).

international community for their respective projects.⁹² But the processes are very different. The SPDC's process has been very tightly regimented; the resistance groups' processes have been multiple, confused, and at times chaotic. The primary substantive goal of the SPDC's process has been to keep the military in power.⁹³ The substantive goals of the democracy movement's processes have included civilian government, ethnic power sharing, federalism, and democracy, but leaders have sharply disagreed over the relationships among these goals.⁹⁴ The primary procedural goal of the SPDC's process has been to write a constitution that will govern Burma;⁹⁵ the primary procedural goal of the resistance groups' processes has been to build a unified movement.⁹⁶

A. *The SPDC Process*

As mentioned above, after its loss in the 1990 election the military government declared that the purpose of the election had never been to choose a legislature. Instead, the point had been to elect a constituent assembly to draft a constitution under whose authority legislative elections could occur.⁹⁷ The regime then summoned the newly elected representatives to its National Convention, along with a greater number of members handpicked by the government.⁹⁸ Some entertained a hope that the Convention, composed of duly elected legislators, might be allowed to draft a democratic constitution, genuinely reflective of the will of the people.⁹⁹ That hope was

92. *See id.* at 439 (stating that NLD officials, who had set up an alternative constitutional process, "never publicly accepted the deliberations at the [SPDC's] National Convention . . . which, they claimed, were secretive and the result of discussions between armed protagonists"); Robert H. Taylor, "One Day, One Fathom, Bagan Won't Move": *On the Myanmar Road to a Constitution*, in MYANMAR'S LONG ROAD TO NATIONAL RECONCILIATION 3, 6 (Trevor Wilson ed., 2006) (observing how the 2003–2004 National Convention convened by the SPDC created a cleavage between those nations, like Thailand, that were "willing to concede the necessity for external engagement with the political process within Myanmar" and those, like the United States and the United Kingdom, that were "judgmental critics" of the regime and sympathetic to Suu Kyi's pro-democracy movement).

93. MYINT-U, *supra* note 26, at 338.

94. Martin Smith, *Ethnic Participation and National Reconciliation in Myanmar*, in MYANMAR'S LONG ROAD TO NATIONAL RECONCILIATION, *supra* note 92, at 38, 64–65.

95. *See* HUMAN RIGHTS WATCH, VOTE TO NOWHERE: THE MAY 2008 CONSTITUTIONAL REFERENDUM IN BURMA 6 (Elaine Pearson et al. eds., 2008), available at http://www.hrw.org/sites/default/files/reports/burma0508_1.pdf ("The SPDC's draft Burmese constitution is not designed to bring about a real transition to democratic rule; its clauses demonstrate that the document's purpose is to continue military dominance of Burma with a civilian face . . .").

96. *See* Smith, *supra* note 94, at 64 (observing that the various resistance groups were willing to compromise in order to facilitate the process of drafting a constitution).

97. *See* SMITH, *supra* note 11, at 415 (describing how the regime skirted its obligations).

98. *See* HUMAN RIGHTS WATCH, *supra* note 95, at 4 (recording that, of the 702 total delegates, only 106 were elected in 1990, with the remaining 596 "handpicked by the generals to 'represent' workers, peasants, intellectuals, national races, and the army, plus 'specially invited persons'").

99. *See* FINK, *supra* note 29, at 83 (noting the initial optimism among the delegates); *see also* SMITH, *supra* note 11, at 429 (describing the persistence of the NLD, which remained involved in the Convention until 1995 despite the imprisonment and harassment of Suu Kyi and other leaders).

short-lived: the junta placed severe restrictions on the right of participants to discuss issues,¹⁰⁰ it completely forbade the discussion of constitutionalism outside the Convention,¹⁰¹ and it delivered to the Convention a detailed set of constitutional principles that any draft constitution would be required to reflect and that would ensure that the military retained determinative power.¹⁰²

Because of these restrictions, the NLD, which had won the election, refused to participate, and even some non-NLD representatives followed it out of the Convention.¹⁰³ Many of these walkouts fled the country to form part of the expat democratic resistance¹⁰⁴—the regime imprisoned others.¹⁰⁵ The SPDC then handpicked additional participants, specifically including leaders of ceasefire-resistance groups,¹⁰⁶ some of whom accepted the invitation so as to influence or disrupt the process from within. When those groups demanded a platform within the Convention, the SPDC suspended the process for long periods of time.¹⁰⁷

100. See FINK, *supra* note 29, at 84–85 (repeating a firsthand account recalling that the junta had preset the substantive agenda, ignored suggestions by the non-SPDC delegates, spied constantly on the delegates, and carefully controlled what delegates said in public).

101. See *id.* at 83 (recording the regime’s ban on any outside discussion of the Convention’s procedures); HUMAN RIGHTS WATCH, *supra* note 95, at 5 (documenting a variety of restrictions on communication by the delegates, including a rule that all delegates were forced to clear all statements with the military-controlled National Convention Convening Commission, which essentially forbade “anything remotely at odds with the aims of the generals” and sentenced violators to long periods of imprisonment).

102. See SMITH, *supra* note 11, at 425 (“[I]t was made very clear in the six guiding principles which the National Convention would have to endorse, that, whatever the eventual form of constitution, the ‘leading role of the [army]’ would be mandatory in ‘national political life.’”).

103. See *id.* at 430 (noting that the NLD party leadership withdrew from the National Convention); see also Trevor Wilson, *Overview to MYANMAR’S LONG ROAD TO NATIONAL RECONCILIATION*, *supra* note 92, at xix, xxi (pointing to the Shan Nationalities League for Democracy as an example of another group that was forced out of the Convention).

104. See FINK, *supra* note 29, at 85 (describing the flight of one convention delegate, Daniel Aung, to Thailand); Win Htein, *Dialogue or Devastation in Burma*, in *BURMA FILE: A QUESTION OF DEMOCRACY* 85, 87 (Soe Myint ed., 2003) (recording that in 2000 there were twenty-two of the elected delegates in exile working for the U.S.-based National Coalition Government of the Union of Burma).

105. See Htein, *supra* note 104, at 87 (recording that forty-three elected delegates were in prison as of the year 2000); HUMAN RIGHTS WATCH, *supra* note 95, at 17 (“Dr. Aung Khin Sint, an NLD delegate, and his colleague U Than Hla were arrested for disseminating speeches delivered to the convention . . .”); see also SMITH, *supra* note 11, at 430, 436 (noting the continual arrests of a variety of key pro-democracy figures throughout the late 1990s, with at least eighteen of them dying in custody).

106. See SMITH, *supra* note 11, at 440–41 (discussing the effect of the government’s ceasefire efforts, which included invitations to join the National Convention deliberations).

107. See HUMAN RIGHTS WATCH, *supra* note 95, at 17–18, 21 (stating the National Convention was suspended in 1996 soon after the NLD walkout and not resumed until 2003, and that by July 2007 there had been a total of thirteen suspensions in fourteen years).

The process dragged on for years, and many came to the conclusion that the regime would never willingly adopt a constitution.¹⁰⁸ The delay seemed strange because the Convention's only job was to implement pre-given principles that settled every controversial question to the military's advantage.¹⁰⁹ Then, to the surprise of many, the Convention announced that it had completed its work, and the junta held a referendum on the document in May of 2008.¹¹⁰ After the referendum, to no one's surprise, the SPDC concluded that the people of Burma had overwhelmingly voted to adopt the new Constitution.¹¹¹ Outside observers have attached less significance to the referendum for various reasons: before the election, the political wing of the army visited many homes to "encourage" citizens to vote yes;¹¹² the junta offered the citizenry only an up/down vote so that the choice was between the new Constitution or unchanged military domination;¹¹³ there were widespread reports of vote fraud and voter intimidation at the polls;¹¹⁴ and the referendum took place in the immediate aftermath of Cyclone Nargis, so voting could not even be held in large areas of Burma.¹¹⁵

In brief, the new Constitution ensures that the military will retain essentially unchecked power. It will appoint twenty-five percent of every legislature,¹¹⁶ enough to block constitutional amendments, which require seventy-five percent of the legislators.¹¹⁷ It will control the Ministries of

108. See, e.g., FINK, *supra* note 29, at 86 (speculating that the generals were using the ongoing process as an excuse not to transfer power to a civilian government).

109. See *id.* at 85 (recording the frustration of the delegates, who were forced to participate in a charade as they pretended to draft a constitution that the military had already written for them).

110. *Id.* at 6 (reporting that the SPDC announced on September 3, 2007 that the National Convention was completed and that on February 19, 2008 announced it would hold a referendum on the draft constitution in May 2008).

111. Announcement No. 10/2008, Commission for Holding the Referendum, Union of Myanmar (May 15, 2008), available at <http://www.mofa.gov.mm/news/Announcements/15may08.html> (claiming that of 22,496,660 votes cast 20,786,596 were "Yes," 1,375,480 were "No," and 334,584 were cancelled).

112. See, e.g., HUMAN RIGHTS WATCH, *supra* note 95, at 3 (reporting on the arrest of individuals that urged voters to reject the new Constitution).

113. See *Disaster in Myanmar*, N.Y. TIMES, May 7, 2008, at A26 (recognizing that the referendum "will effectively leave the military in control anyway").

114. See, e.g., *When It Comes to Politics, Burmese Say, Government Is All Too Helpful*, N.Y. TIMES, May 28, 2008, at A6 (relating the account of an official at a government-run company who stated that its 1,000 employees had not actually voted because the company had marked ballots for them).

115. See Tom Hundley, *In the Cyclone's Wake*, CHI. TRIB., June 8, 2008, at C19 (reporting that despite the "dimensions of this catastrophe," the military leaders insisted on going ahead with the referendum vote on the new Constitution).

116. See CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR ch. III, § 109, translated in 12 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Rüdiger Wolfrum & Rainer Grote eds., 2009) (requiring the 440-member legislature to include 110 representatives "who are members of the Defense Services nominated by the Commander-in-Chief of the Defense Services").

117. *Id.* ch. XI, § 436(b).

Defense, Border Affairs, and Home Affairs.¹¹⁸ The military will have the power to carry out its mission completely free of interference from anyone. Because the Constitution defines that mission very broadly—it includes protection of the Constitution and safeguarding of the union from all enemies external and internal—the military will be free to do whatever it wants, and the civilian government will govern only in compliance with the wishes of the commanders.¹¹⁹ If the military ever tires of civilian government, even in its lapdog role, it has essentially unchecked power to declare a state of emergency and dissolve the civilian government altogether.¹²⁰ In other words, the Constitution gives the military the power to seize control just as it did in 1961—and this time the seizure will be legal.

Formally, the new Constitution is federal in that it creates states and gives them powers that may not be taken away except by constitutional amendment.¹²¹ The junta has often denounced ethnic demands for federalism as tantamount to a desire to break up the country.¹²² It is therefore surprising that the junta should itself author a federal constitution. It is less surprising that the President of the country will appoint the executive and judicial branches of state governments and that the state legislatures will possess very few powers.

The first elections under the new Constitution will occur in 2010.¹²³ Even in the unlikely event that the elections are free and fair, they will be meaningless because the military will still be pulling the strings. The regime has offered the form but not the substance of democracy; the Constitution is an empty gesture, apparently to placate international calls for reform.

Opposition groups must now decide whether to participate in the elections. They are faced with a difficult calculation. On the one hand, there is a small chance that the elections might lead to change. Even though the Constitution will not shift power in any important way, it might open up a little political space such that newly elected legislators might start a political

118. *See id.* ch. V, § 232(b) (mandating that the President appoint the Ministers of Defense, Border Affairs, and Home Affairs from a list of members of Defense Services nominated by the Commander-in-Chief of the Defense Services and permitting the Commander-in-Chief to make the appointments himself if he desires to do so).

119. *See id.* ch. I, § 20 (declaring the rights and responsibilities of the military to include “safeguarding the non-disintegration of the Union, the non-disintegration of National solidarity and the perpetuation of sovereignty” and “safeguarding the Constitution”).

120. *Id.* ch. XI, §§ 418–420.

121. *See id.* ch. I, §§ 12, 17, 18 (providing for the division of legislative, executive, and judicial power to be divided among the Union and state governments); *see also id.* ch. II (establishing the seven regions, seven states, and the Union territories).

122. SMITH, *supra* note 11, at 418. For full disclosure, I should reveal that the New Light of Myanmar, the SPDC’s propaganda press, has several times condemned me by name for supporting groups who want to split the nation.

123. *See Myanmar Trial Opened to the Media*, WALL ST. J., May 21, 2009, at A10 (reporting on the upcoming 2010 elections, which are generally believed to be the impetus behind the military’s trial of Suu Kyi).

movement that the junta will be unable to control. If so, the opposition groups should participate in the elections so that they can be a part of the change. On the other hand, the military has given itself plentiful constitutional tools to block change, and it will presumably be alert for signs of unwelcome developments. If these will restrict all meaningful input, the opposition groups should not participate because their participation will only lend legitimacy to an illegitimate process—precisely the result that the SPDC craves.

But if the opposition groups do not participate in the SPDC process, they will need an alternative to present to the people of Burma and the international community. And, in point of fact, the pro-democracy groups have been seeking to develop such a process for some time.

B. The Democracy Movement's Processes

To understand the democracy movement's constitutional processes, one must first understand the organization, composition, and general goals of the resistance organizations. The democratic resistance is extraordinarily complicated; a clear organizational chart would be impossible, and even an unclear chart would be outdated as soon as completed. In lieu of wielding sovereign power, pro-democracy advocates have formed many associations over the years.¹²⁴ All have acronyms that sound very much alike to unfamiliar ears—the NCGUB and the NCUB, for example, are very different animals¹²⁵—resulting in a kind of alphabet soup. In addition, groups tend to form, then fissure or dissolve.¹²⁶ Sometimes a group just changes its name because the old one has acquired unwanted associations. People often refer to the Burma democracy “movement,” but if by that term one means a unified organization with a determinate set of demands, then the pro-democracy resistance does not qualify.

1. The Organization of the Movement.—Instead of attempting an exhaustive listing of the particular groups, which would be tedious,

124. See Kyaw Yin Hlaing, *Burma: Civil Society Skirting Regime Rules*, in *CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA* 389, 408 (Muthiah Alagappa ed., 2004) (discussing the proliferation of Burmese pro-democracy groups); Bertil Lintner, *Burma, Democracy Movement, 1988–1989*, in *PROTEST, POWER, AND CHANGE* 56, 56–58 (Roger S. Powers et al. eds., 1997) (discussing the various associations among students, monks, nurses, community elders, and others during various stages of Burma's pro-democracy movement).

125. See Alan Smith, *Burma/Myanmar: Struggle for Democracy and Ethnic Rights*, in *MULTICULTURALISM IN ASIA* 262, 278 (Will Kymlicka & Baogang He eds., 2005) (describing the NCUB as a peak alliance of various pro-democracy groups, including the NCGUB); see also *infra* note 139 and accompanying text.

126. See, e.g., Smith, *supra* note 94, at 38, 45 (discussing the demise of long-standing pro-democracy groups as well as the cultivation of fledgling groups in the context of widespread disagreement among pro-democracy organizations regarding political goals).

bewildering, and overlong, I describe four different types of groups. Almost all of the pro-democracy organizations fall into at least one of these types.

a. Ethnic Resistance Armies and Associated Political Parties.— These groups have formed the backbone of the resistance for decades.¹²⁷ They are composed overwhelmingly of ethnic minorities; some are mono-ethnic and some multi-ethnic.¹²⁸ They have fought to control territory that they consider to be their traditional homelands.¹²⁹ Many are divided between a military wing and a civilian wing, often with quite different political cultures. Most claim to speak for all the people of a particular territory or a particular ethnicity; in some cases those claims have a limited truth, and in others they are completely off base (as in areas where ethnic resistance groups have actually fought each other for control of land and income).¹³⁰

Some groups are still in active resistance, and the junta is inflicting on them treatment that may amount to international crimes.¹³¹ Others have accepted ceasefires that allow them to keep their arms, control territories, and tap into income streams.¹³² As a result, de facto sovereignty in Burma is quite complicated: the regime unambiguously controls some areas,¹³³ in ceasefire areas, the regime and the ceasefire groups divide jurisdiction,¹³⁴ and in non-ceasefire areas, the regime and the resistance contend for control of ground and people,¹³⁵ though in recent years the resistance groups have lost

127. See BENEDICT ROGERS, *A LAND WITHOUT EVIL: STOPPING THE GENOCIDE OF BURMA'S KAREN PEOPLE* 31 (2004) (“The Karens, along with the Shan, Karenni, Chin, Kachin, Arakan, Mon and other ethnic groups, share a common cause with the Burman democracy movement.”).

128. SMITH, *supra* note 11, at 30–31.

129. See *id.* at 36 (attributing to minority ethnic groups the notion that they are “nations” subject to Burmese colonialism).

130. See JACK FONG, *REVOLUTION AS DEVELOPMENT* 162 (2008) (discussing clashes between the Karen and Mon ethnic groups).

131. See INT’L HUMAN RIGHTS CLINIC, HARVARD LAW SCH., *CRIMES IN BURMA* 45, 51 (2009) (reporting use of forced internal displacement and sexual violence by the military against the civilian population in an effort to break their connections and loyalty to armed opposition groups).

132. See, e.g., ASHLEY SOUTH, *MON NATIONALISM AND CIVIL WAR IN BURMA* 166 (2003) (discussing ceasefires entered into by several Burmese opposition groups that permitted them to retain their weapons and control over certain territories); Mary P. Callahan, *Political Authority in Burma’s Ethnic Minority States: Devolution, Occupation, and Coexistence*, 31 *POL’Y STUD.* 1, 13 (2007) (“[T]he junta . . . offered these groups quite extensive local autonomy over economic, social, and local political affairs as well as the opportunity to hold onto their weapons.”).

133. See FINK, *supra* note 29, at 77 (stating that, while some areas had de facto autonomy due to ceasefire deals, only pockets of resistance remained in 2000).

134. See Callahan, *supra* note 132, at 44 (“[C]easefire arrangements have led to multiple sites of overlapping and indefinite authority.”).

135. See SMITH, *supra* note 11, at 440–50 (discussing the ongoing insurgencies in the 1990s, with various battles, ceasefires, defections, and splits causing continual shifts in local control throughout the country).

much of their effectiveness. Some of these groups demand independence;¹³⁶ others demand a federal constitution with strong state powers.¹³⁷ All endorse the United Nation's demand for tripartite dialogue between the junta, the NLD, and the ethnic groups.¹³⁸

b. Groups Connected with the 1990 Election.—Other groups are composed of those who won seats in the 1990 election and so can claim to be the last democratically elected leaders of the country. As individuals, some of these MPs are still active in and around Burma, but the organizations themselves are headquartered outside the country. The best known, the National Coalition Government of the Union of Burma (NCGUB), is sometimes described as the government in exile, and it sits in Washington D.C.¹³⁹

The claim to leadership that these groups can make is very different from the claim made by the ethnic resistance groups. The latter actually control territory and care for their people; the former generally live outside the country and campaign in foreign capitals, but they were chosen in a formal, nationwide process that was generally regarded as free and fair.¹⁴⁰ The claim of these parliamentary groups is generally thought to be waning: the election is receding in time, and many MPs are thought to be detached from conditions on the ground.¹⁴¹

136. See, e.g., ANN HIRONAKA, *NEVERENDING WARS: THE INTERNATIONAL COMMUNITY, WEAK STATES, AND THE PERPETUATION OF CIVIL WAR* 77 (2005) (noting that the Karen ethnic group demands complete independence from the state).

137. See, e.g., Josef Silverstein, *Fifty Years of Failure in Burma*, in *GOVERNMENT POLICIES AND ETHNIC RELATIONS IN ASIA AND THE PACIFIC* 167, 195 (Michael E. Brown & Šumit Ganguly eds., 1997) (discussing the political goals of the National Council of the Union of Burma, which desires a federal form of government).

138. See Martin Smith, *State of Strife: The Dynamics of Ethnic Conflict in Burma*, 36 *POL'Y STUD.* 1, 49–50 (2007) (stating that almost every opposition group in Burma backed the U.N. concept of tripartite dialogue).

139. See FINK, *supra* note 29, at 70 (describing the formation of the NCGUB on the Thailand–Burma border and noting that it was intended primarily to reach an international audience); see also MYA MAUNG, *THE BURMA ROAD TO CAPITALISM* 36 (1998) (noting that the NCGUB's U.S. headquarters and Prime Minister's office are now in Washington, D.C.).

140. See, e.g., FINK, *supra* note 29, at 68 (“Despite the authorities’ harassment of political parties during the campaign, the voting on election day itself was relatively free. Out of the 20.8 million people who had the right to vote, 72.5 per cent cast ballots . . . and the vote counting appears to have been fair.”); SMITH, *supra* note 11, at 414 (agreeing with the general consensus that, despite intimidation efforts prior to the election, the balloting itself was fair).

141. See, e.g., Bo Kyaw Nyein, *Burma Needs Strategy Not Strategy: Is Power Mediation a Solution?*, MIZZIMA, July 24, 2007, <http://www.mizzima.com/forum/14-forum/84-burma-needs-strategy-not-strategy-is-power-mediation-a-solution.html> (lambasting the NCGUB for simply writing papers, attending conferences, and hoarding donors instead of taking concrete steps to aid the Burmese people); Tai Samyone, *Does Burma Need an Exile Government?*, BURMA DIG., Jan. 29, 2008, <http://burmadigest.info/2008/01/29/does-burma-need-an-exile-government/> (examining the current government in exile and concluding that the formation of a rival competitor would result in a renewed organization that is more responsive to both the exile community and those still in Burma).

These groups have traditionally demanded that the junta surrender power to the MPs elected in 1990 before further discussion can occur.¹⁴² Others are more open to tripartite dialogue.¹⁴³ Many ethnic leaders perceive these groups as being dominated by Burmans and Burman concerns. Some of the parliamentary leaders have argued that the democracy movement should struggle for a unitary but democratic system first; after that goal has been achieved, Burmese citizens can discuss whether to adopt federalism.¹⁴⁴ In contrast, minorities generally desire federalism as much as democracy; indeed, many believe that democracy without federalism will be a prison for the minorities.¹⁴⁵ And they believe that if Burma adopts democracy without federalism first, federalism will never follow because the Burman majority will refuse to devolve power.¹⁴⁶

c. Civil Society Groups.—These groups seek to advocate for various segments of civil society; they include women’s groups, youth groups, environmental groups, religious groups, and others. Unlike the ethnic resistance groups and the parliamentary groups, they make no claim to political power,¹⁴⁷ but they do seek to influence political processes inside and outside the country, including the democracy movement’s political processes.¹⁴⁸ Some are perceived as being Burman in orientation; others as being more oriented toward the ethnic minorities; and still others are explicitly devoted to a particular ethnic group.

d. Umbrella Groups.—From time to time, the various groups described above have banded together to form loosely associated umbrella

142. See, e.g., FINK, *supra* note 29, at 83 (recounting NLD reluctance to attend the 1993 National Convention because “the entire process delegitimated the 1990 election results”); SMITH, *supra* note 11, at 445 (noting the expulsion of a group from the Democratic Alliance of Burma and the National Democratic Front because it signed a ceasefire).

143. See, e.g., MEMBERS OF PARLIAMENT UNION, MALAHIDE DECLARATION (2009), available at <http://www.ncgub.net/article.php?story=20090125174957661> (indicating support for the international efforts to convince the army to participate in tripartite negotiations).

144. See Christina Fink, *An Overview of Burma’s Ethnic Politics*, CULTURAL SURVIVAL Q., Fall 2000, at 11 (discussing the history of Burma’s democracy movement and the debate over adopting a unitary or federalist system).

145. See, e.g., Khin Maung Win, *Designing Constitution as Policy Formulation to Stop Human Rights Violations*, 8 LEGAL ISSUES ON BURMA J. 63, 63 (2001) (“Even when Burma was led by a democratic government from 1948 to 1962, the non-Burman ethnic groups were not convinced that only having a democratic government would be sufficient to ensure their political equality.”).

146. See *id.* at 63–65 (describing minority groups’ perception that the central government has made false promises of federalism since 1947).

147. See David I. Steinberg, *A Void in Myanmar: Civil Society in Burma*, in STRENGTHENING CIVIL SOCIETY IN BURMA: POSSIBILITIES AND DILEMMAS FOR INTERNATIONAL NGOS 1, 2 (Burma Ctr. Neth. & Transnat’l Inst. eds., 1999) (“Civil society obviously means those institutions and groupings that are outside of government.”).

148. See *id.* at 3 (“The importance of civil society is that included groups have the capacity to act or advocate . . . for the common good They provide sources of pluralism in the society, thus diluting the possibility of a completely centralized, autocratic, or authoritarian state.”).

groups. The two most important at present are the Ethnic Nationalities Council (ENC), which is perceived to be skewed toward the ethnic minorities,¹⁴⁹ and the National Council of the Union of Burma (NCUB), which is often thought to be more oriented toward Burmans.¹⁵⁰ To some extent, these umbrella groups have overlapping memberships, i.e., some constituent groups are members of more than one umbrella group.¹⁵¹ During our last trip to the Thai–Burma border, leaders of both the ENC and the NCUB wanted to talk to us about forming a still larger umbrella group that would include both—which would be an important step if the agreement can be worked out.

These umbrella groups claim a leadership role on the grounds that they can speak for large numbers of organizations and therefore for large numbers of Burmese people.¹⁵² Both the NCUB and the ENC have sponsored constitutional drafting processes,¹⁵³ and the legitimacy of these processes to some extent derives from the legitimacy of the sponsoring organization. But the ability of the umbrella groups to speak for their members is complicated and often obscure. The organizations are quite loose associations, and the member groups typically give up none of their decision-making autonomy. Many people inside Burma are only dimly aware of the existence of the umbrella groups. Many of the constituent groups command great loyalty from large numbers of Burmese people, but almost no one feels that way about the umbrella associations, which have no membership apart from the memberships of the constituent groups. The Karen National Union (KNU), for example, is a member of both the NCUB and the ENC¹⁵⁴ but matters far more than either.¹⁵⁵ In other words, the center of moral gravity still lies with the member organizations, and for greatest legitimacy, the umbrella groups must stay closely connected to those organizations—which they have not always done.

149. See Julien Levesque & Mirza Zulfiqur Rahman, *Ethnic Nationalities and the Myanmar Question*, INST. OF PEACE & CONFLICT STUD., Dec. 12, 2007, http://www.ipcs.org/article_details.php?articleNo=2441&cID=9 (describing the ENC as an “ethnic parliament”).

150. See Kanbawza Win, *Why Another Insane Government?*, BURMA DIG., Jan. 17, 2009, <http://burmadigest.info/2009/01/17/why-another-insane-government/> (noting that all of the NCUB leaders are de facto Burman).

151. See TIMO KIVIMÄKI & MORTEN B. PEDERSEN, BURMA: MAPPING THE CHALLENGES AND OPPORTUNITIES FOR DIALOGUE AND RECONCILIATION, 74–75 tbls.1 & 2 (2008), http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/VDUX-7LDRL4-full_report.pdf (indicating significant overlap in the memberships of the ENC and NCUB).

152. See, e.g., ETHNIC NATIONALITIES COUNCIL, POLICY STATEMENT—2007, at 1, 1–3 (2007), available at http://www.encburma.org/enc/Policy_Papers/ENC_POLICY_STATEMENT_2007.pdf (“The main task of the Council is to coordinate the efforts of the 20 million plus non-Burman ethnic nationalities . . .”).

153. See *infra* subsections II(B)(2)(c)–(d).

154. KIVIMÄKI & PEDERSEN, *supra* note 151, at 74–75.

155. See SMITH, *supra* note 11, at 94 (noting how for many years the KNU has “controlled vast liberated zones with their own regional governments, education departments and armies”).

2. *The Constitutional Processes.*—Shortly after the junta called its National Convention, elements of the movement undertook to develop an alternative draft that would command broad support among pro-democracy leaders and, to the extent possible, the people of Burma. It is possible to discern four phases in these efforts, though it is a controversial question whether they are actually four distinct processes. Before proceeding any further, I must reveal that the CCD and I have been intimately involved in some of these developments, as I will detail.

a. *Phase One: The NCUB Constitution.*—In the 1990s, the NCUB drafted a proposed constitution for a future democratic Burma.¹⁵⁶ This project proved to be controversial, and it stirs strong feelings even today. Many believe that it was hastily written behind closed doors by a small group of people in the Burma Lawyers' Council (BLC) with very little consultation. (I feel obliged to reveal that although I was not involved in Burma in the 1990s, I am now on the advisory board of the BLC, and its on-the-ground director is one of my doctoral students.) Many also believe that it borrowed too heavily from the 1948 Constitution and thereby privileged Burman interests over the concerns of ethnic minorities.

The implicit charge is that the drafters seemed to believe that Burma's problems started in 1961, when the army seized control, and the problems will be solved by a return to Burma's first Constitution. From the perspective of the ethnic minorities, however, the problems started in 1947 when they were denied self-determination, and a return to the 1948 text will merely start the cycle again. The NCUB drafters bitterly resent all these allegations, but the draft has largely been abandoned. No one seriously urges that the text should become the basis for a new settlement, and many of its drafters have now become participants in the later phases.

b. *Phase Two: The State Constitutions.*—Because ethnic minorities were the most vociferous critics of the NCUB draft, they became the primary architects of the next phase. Their primary objection to the NCUB draft was its insufficient protection for the states, so the minority leaders decided to begin by writing draft state constitutions. The democracy organizations associated with each state then formed state-constitution drafting committees. The plan was that once the people of each state had determined how they wanted to govern themselves, the state committees could thereafter jointly formulate a union constitution that would be consistent with the state drafts and that would allow for peaceful cohabitation. From about 2000 to about 2005, the state committees met separately to work on their own drafts, but they also met together at least once a year to share experiences, hopes, and

156. NAT'L COUNCIL OF THE UNION OF BURMA, *FUTURE CONSTITUTION OF THE FEDERAL UNION OF BURMA* (1997), available at http://www.blc-burma.org/pdf/Constitution/ncubcon_e.pdf.

strategies. Over time, at these joint meetings, they also began to discuss their desires for a union constitution in a very preliminary manner.

My own involvement with the democracy movement began with this process, as I was asked to advise each of the drafting committees and their joint meetings. Eventually, to support the work in Burma and elsewhere, Indiana University created the CCD, which includes both American professionals and reformers from around the world. We generally meet with the drafting committees at least once a year, and we now advise many other elements of the movement.

To understand the importance of the state-constitution drafting process, one must understand the constitutional narrative that the ethnic minorities have developed to explain their current situation. Many of Burma's ethnic minorities consider that they never wanted to become a part of Burma, and they will accept a constitutional settlement only if it grants them significant self-rule. They fear Burman domination for several reasons. First, they think that a Burman government will adopt policies inimical to the values and traditions of ethnic minorities, especially coercive Burmanization through the imposition of Buddhism and the Burmese language. Second, they distrust Burmans because Burmans have traditionally regarded the minorities as inferior; they believe, therefore, that a Burman government will favor Burman people and areas, especially with respect to economic development, infrastructure, educational opportunities, and environmental protection. Third, some of these minorities have a strong sense of peoplehood, so they desire to form a political community as a people. Ethnic self-determination is thus an end in itself.

Burma's ethnic divisions have often been thought to have a geographical dimension.¹⁵⁷ At present, Burma is divided into seven states and seven divisions.¹⁵⁸ The states nominally have a small degree of self-government, though the reality is that the center dominates everything. The states cover territory traditionally associated with ethnic minorities, though they are now all multi-ethnic, and each is named for the group that historically formed its largest community: Shan State, Karen State, Karenni State, Chin State, Kachin State, Mon State, and Rakhine State. The divisions are simply subdivisions of the central government. They cover territory traditionally associated with the Burman majority, though again, all are multi-ethnic, and they are named for cities or physical features: Rangoon Division, Mandalay Division, Pegu Division, Irrawaddy Division, Sagaing Division, Tenasserim Division, and Magwe Division.

Because of the (sometimes erroneous) perception that minorities control the states, the minorities have focused their demands on the status of the

157. See Smith, *supra* note 125, at 262 ("The seven major non-Burman ethnic groups . . . are each identified with states of the Union within which they constitute the majority.").

158. MARTIN SMITH, BURMA (MYANMAR): THE TIME FOR CHANGE 9 (2002).

states. Some demand independence; others will agree to enter a federal union but only if the constitution protects their right of secession; still others will agree to a federal constitution without a secession right but only if the states are guaranteed substantial powers over those issues that matter most to the minorities such as language, religion, culture, education, and environmental protection.

But although the ethnic divisions have a geographical dimension, the democracy movement is composed of voluntary associations, not territorial governments. There are partial exceptions: some armed ethnic groups, especially the ceasefire groups, control territory and function as *de facto* governments; others have sought to impose their writ on everyone, even the unwilling, in areas to which they believe they have a legitimate claim. But even these groups have only a limited jurisdiction, and none controls a whole state. As a result, it is not possible to hold statewide elections to choose the drafting committees, and it will not be possible to hold formal referenda on the drafts in the foreseeable future.

In default, the democracy movement has tried to find other ways to create drafting committees with some claim to legitimacy. Different state groups have adopted different strategies in response to different circumstances. In some states (such as Karen, Karenni, Mon, and Kachin State), one particular resistance group enjoys widespread legitimacy, so it can reasonably claim to speak for the people of the state. As a result, such groups have organized drafting committees for their states as committees within their own structure. In other places, however, no one organization can conceivably speak for the whole, and under such circumstances, the strategies have varied. In Shan State, a drafting committee self-organized around the authority of its chair, a well-respected Shan prince. Different Shan State associations—"mother organizations"—then sent representatives to this committee, and the committee has stayed in very close touch with the people of the state through open meetings, surveys, and the like. In Chin State, by contrast, the leading resistance group, the Chin National Front (CNF), refused until recently to participate in the constitution drafting process because it would settle for nothing less than independence. In its stead, the Chin Forum, which is essentially a discussion group of Chins in exile, created a drafting committee, which is now in conversation with people in Chin State. Finally, the democracy organizations in Arakan State have been so disunited and contentious that their process is still in the formative stages.

Ethnicity has proved an especially important question in the composition of the committees and the substance of their work. Originally, most state committees imagined their goal as self-determination for their particular ethnic group. As a result, the membership of the committees tended to be mono-ethnic, and the drafts themselves confined citizenship to

the titular ethnicity of each state.¹⁵⁹ But these groups claimed state territories that included many different ethnic groups.¹⁶⁰

Over time, the drafters came to believe that they needed to become more inclusive. The substance of the drafts has accordingly changed drastically. None of the current drafts define citizenship in ethnic terms, and all guarantee equal rights and equal treatment.¹⁶¹ The membership of the committees has also changed, but less drastically. Many of the committees have become more ethnically complex. The Shan State committee was particularly diverse from the beginning, but it has become even more so. The Kachin committee, which was originally just a part of the Kachin Independence Organization, now includes representatives of other ethnic groups. The Karenni and Chin committees are still mono-ethnic, in part because their titular states are particularly homogeneous. The Arakan committee is also composed wholly of Rakhine people, and that limitation is especially problematic because Rakhine people have abused Arakanese Rohingyas for decades.¹⁶² For that reason, one of the main challenges for an Arakan State constitution will be to heal the rift, and any drafting committee must include both groups.

Burmans' participation in the process has been limited, as might be expected. The state-constitution drafting process began as a reaction against the NCUB draft, which would have overconcentrated power in the central government and the Burman majority. Its primary purpose was to shift power to the minorities. Its primary sponsors were organizations made up of ethnic minorities. Finally, its geographic scope was confined to the ethnic minority states: people in those states strongly desired to write their own constitutions, but it was less clear whether people in the Burman-dominated divisions wanted to form states with their own constitutions.

As a result, Burmans have intersected with the process in only four ways. First, individual Burmans have served on some of the state drafting committees and on the umbrella group. Second, prominent Burmans, including Suu Kyi and much of the NLD leadership, have formally endorsed

159. See, e.g., THIRD INITIAL DRAFT OF THE CONSTITUTION OF CHINLAND, art. 3 (2002), available at http://zomilibrary.com/main/archive/files/the-3rd-initial-draft-of-the-constitution-of-chinland_49b63d8ac3.pdf (granting the rights of "life, liberty, and the pursuit of happiness" but deliberately limiting this grant to only the Chin people).

160. See, e.g., *id.* art. 1–2 (proclaiming that all adjoining land where Chin people live to be Chinland and all nonadjoining areas where Chin people live to be territories of Chinland).

161. See, e.g., SHAN STATE CONSTITUTION: SECOND DRAFT, art. 11(B) (2008), available at http://www.burmalibrary.org/docs07/Shan_State_Constitution-2nd_draft.pdf ("Every person living in Shan State . . . [s]hall be equal before the law irrespective of differences with regard to ethnicity, native birthplace, religion, skin color, social status, age, gender, and sexual orientation . . .").

162. See SMITH, *supra* note 11, at 422 (noting the "mass exodus" of 260,000 Muslim Rohingyas from the Arakan State to Bangladesh in 1991, the second such refugee migration in fifteen years).

the idea that Burma's constitutional structure should include strong states,¹⁶³ and many ethnic minorities take this endorsement as implicit support for their process. Third, Burmans have formed a formal study group to attend meetings and consider whether they want to participate in more formal ways. Finally, just in the last year, some people (Burman and non-Burman) in some of the divisions have started making plans to form drafting committees. Even without substantial Burman participation, the state drafting process has great intrinsic value for the ethnic minorities, as I will later elaborate. But Burman participation will be necessary when it comes time to draft a formal, binding union constitution.

c. Phase Three: The FCDCC Process.—As the state committees continued meeting together, they began to sense agreement on the fundamentals of a union constitution. In 2005, a large number of Burmese democracy organizations agreed to participate in a process to write a union constitution that would embody eight listed principles including minority self-determination, gender equality, and the like.¹⁶⁴ Leaders from the various state committees and some representatives from other organizations formed the Federal Constitution Drafting and Coordinating Committee, which was charged with drafting a constitution according to those principles.¹⁶⁵ Eventually, the FCDCC completed a draft, which they reported to the sponsoring organizations who approved it.¹⁶⁶ The FCDCC has gathered input from the state committees and some outsiders and has revised the first draft according to some of that advice.

Again, the CCD has been involved in the FCDCC process at every stage, so the reader should bear that fact in mind. Members of the CCD were invited to become part of the Technical Advisory Team, and we met with the FCDCC in December 2005 in Thailand to review the draft. TAT members raised many concerns: some of the provisions were inconsistent, obscure, or incoherent; some violated international law; some were in tension with the conventional wisdom in the constitutional-design literature; and perhaps

163. See Josef Silverstein, *The Evolution and Salience of Burma's National Political Culture*, in *BURMA: PROSPECTS FOR A DEMOCRATIC FUTURE* 11, 27–30 (Robert I. Rotberg ed., 1988) (discussing the advocacy of the NLD and Aung San Suu Kyi for strong states to protect minority rights and the support that the NLD has received from minority groups).

164. See CHATHAM HOUSE, *BURMA: THE WAY FORWARD* 7–8, (2008), available at http://www.chathamhouse.org.uk/publications/papers/download/-/id/622/file/11598_220408burma.pdf (listing the eight principles of sovereign power; equality; self-determination; federal principles; minority rights; democracy, human rights, and gender equality; secular state; and multiparty democracy system).

165. Press Release, FCDCC (Dec. 9, 2005) (on file at http://www.enburma.org/fcdcc/Data/Statements/Press_Release.pdf) (announcing the FCDCC's successful completion of a first draft based on those principles and noting that the FCDCC is made up of a diverse group of representatives).

166. For a copy of the report, see FCDCC, *ACTIVITIES REPORT (2005–2006)* (2006), available at http://www.enburma.org/fcdcc/Data/Activities/FCDCC_Activities2.pdf.

most importantly, the draft protected the states much less than the state drafters—to whom the FCDCC nominally reported—would like. In fact, the new draft looked a great deal like the old NCUB draft, and it escaped no one's notice that some of the FCDCC drafters had also written the NCUB draft.

Tension soon developed. The state drafting committees complained that the FCDCC met in secret, that it rarely responded to suggestions for revisions, and that in face-to-face meetings it ignored or steamrolled opposition. As noted, the FCDCC did bring its draft before its sponsoring organizations for approval, but as with the SPDC referendum, the procedure allowed only an up or down vote, not a chance for discussion or suggestions for revision. In our meetings with them, the state committees expressed increasing unhappiness with the FCDCC. In the fall of 2006, the CCD hosted FCDCC drafters for a two week working conference to review some of these concerns. The conference was substantive and amicable, but, again, the drafters made no significant changes to the draft.

Eventually, the Constitutional Affairs Committee (CAC) of the ENC played a hand. As noted, the ENC is the broad umbrella organization linking most of the associations of ethnic minorities, and it has become the sponsoring organization for the state drafting committees. In the summer of 2007, it gathered the state drafters and asked the CCD to explain the significance of the FCDCC draft for state power. When we explained that the draft was not consistent with the wishes that state drafters had expressed to us, the CAC asked us to meet with each of the state committees separately and then to produce a written summary of our analysis, which the CAC has distributed to its affiliated organizations.

d. Phase Four: The “Constitutional Convention.”—Ultimately, many of the state drafters concluded that the FCDCC process failed because it was insufficiently connected to the people on the ground in Burma. By contrast, many of the state drafting committees themselves are very involved inside the country; in some cases, their mother organizations are the closest thing to a legitimate de facto government over their particular territory. Instead of the FCDCC process, which delegated drafting authority to a small group, the state drafting committees have now decided to meet in convention to discuss the broad outlines of a union constitution and, if possible, to define some common ground. The CAC of the ENC will sponsor the convention, and they have asked the CCD to advise the process and to structure the conversation.

The relationship of the convention to the FCDCC is deliberately ambiguous. Some have described the convention as a rejection of the FCDCC's work; because the FCDCC failed, the state committees will start anew in drafting. But many would prefer to describe the convention as the continuation of the FCDCC's assigned task, which was to develop a draft and report back to the states. Now that the FCDCC has fulfilled that assignment,

the states will take over, begin with the FCDCC draft, but modify it where appropriate.

The state drafters have never actually held this sort of discussion all together in one room, so it would be premature to forecast an outcome. We anticipate that the event will occur this spring. The delegates will need to discuss at least the following questions in very concrete ways:

- How should power be divided between the union government and the states?
- How should conflicts between the union and the states be resolved?
- Should Burmese federalism be symmetrical or asymmetrical?
- Should the Burman-dominated divisions become states, and if so, how many?

But the more general process question is at least as important: because these constitutions will not become binding law any time soon, what is the point in drafting them? What is the relationship between this process and an ultimate constitutional settlement in Burma?

III. Early Drafting

The above-mentioned questions are especially compelling because many commentators have warned against premature constitution writing.¹⁶⁷ The warnings forecast a range of destructive consequences if drafting begins too soon.¹⁶⁸ These prognostications fall into two quite different categories.

First, some counsel that before a country commences a state-sponsored constitutional process to produce a binding constitution, it must first ensure that its citizenry is actually ready to enter into such a constitutional project.¹⁶⁹ That warning is quite apt for the SPDC process, but it is actually irrelevant to the democracy movement's process, which is neither state-sponsored nor intended to become binding law in the foreseeable future. Instead, it serves a different goal; indeed, precisely the goal of readying the citizenry to enter into a formal constitutional process.

Second, some argue further that it is unwise ever to draft constitutions before the country is actually ready to commence a formal, binding

167. See, e.g., Ran Hirschl, "The Design Sciences" and Constitutional "Success," 87 TEXAS L. REV. 1339, 1362–65 (2009) (listing a variety of scenarios in which constitution writing may be premature); al-Istrabadi, *supra* note 1, at 1654–55 (arguing from personal experience that the rushed drafting process in Iraq was disastrous).

168. See, e.g., Hirschl, *supra* note 167, at 1362–64 (noting that a constitution imposed on an unreceptive populace may not offer significant protection of minority rights or civil liberties); al-Istrabadi, *supra* note 1, at 1629–30 (arguing that an insufficient foundation of trust among participants during the framing of the Iraqi constitution resulted in "constitutional tensions that erupted into ethno-confessional violence and that threaten further instability").

169. See, e.g., Hirschl, *supra* note 167, at 1363–64 (2009) (detailing contentions that "favorable sociocultural factors" are more important to the success of a constitution than mere design).

process.¹⁷⁰ In this view, early, concrete talk about constitutions only exacerbates problems, even if no one intends them to become law as a result of the process that produced them. Unlike the first set of objections, this set is relevant to the democracy movement's drafting efforts. But our experience in Burma suggests that it is best to be contextual on this point: sometimes early talk may lead to bad consequences, but sometimes it leads to good ones. And in Burma there is reason to believe that not only is early constitutional talk advisable, it is actually necessary to a better future.

A. *Early Formal Drafting*

The literature on the timing of constitution drafting is as yet very thin, although an important work by Feisal al-Istrabadi may be in the offing.¹⁷¹ Nevertheless, among those who support constitutional work abroad, the question is often discussed, frequently in connection with the related question of the timing of elections.¹⁷² As the conventional wisdom has come to stress the disadvantages of early elections,¹⁷³ many have also started to stress the disadvantages of early drafting.¹⁷⁴ Simply drafting a constitution will ameliorate few of the underlying problems that the constitution seeks to correct. Instead, the social conditions must be in place to support constitutionalism before a country can have a written constitution.¹⁷⁵ In a divided society in particular, the causes for the conflict must first be addressed before the first keystroke is struck.¹⁷⁶ At least a certain measure of social integrity must precede drafting.

170. Al-Istrabadi, *supra* note 1, at 1653 (concluding that the lesson learned from Iraq is that “before one engages in the process of drafting a permanent constitution in a country attempting the arduous task of making the transition from dictatorship to democracy, that country’s politics should be allowed to settle into a state of natural equilibrium”).

171. Al-Istrabadi, *supra* note 1.

172. *See, e.g.*, Peter C. Ordeshook, *Constitutions, Elections, and Election Law*, 87 TEXAS L. REV. 1595, 1614–15 (2009) (comparing the timing of elections in Russia and Ukraine and concluding that it is a major factor in the disparity between their relative levels of election fraud).

173. *See, e.g.*, JACK SNYDER, FROM VOTING TO VIOLENCE: DEMOCRATIZATION AND NATIONALIST CONFLICT 27–31 (2000) (examining how the introduction of voting into various postauthoritarian countries in the 1990s led to an increase in ethnic and nationalist conflict during their early transitional periods).

174. *See, e.g.*, Walter F. Murphy, *Designing a Constitution: Of Architects and Builders*, 87 TEXAS L. REV. 1303, 1327–34 (2009) (laying out several arguments against attempting to draft a single, authoritative constitutional text and pointing out the benefits of a rolling or gradual adoption of fundamental laws and practices).

175. *See, e.g.*, ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 143 (1956) (concluding based on the American example that no rules can ultimately sustain democracy unless the necessary underlying social conditions are present); al-Istrabadi, *supra* note 1, at 1655 (“It is naive in the extreme, however, to believe that constitutionalism can be engendered by the mere drafting of a document in a country where the political institutions necessary for constitutionalism are lacking.”); Murphy, *supra* note 174, at 1313 (arguing that, for a constitutional system to survive formation, there must first be at least an “embryo” of a unified people).

176. *See* al-Istrabadi, *supra* note 1, at 1655 (“In fragile states attempting to heal themselves after despotic rule, . . . the drafting process might cause breaches resulting in violence in an

If the conditions are not right, according to this argument, the constitution can actually exacerbate the conflict. There are issues of cognition: before the constitution's adoption, the players may not have had time to discern the draft's likely consequences;¹⁷⁷ after its adoption, the players may not have had time to learn how to make the constitution work.¹⁷⁸ And there are issues of power: if conflict is still rampant, the constitution may only be the imposition of a more powerful group's agenda on the less powerful groups; constitutional government will then resemble legalized predation; dissatisfied groups may take up arms or seek to secede; and, worst of all, as is so often the case, the people of the country may come to embrace a self-fulfilling prophecy that constitutionalism will not work for them.¹⁷⁹

These general warnings apply quite well to the SPDC's process. On cognition, the draft was released only weeks before the referendum vote, no opportunity was allowed for discussion, and, aside from a very small group, Burmese people know very little about constitutionalism.¹⁸⁰ In the wake of the Constitution's adoption, few Burmese have any clear idea about what will come next, and the democracy movement's organizations have asked us to develop seminars to explain the Constitution's meaning. Burma has not known democratic government for five decades,¹⁸¹ and it is largely lacking a leadership that could run a constitutional government. On power, as already noted, the SPDC Constitution will perpetuate the army's long-standing dominance, and it will transfer no meaningful power to the ethnic minorities.¹⁸² Although some of the opposition groups may try to participate in the process, others will continue the conflict. When the regime tries to force the ceasefire groups to disband and lay down their arms, they will likely refuse and will instead go back into open resistance; as a result, the conflict may actually increase.

The warnings do not apply, however, to the democracy movement's process. All of the predicted consequences of early drafting occur in the wake of the constitution's adoption, but the goal of the democracy movement is not to produce a constitution for adoption at the conclusion of the process. To be sure, at some point, in some way, some part of the various drafts may find its way into a formal constitution after, presumably, prolonged negotia-

environment that is, in any case, incapable of supporting genuine constitutionalism and the rule of law.”).

177. *See, e.g., id.* at 1650 (recording how the proposed constitutional text in Iraq received scarce debate and underwent changes right up to or even during the national referendum, thereby destroying any possibility of an informed electorate).

178. *See, e.g.,* Murphy, *supra* note 174, at 1333–34 (arguing that the success of a constitutional project may depend upon the players having prior experience in making constitutionalism work).

179. *See, e.g., id.* at 1312 (discussing the failure of constitutionalism in Afghanistan).

180. *See, e.g.,* MYINT-U, *supra* note 26, at 337 (noting that, as of 2006, a majority of the population had been born after 1988 and thus have known nothing other than military rule).

181. *See supra* Part I.

182. *See supra* subpart II(A).

tion between all the major players. But to state the obvious, the movement is simply not in a position to make any constitution applicable throughout Burma.

B. Early Informal Drafting

In other words, processes like the democracy movement's must be evaluated in a different way from the SPDC's because it is intended to serve different goals much earlier in the process of constitution building. Even so, it would be possible to construct an argument, based on the objections to early formal drafting, that even informal early drafting is a bad idea. Indeed, I have heard such arguments expressed in public settings. I believe, however, that such arguments do not apply in Burma—they are overgeneralizations based on a limited range of case studies.

According to this argument, before the country has addressed its underlying problems, early drafting, even informal drafting, will likely create long-term problems. Only a formal process, held under legally regular procedures, on a nationwide basis, in a nation that is ready for constitutionalism, can actually create a legitimate constitutional settlement. Any drafting done before that point will have the following problems:

- It will be pointless because no document produced at such an early point will ever become the law of the land; such drafting is “make believe” or “as if” constitutionalism.
- It is misleading and deceptive. Because the process takes the form of drafting actual constitutional text, many may take it to be (or insist that it is) the creation of a formal constitution designed to be binding at the end of the process. But no constitution drafted through such an informal process can actually have democratic legitimacy because it was not produced through nationwide participation by all stakeholders.
- It can heighten conflict, harden battle lines, and encourage posturing by encouraging people to discuss the difficult, technical, zero-sum questions of power distribution before the social integration that would allow a fruitful discussion.

In some places, these bad consequences may well follow early drafting. But the CCD's experience in Burma suggests that they will not follow there. It is, therefore, probably best to consider the warnings as dependent on context.

1. “Make Believe” Constitutionalism.—The first objection—that these constitutions will never actually become law—is almost certainly correct, but even these early drafts may influence whatever constitutional settlement Burma ultimately achieves. As noted, since 1947, Burma's problems have

been essentially constitutional in nature: different groups have demanded different constitutional structures, often at the point of a gun.¹⁸³ As the international community has repeatedly recognized, a legitimate constitutional settlement will occur only through tripartite dialogue between the regime, the ethnic minorities, and the other democracy groups.¹⁸⁴ The present drafting process is helping to bring about that dialogue and will help to make it more successful.

Some of the benefits are educational: through drafting, arguing, and studying, the leaders of the democracy movement are identifying what they want in a constitution, which demands are crucial and which can be surrendered. A Burmese research fellow in the CCD recalls the 1988 protests: “When we were so brave and shouting for democracy, actually we didn’t know anything about democracy,” he said.¹⁸⁵ “Our distaste for the regime was so bitter that it made us very brave.”¹⁸⁶ After twenty years, the democracy movement has learned much more about democracy in all its complications, partially through the concrete exercise of crafting model constitutions.

Some of the benefits are political: the drafting process allows the organizations of the democracy movement to build unity, which will allow the movement to coordinate resistance and pursue a coherent strategy at the bargaining table. For the minorities, unity is especially important. Because there are so many different groups and because they have traditionally made so many different demands, the international community has had difficulty working with them. Unless the minorities can speak with one voice, they may well be ignored until they start shooting again.

All the organizations know that they agree on certain central goals—removing the regime and moving to elections—but probably disagree on other profoundly important issues of constitutional structure. Much conventional wisdom suggests that, at this stage, the movement should focus on shared common ground, find a way to oust the junta, and then, afterwards, deal with the more contentious concerns. Again, that strategy may succeed in some places at some times, but in Burma it has not. In fact, since 1990, the movement has been profoundly disunited because the various groups have never quite been able to trust each other. As a result, they have never

183. *See supra* Part I.

184. *See, e.g.*, G.A. Res. 63/245, ¶5(a), U.N. Doc. A/RES/63/245 (Jan. 23, 2009) (calling upon the government of Myanmar to initiate the tripartite negotiations); Letter from Twenty Former Heads of State to The Honorable Hu Jintao, President, P.R.C. (Oct. 5, 2007) (on file at www.oslocenter.no/index.php?option=com_content&task=view&id=92=Itemid=44) (urging China’s President to apply his leverage with the regime in favor of this dialogue so as to arrest Burma’s continuing downward spiral).

185. Press Release, Ind. Univ., Indiana University Tip Sheet: 20th Anniversary of Burma’s 8/8/88 Uprising (Aug. 6, 2008) (on file at <http://newsinfo.iu.edu/news/page/normal/8636.html>) (quoting Ngun Cung “Andrew” Lian).

186. *Id.*

managed to cobble together a shared agenda. In particular, the ethnic minorities and the Burman democracy groups have long suspected each other's ultimate agendas—and for good reason because they really do disagree. Unless the movement can find a widely shared constitutional vision—a common hope for the future—they will never be pulling together.

The democracy movement's drafting process has fostered unity in clear, concrete ways. In particular, the minorities are now more unified than they have ever been, and that change has begun to draw in more Burman-oriented groups. I will more fully describe how that trust has been built in my consideration of the third objection to the process, below.

Finally, the drafting has a very immediate impact on those resistance groups that exercise quasi-governmental power in ceasefire areas or combat zones. Most of these groups have their own constitutions, and the process of drafting state constitutions for the future has caused many to reflect on the way that they are exercising power at the present moment. Some have revised their organizations' constitutions so that their civilian wings will be more participatory, transparent, and decentralized; will better protect individual rights; and will more fully divide power.

2. *Deceptive Constitutionalism.*—The second objection contends, first, that this process of drafting can never produce a legitimate constitution because the movement cannot hold a nationwide, free and open, legally-regular process; and, second, that it is therefore pernicious because observers and participants might mistake this informal process for a more formal one designed to generate binding law. In a sense, the argument holds that the process might be a swindle—at some point, its creators might insist that their drafts are not merely proposals but actual constitutions that should immediately be laid in place to govern the ground.

Sadly, the warning has some applicability to the Burmese context. As the SPDC process has wound to a conclusion, some democracy leaders have offered their process as a rival alternative. In a clear public-relations move, they have asked the international community to regard their draft as Burma's legitimate fundamental law.¹⁸⁷ If an international or foreign power ever occupies Burma, these leaders may well request that their draft immediately become the law of the land.

But, in truth, that focus on public relations does not run very deep in the democracy movement, and it afflicts almost none of the state drafters, who want to prepare themselves to represent their people at the bargaining table and to run a constitutional government. Overwhelmingly, they understand that peace will come only through trilateral dialogue, so their drafts can

187. See, e.g., *Alternative Constitution for Myanmar*, DEUTSCHE WELLE, Mar. 26, 2008, <http://dwelle.de/southasia/SoutheastAsia/1.233484.1.html> (reporting the presentation of an alternative constitution by exiles in Bangkok just prior to the referendum).

function only as starting demands in negotiation. And even a negotiated peace among the primary stakeholders can, in the short run, yield only an interim constitution to govern the country until a full-blown constitutional process can be concluded.

In short, this process does not possess the kind of democratic legitimacy necessary for a permanent formal constitution—but it does not matter because almost everyone recognizes that fact. At present, it is not possible for anyone to conduct a free, fair, nationwide constitutional process in Burma because the government will not allow it. Inevitably, then, any process will be flawed if measured according to the standards that we use for the ratification of a binding constitution. Some might therefore argue that the democracy movement should organize no constitutional process until it can do so the “right” way. But this process has very great benefits for Burma, so second-best may be good enough for certain purposes—as long as everyone remembers that it is only second-best. Hoping for a perfect process can make it impossible to realize the advantages from a good process.

It is also important to remember that this process does have legitimacy of a kind and that it is not as different from a formal ratification process as some might surmise. Following *Marbury v. Madison*,¹⁸⁸ some constitutionalists describe a constitution as the direct act of the people themselves, as though the entire citizenry assembled in a big room, held a year-long constitutional conversation, and then individually signed the convention’s work product.¹⁸⁹ In point of fact, virtually all constitutional processes are elite driven: someone has to take the lead to organize and to draft before any significant popular participation occurs.¹⁹⁰ This necessity is acute in countries such as Burma, where the citizenry has little constitutional comprehension and tends to follow its leaders. If the elites are closely connected to the people, if they have general support, if they welcome regular input, and if they broadly represent all the relevant social sectors, then they possess considerable relative legitimacy. Although the democracy movement’s process is hardly perfect measured according to these criteria, it is clearly much better than any other process since 1947.

And, inevitably, the ultimate democratic legitimacy of any drafting process can be measured only *ex post* when (if) the people ratify and embrace the proposed constitution. Only the future can reveal whether the democracy movement’s process will achieve that kind of legitimacy.

188. 5 U.S. (1 Cranch) 137 (1803).

189. See *id.* at 176 (“That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.”).

190. See WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 149 (2007) (“In short, leaders matter. . . . A polity is doomed if that elite is so skill- and resource-deficient as not to be able to persuade others of constitutional democracy’s desirability and later move them to internalize needed system values.”).

3. *Fissiparous Constitutionalism.*—Finally, some may object that early drafting will only harden divisions because it is so difficult to secure agreement on constitutional details. Constitutions distribute power; frequently for one party to gain power, another must lose it, and any discussion over the distribution of power will be fruitless until the country has achieved a certain measure of social integration, stability, trust, and so forth. In fact, it might be worse than pointless—it might exacerbate the conflict by encouraging a competition for power and by precommitting stakeholders to demands that they will be unable to realize. Better in the short term to focus on shared common ground and put off for tomorrow the hard questions.

Again, this counsel may be extremely important in other settings, but our experience suggests that it is inapposite in Burma. Without constitutional dialogue now, little progress can be made toward a stable peace. It will be harder to achieve a peace and harder to keep it.

As noted, since 1947, the ethnic minorities have understood their grievances to be constitutional in nature, and since 1990, so has the Burman majority.¹⁹¹ As a practical matter, it is very hard to build trust, integrity, and social capital without directly addressing the constitutional issues; it would be like playing Hamlet without the Prince of Denmark. In the CCD (which includes a lot of graduate students who are prone to graduate-student humor), the joke runs that, in this view, we should organize seminars in the Rocky Mountains at which contending leaders will have to fall backwards into each other's arms so they will learn to trust. Even if one leader dutifully catches another, each will still demand to know where the other stands on the proper structure of the upper chamber of the legislature. It is one thing to trust a person to catch you; it is something entirely different to expect him to share power with you.

The objection seems to suggest that the stakeholders should talk about something other than constitutional structure or should work on some shared project unrelated to constitutional structure. As they build up trust in those other domains, it will transfer to the later constitutional discussion that they must eventually take up. But in fact, the democracy movement has long shared the goal of removing the junta from power; they have struggled in the traces together; and that striving-in-common has not removed the underlying distrust. In particular, ethnic minorities still fear that when democracy comes, the Burmans will suppress their drive for self-determination; and Burmans fear that when democracy comes, the minorities will use violence to secure their own preeminence or to break up the union. These fears are central and profound.

To be sure, fear can be alleviated only by contact, but contact that is irrelevant to the underlying constitutional worries has not helped. Indeed, it may be that scrupulous avoidance of constitutional disagreement only

191. See *supra* Part I and subpart II(A).

heightens tension. Many have told us that Burmese people cannot talk about these issues because the conflict is too deep and the “other” side too untrustworthy. As a result, constitutionalism can become a verboten subject, chained up in the basement for fear that if let loose, it might eat the householders. The pressure builds up, and without open conversation, it will never be released.

Burma’s particular history furnishes a counterwarning to the claim that it is better to defer discussion of dicey constitutional issues: when Burma last did so, civil war erupted over those very issues. As recounted above, just after World War II, the ethnic minorities were concerned about their inclusion in the new country, and they sought constitutional protection for a measure of self-rule.¹⁹² The British held a commission of inquiry, and some negotiations occurred between the AFPFL and minority leaders.¹⁹³ But constitutionalism was a new subject for most Burmese, and to be useful, the conversation would have taken a long time. Aung San and other AFPFL leaders insisted that the most pressing goal was to force the British out as soon as possible; constitutional disagreements could be worked out later.¹⁹⁴ As a result, the British left, the conversation never took place, and the new Constitution failed to protect the ethnic minorities in the way that they thought they deserved.¹⁹⁵ Civil war broke out and continues to this day.¹⁹⁶ In light of this history, few minority leaders will embrace the idea that it is better to fight the common foe and postpone discussion about the hard constitutional issues until some later, unspecified point. In a sense, they feel that they were hoodwinked in 1947, and they do not want to be hoodwinked again.

And, in truth, if the dicey questions are postponed until after some sort of transition to peace and democracy, Burma may remain unstable because it will lack consensus on constitutional fundamentals. Indeed, postponing the discussion until after some sort of constitutional peace is in place may tragically backfire: right now, the ethnic minorities are struggling against the junta, and they are united with the Burman democracy forces through opposition to a common foe. If the transition does not protect them, they may end up fighting the Burman democracy forces, they may become convinced even more that they cannot trust the Burmans, they may lose whatever trust they have in constitutionalism, and they may try to secede.

In other words, resolving the constitutional disagreement will take a long time, and Burmese groups will not trust each other until the disagree-

192. LINTNER, *supra* note 12, at xiv.

193. Silverstein, *supra* note 137, at 176–77.

194. MYINT-U, *supra* note 26, at 245–48.

195. See Silverstein, *supra* note 137, at 180 (“Although the constitution was supposed to allow multiculturalism to flourish, it placed power in the hands of leaders at the center who wanted to spread Burman culture throughout the country.”).

196. MYINT-U, *supra* note 26, at 258.

ments have been minimally resolved. When the junta finally goes, the Burmese peoples will have an enormous amount of work to do to get a constitutional government up and running. Tensions will surely run high as competing groups jockey for position. People will learn to relate in very new ways. If the peoples of Burma must also suddenly start addressing deep-seated constitutional conflicts deliberately deferred from an earlier period, it is hard to see how the country can avert another war. The preparatory work needs to begin now, and it should be imagined as an early stage in a long constitutional process.

One can never be grateful that the SPDC has stayed in power so long, but one benefit is that the democracy movement has had an opportunity to prepare itself before the leaders face the trauma of actually trying to govern a fractious country. And many of them have put the time to good use—in particular, by using constitution drafting as a path to building the social integration that may one day make a formal constitution possible. In a piece of this length, it would be impossible to explore all the dynamics that we have seen in the constitution-drafting process. Instead, I will identify a few phenomena and then offer a specific example.

Because the leaders have been meeting for a long time, some have developed warm personal relationships. These relationships grew up in constitutional discussion, and they will be a resource for avoiding constitutional crisis after the transition to democracy.

Because the democracy movement is not actually in power, its constitutional conversation will have no direct effect on who will actually receive how much power. As a result, the discussion can be (and often is) oriented less around short-term power politics and more around ideas and the long-term well-being of the people. Many of the state drafters have changed their minds about many issues in the course of these meetings. Most conspicuously, perhaps, every state drafting committee has dropped its ethnic definition of citizenship in response to the argument that they should not treat others in the way that the SPDC has treated them.

Many of the leaders have discovered that they share more common constitutional ground than they thought. In particular, few of the minorities demand independence or a secession right anymore; and few of the Burmans demand a strongly unitary state. In other words, they have realized that the others are not actually constitutional monsters. This realization has done more to create constitutional trust than any amount of nonconstitutional work could do. With this newfound trust, the leaders then have much greater capacity to address more contentious issues.

In some cases, open and honest discussion about constitutional disagreement has made conflict more tractable rather than less. Everyone knows that the disagreement exists. If people cannot talk about it, they will express their distrust in some other way—commonly through symbolic politics that express ethnic mistrust. If the leaders can talk about what is actually at stake in the clear light of day, they have a much better chance of

making progress toward social integrity, which may, in turn, make a more formal process possible.

Finally, because each state has organized its own drafting committee and will send its own representatives to the convention in the summer of 2009, the leaders of even the smaller states feel that they have a stake in the process. That feeling is especially important for people in Chin and Karenni states, which are poor, small, homogeneous, and rural.¹⁹⁷ Without specific inclusion in a structured process, these two states might well feel sidelined and ignored in any peace settlement.

And those two states play a particular role in the specific example that I offer. Before the constitution drafting process began, most ethnic resistance groups demanded independence as a first preference and federalism with a secession right as a nonnegotiable minimum. For many, these two demands became identity defining: they became the cultural marker of membership—the cause for which people were fighting and dying. But for practical reasons, independence was not a realistic option, and the Burman groups would never agree to a secession right.

The conventional wisdom might warn that the democracy movement should postpone consideration of these thorniest of issues. But the democracy movement instead faced the issues head-on, and through participation in the drafting process, virtually every major resistance group has decided that the best future lies in a federal constitution without a specific secession right. This about-face occurred through genuine, intense conversation and reflection that would not have occurred without this process.

The last holdouts were KNPP, the most significant political organization in Karenni State, and the CNF, perhaps the most important resistance army in Chin State. Understandably, both feared that merger into a larger union would mean the submergence of their states.

For years, the KNPP sent “observers” to joint meetings of the state drafters, and the CNF refused to participate altogether. Then, a few years ago, the Karenni committee gave up its demand for independence and a secession right, and joined as a full participant. The committee members told the other drafting committees and the CCD that they had come to believe in

197. See Chizom Ekeh & Martin Smith, *Minorities in Burma*, BRIEFING (Minority Rights Group Int'l, London, England), Oct. 30, 2007, available at <http://www.minorityrights.org/3546/briefing-papers/minorities-in-burma.html> (“A Chin State was created in 1974 but remains impoverished and under-developed.”); MINORITY RIGHTS GROUP INT’L, WORLD DIRECTORY OF MINORITIES AND INDIGENOUS PEOPLES—MYANMAR/BURMA: KARENNI (2008), <http://www.unhcr.org/refworld/docid/49749cdd.html> (“The Karenni live not only in Burma’s smallest state, but also its least developed region and one of the most closed, since foreigners remained largely unable to visit this part of the country.”); see also SMITH, *supra* note 11, at xix (showing the distribution of the major ethnic groups in Burma). In regards to Chin homogeneity, although the Chins have great internal diversity, especially linguistic, they are homogeneous in the sense that they all recognize a kinship that does not extend to non-Chin people, and the population of Chin state is overwhelmingly Chin.

the process and the other committees; they could imagine a shared future with these people.

This last fall, many thought that the CNF would schism over the issues of independence and secession; some wanted to hold out, but others wanted to join the process, to stand with the other ethnic minorities. A schism would have been disastrous because it might have led to open conflict among Chin people, and it surely would have led to general tension within the democracy movement on the western side. The CNF held its Fourth Annual Convention to grapple with the problem—facing it head-on, not deferring—and asked the CCD to attend as advisors. We were all in the jungle for eight days as these guerrilla fighters tried to glean the best way forward.

In the end, through sustained discussion, they all became convinced that the demands for independence and secession hurt them more than they helped. By consensus, they abandoned both. In a sense, we watched them redefine their identity through reflection. And they were all intensely, infectiously happy. They felt that they had avoided conflict by finding the best way forward for all. Those who had initially demanded independence and secession were as happy as the others because they did not feel that their demands had gone unheeded; instead, they had simply changed their minds. Through reflective thinking, they felt that they had been freed to set new goals. Dozens of people told us that their thinking had “changed one hundred and eighty degrees,” that they were amazed at what they had been able to do in that week together. And we, the CCD members, were amazed too.

And that amazement illuminates the last, and perhaps greatest, benefit to early drafting: sometimes, it can help to convince people that a better constitutional future is available for them. It can, in other words, sustain hope. When people are badly hurt by conflict, they sometimes start to believe that there is something wrong with them individually and as a citizenry. Many conclude that other countries and other peoples can self-govern, but they cannot. But when a group of Burmese people from different backgrounds successfully manage to address a contentious constitutional issue, their faith in their own capacity grows. Constitutions work only if people believe that they can make them work, and early drafting can help shore up that belief, as a fundament for the hard work that lies ahead.