

Can Myanmar's 2008 Constitution Be Made To Satisfy Ethnic Aspirations?

The ongoing political changes in Myanmar/Burma may provide only partial solutions to the country's problematic nation-building. For more than sixty years, ethnic conflicts and civil wars have prevented the construction of a functioning state. While a new round of ceasefire negotiations, beginning in 2011, between the government and various ethnically defined armed groups may constitute the first steps towards a comprehensive peace, they are only first steps. Ethnic leaders want a genuine political dialogue on the basis of equality. Much of that dialogue will need to be about constitutional amendments. Myanmar's 2008 constitution does not satisfy the aspirations of the country's main ethnic groups, and it includes fundamental barriers to needed political change.

This policy brief examines the background for the 2008 constitution and its main problems from an ethno-political point of view; discusses some of the amendments needed in order to accommodate ethnic aspirations; and discusses how such amendments might be agreed upon.

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The Roadmap to Democracy

Myanmar's 2008 constitution formed a milestone on the 'roadmap to discipline-flourishing democracy' presented by the country's State Peace and Development Council (SPDC) in 2003. It must be viewed against the background of the 1988 uprising (when the previous constitution was abolished), which revealed not just the economic bankruptcy of the Ne Win era, but also the state's lack of legitimacy and the army's inability to live up to its ideal of protecting the unity of the country. The illegitimacy of the regime was further confirmed when SPDC's predecessor, the State Law and Order Restoration Council (SLORC), decided to ignore the results of the 1990 elections, in which the National League for Democracy (NLD) won a resounding victory. With the roadmap, General Than Shwe's regime aimed to reinvent and maintain the political role of the military by making it constitutional, before instituting a civilian government.

The 2003 seven-step roadmap aimed to reconvene the National Convention, adjourned since 1996 (Step 1), in order to gradually introduce a 'genuine and disciplined' democratic system (Step 2) through the drafting of a new constitution (Step 3), which would be endorsed in a national referendum (Step 4). This would in turn lead up to free and fair elections for the national legislative bodies ('hluuttaws') (Step 5), where elected representatives would convene in accordance with the new constitution (Step 6), so that a 'modern, developed and democratic' nation might be built (Step 7).

The Adoption of the 2008 Constitution

The roadmap was the second attempt to develop a new constitution. The first was the National Convention (1993–96), where only 15% of the delegates were chosen among those elected in 1990. Ethnic-minority representation was limited, and members were by and large handpicked by the regime. In 1995, those few members who represented the NLD were expelled after boycotting the meetings. By 1996, the whole constitution-making process was adjourned.

In 2004, the National Convention was reconvened, with new members chosen by the SPDC. Since ethnic armed groups, that the regime had negotiated ceasefires with, were

invited to take part in the convention, the number of ethnically designated delegates increased significantly from 215 to 633, out of a total of 1,086 delegates. Their influence, however, was limited. Some 104 basic principles had already been settled, and although these included important provisions for Self-Administrated Areas for particular ethnic nationalities, other provisions – notably those ensuring the dominant role of the military and a steadfast refusal of federalism – were deeply problematic for the ethnic-minority delegates.

Opportunities for delegates to influence the drafting process were restricted. One of the main ceasefire groups, the Kachin Independence Organization (KIO), submitted a 19-point proposal for how the Union of Myanmar could be rebuilt along the lines of the Panglong Agreement of 1947. Its core demands were democratic rights for all citizens, political equality for all nationalities, and the right to internal self-determination for all members of the Union. None of the KIO's 19 proposals were taken into consideration – something that disillusioned many Kachins, as well as members of other ethnic nationalities. Today, against the backdrop of their negative experiences, the KIO have become the most recalcitrant of all the armed groups within Myanmar.

Another problem with the drafting of the constitution was the absence of non-ceasefire groups in the proceedings. Crucial actors like the Karen National Union (KNU), which had been in continuous armed conflict with the government since 1949, were never consulted, although some Karen representation was ensured through other non-fighting representatives of the Karen community.

A constitutional referendum was held on 10 May 2008 (24 May in some townships) just as the cyclone Nargis had devastated the country. Many criticized the authorities for carrying out a national referendum at a time when they should have been concentrating on humanitarian efforts. Allegations of ballot fraud were also numerous, and few people discovered the new constitution's potential for underpinning genuine change. For its part, the SPDC claimed that the process had been free and fair, and reported an overwhelming voter turnout and approval of the constitution. The SPDC was content to finally see prospects for transferring the administration of the country

to a civilian government, while having obtained guarantees for the army's ultimate power. As of 2008, no one imagined that the constitution and the following 2010 elections – boycotted by the NLD and many ethnic groupings – would pave the way for real change. That this might be the case only became clear when the new president, General Thein Sein, launched his reform policy in 2011.

What Needs To Be Changed?

Revising the constitution was initially not a part of the government's reform plan, but it will clearly be necessary if there is to be any possibility of satisfying the aspirations of the NLD and creating peace among the country's ethnic groups. In relation to Myanmar's ethnic conflicts, there are two key problems: the prerogatives of the Tatmadaw (the armed forces) and devolution of power.

Military Prerogatives

A main ambition of the SPDC was to institutionalize a political role for the military. The rights of the military take up a considerable part of the constitution (Ch.I.20 in particular). It is affirmed that the Union shall enable the defence services to participate in the national political leadership (Ch.I.6.f). In support of this principle, military representatives, appointed by the commander-in-chief, are to constitute 25% of the members of both chambers of the national parliament (Pyidaungsu Hluuttaw) (Ch. IV.109, 141) and one-third of the membership of the state and regional parliaments (Ch.IV.161.d).

Considerable power is vested in the National Defence and Security Council, of which at least six of the eleven members are to be serving military personnel (Ch.V.201, 232.b.ii). The military is also ensured at least one representative within the presidency (Ch.III.60), and the commander-in-chief shall nominate candidates for the positions of ministers of defence, home affairs and border affairs (Ch.V.232.b.ii). Furthermore, if there is a risk that the Union or national solidarity may disintegrate, or that national sovereignty may be lost, the armed forces have a constitutional right to rule by decree. In such a state of emergency, all power sharing is to be suspended and legislative, executive and judicial powers shall all be concentrated in the hands of the commander-in-chief (Ch.XI.417–420). The constitution even grants the military a

constitutional right to take over the government on its own initiative if it should regard the unity, solidarity or sovereignty of the country as being under threat (Ch.I.40.c).

The paramount constitutional dominance of the Tatmadaw is not only a democratic problem, but also a major obstacle to the political integration of ethnic nationalities. To ensure political participation and respect for the constitution, changes will need to be made. Amendments to the constitution, however, require more than a three-fourths majority in the Pyidaungsu Hluttaw (Ch.XII.436), so the 25% of representatives that are military appointees have the power to block any constitutional change.

Devolution of Power

A recurrent political dispute within the modern history of Myanmar is the union-versus-federation controversy. While all ethnic-minority groups argue for a federal solution and insist on the right to internal self-determination in accordance with ‘the spirit of Panglong’, the 2008 constitution holds the Union as sacred and rejects any solution that might compromise the first three basic principles enounced in Chapter 1: non-disintegration of the Union, non-disintegration of national sovereignty, and perpetuation of sovereignty (Ch.I.6.a–c). This does not preclude some decentralization of the power, but it does rule out any recognition of sovereign powers at a different level.

The equal rights of all citizens (Ch.I.21.a) follows naturally from the general principle of Union sovereignty, but the constitution also includes some general remarks on the right of ethnic minorities to political representation in relevant legislatures (Ch.I.15, Ch.IV.161.b–c). Moreover, it states that the union shall assist in developing minority languages, literature and culture (Ch.I.22.a), and promote socio-economic development for less-developed ethnic minorities (Ch.I.22.c). While these provisions recognize ethnic-minority needs, they are only about what the Union shall do to ‘assist’, not about socioeconomic or cultural *rights*.

The most important and promising part of the constitution in terms of accommodating ethnic-minority aspirations is the establishment of elected regional and state assemblies. By creating seven regional and seven state hluttaws, Myanmar has established constitutionally embedded bodies that might provide

minorities with an opportunity to practise a degree of internal self-governance (Ch.IV.161–195). The problem is that, apart from stipulating how the assemblies shall be formed, who can run for seats, and how local legislation and submission of bills shall take place, the constitution says little about their contents. The constitution does not provide them with real power, and the chief minister in each state or region is appointed by and responsible to the president of Myanmar, not to the regional or state hluttaws. Furthermore, the new bodies have extremely limited budgets (Ch.XV, Schedule 5). If they are to play a constructive role in the country’s national reconciliation process, these assemblies will need to be filled with attributions and responsibilities and must be provided with revenue either through allocations from the Union level or through being granted the right to retain a certain percentage of local revenues.

The question of political self-determination is the most important for the country’s various ethnic groups. This is of strategic interest for any assessment of the possibility of constitutional change. For where Aung San Suu Kyi, the NLD and the predominantly Burman democracy movement will primarily seek to reduce the military’s prerogatives at the Union level, many members of the major ethnic groups are primarily concerned with the relationship between their own states and the Union, as well as the protection of minority rights. Since a three-fourths majority is required, it will scarcely be possible to achieve any constitutional change unless the various ethnic groups and parties are able either to coordinate their political demands with the NLD or to obtain support from the reform faction in the government and its ruling Union Solidarity and Development Party (USDP). So far, there is little to indicate that the NLD and the main ethnic parties will be able to develop a common platform before the elections in 2015.

How To Amend the Constitution

While army conservatives may see the 2008 constitution as a definitive document, Myanmar’s ethnic and democratic opposition movements do not regard it as legitimate. However, interviews with key ethnic-minority actors reveal that many of them are willing to accept it as a transitional document that can be amended. After all, the constitution does to

some extent accommodate proposals put forward in the past by the United Nationalities League for Democracy (UNLD), a coalition of ethnic groups. The constitution establishes regional and state parliaments and lays down the principle of a bicameral parliament, with equal representation from each region and state in the Amyotha Hluttaw. Together with the demand for separate constitutions for member states, these are elements that repeatedly have been put forward by ethnic groups.

All reformist forces are wary of a military backlash if the Tatmadaw sees its interests as threatened. They understand that constitutional change is a delicate matter. In the present situation, we see three possible ways through which constitutional change could transpire.

The Constitutional Way

The first alternative would involve formal proposals in the National Assembly and attempts to secure a three-fourths majority in both houses of the Pyidaungsu Hluttaw. In regard to substantial parts of the constitution, a national referendum would also be required, in which 50% of all those *eligible* to vote must endorse the changes (Ch. XII.436). These obstacles to change are further strengthened by the fact that the Tatmadaw controls 25% of the MPs. It is therefore safe to assume that neither the NLD nor the ethnic parties will choose to rely solely on the constitutional way. Moreover, not all ethnic groups are duly represented, since many parties were either excluded from or opted not to participate in the 2010 elections. The Kachins, for example, are hardly represented at all.

Tripartite Negotiations

The second alternative is tripartite negotiations between the government, the NLD and a coalition of ethnically designated organizations. President Thein Sein has indicated a willingness to negotiate, but there are many obstacles to overcome. Can his government negotiate on behalf of the Tatmadaw and expect it to accept a reduction of its constitutional prerogatives? Can the NLD unite behind a constitutional reform package? Can the main ethnic parties and organizations unite and navigate in negotiations both with the government and the NLD?

If a negotiated solution were to be reached, the challenge is to get the result adopted in

the constitutional way. A political deal would need to be endorsed by the Pyidaungsu Hluttaw, as well as in a referendum. A high degree of national consensus would thus be required in order to make a negotiated solution constitutional. One option might be for the government to conduct tripartite negotiations while simultaneously consulting with the National Assembly. Such a delicate process would require skilled mediation, strong leadership and highly disciplined parliamentarians. And it is by no means certain that the situation will become easier after the 2015 elections. If these are free and fair, increased political diversity could generate an even less predictable parliament. In other words, there may be a window of opportunity now that will remain slightly open only until 2015. Assuming that both the government and the army have ownership of the reform process and are willing to commit to a negotiated result, it seems plausible that loyal USDP MPs and MPs appointed by the army would endorse a negotiated solution. Then again, this would depend on the opposition being coordinated and unified. As of today, there are few indications that any of these preconditions can be met in time.

The Long Road to Democracy

It seems most likely that few, if any, constitutional amendments will be agreed upon before 2015. Given Aung San Suu Kyi's prominence as the country's leading politician and the results of the April 2012 by-elections, the next National Assembly could well be dominated by the NLD and a number of ethnic parties, leaving the Tatmadaw representatives as guardians of the constitution. The struggle for constitutional change could then become a tug-of-war between a NLD-dominated government and the army (note that it is constitutionally possible to reduce either the military or the civilian representation in the Pyithu Hluttaw by reducing the total number of

seats; see Ch.IV.109). At present, the NLD is far from consolidated on a clear political platform. Many of its members have been in prison, house arrest or exile for over two decades. The NLD may need the time until 2015 to work out a durable political strategy. For their part, the ethnic organizations are also not yet unified behind a common agenda. And moreover, disagreements exist between political parties that participated in the 1990 and 2010 elections. The main driver of reform in today's Myanmar is neither the NLD nor the ethnic organizations but the government of President Thein Sein, who has opted to leave the present constitution in place while concentrating on economic reform. This may have been wise, since any attempt to change the constitution at this stage could provoke the Tatmadaw. The fear of a military backlash has not gone away.

The third and most likely approach to constitutional change is therefore a strategy of postponement, lasting well beyond the 2015 elections. The NLD and the ethnic organizations will make some demands known; there may be some dialogue; but there will be no genuine negotiations or parliamentary process leading to real constitutional change. The most realistic option for those who aim for constitutional change may be to take the long view, initiate a long-term dialogue on how to reconcile the principle of the Union with ethnic-minority rights and how to reconcile the army with the principle of democratic rule. Slow step-by-step amendments could then be imaginable.

One of the least difficult tasks might be to fill the state and regional assemblies with finances and powers by adding some content to Ch.IV.161–198, which regulate the form and procedures of the regional and state assemblies, and expanding Ch.XV, Schedules 2 and 5, which specify the regional and state legisla-

tion lists and the taxes collected by the regions and states (The Pyidaungsu Hluttaw has already considered a proposal from the Rakhine Nationalities Development Party (RNDP) to allocate some revenues from natural resources to the local state or region – a proposal that has gained support from the President's office).

This could give local politicians time to build political and administrative capacity, generate and regulate economic and social development in their home regions, and ensure protection and furtherance of minority rights. Facts could be created on the ground as a basis for a more strongly recognized principle of self-governance. It might also be possible to seek agreement on a time period during which the principle of internal self-determination would be implemented – for example, ten years. Government representatives have already indicated a willingness to consider constitutional changes that may secure revenue for states and regions. This could partially satisfy the aspirations of the ethnic minorities and provide them with a platform for a long-term legal and political struggle, thus reducing the risk of further civil war.

Further Reading

- Constitution of the Republic of the Union of Myanmar* (2008), Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=181169 (3 Oct. 2012)
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