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Constitutional Change in Myanmar: Process v Substance

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Constitutional Change in Myanmar: Process v Substance

By Andrew Harding*

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1. Introduction: The Amendment Process under the 2008 Constitution

The fact that the process of constitutional amendment has become a critical issue in Myanmar should not be a matter of surprise. There many issues to be decided which involve the actual application of the amendment process. In addition the issue of whether and how to change the amendment process itself, given the 2008 Constitution's¹ comparative rigidity,² is notably a matter for speculation and debate. More than one third of the 323,000 individual suggestions for revision received in the review process relate to the problem of constitutional amendment.³ It is, for example, heavily implicit in discussions about creating a federal system for Myanmar, given that the states' powers to resist constitutional changes depend on how the amendment provision is drafted.

Let us first take a careful look at the amendment process currently provided under Section 433 of the Constitution. It states:

433. Any provision of this Constitution may be amended in the manner herein after provided :

(a) the proposal to amend the Constitution shall be submitted in the form of a Bill;

(b) the Bill to amend the Constitution shall not contain other proposals.

434. The Bill to amend the Constitution shall be submitted to the Pyidaungsu Hluttaw.

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

436. (a) If it is necessary to amend the provisions of Sections 1 to 48 in Chapter I, Sections 49 to 56 in Chapter II, Sections 59 and 60 in Chapter III, Sections 74, 109, 141 and 161 in Chapter IV, Sections 200, 201, 248 and 276 in Chapter V, Sections 293, 294, 305, 314 and 320 in Chapter VI, Sections 410 to 432 in Chapter XI and Sections 436 in

• Director, CALS.

¹ For the text of the Constitution, see http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf.

² For discussion of the issue of rigidity/ flexibility in the Myanmar context, see below; and A Harding, 'Law and development in its Burmese moment: Legal reform in an emerging democracy', ch.20 of M Crouch and T Lindsey (ed), *Law, Society and Transition in Myanmar* (Oxford, Hart Publishing, 2014, forthcoming).

³ 'What is wrong with Myanmar's Constitution?', *The Economist*, 5 March 2014, <http://www.economist.com/blogs/economist-explains/2014/03/economist-explains-3>.

Chapter XII of this Constitution, it shall be amended with the prior approval of more than seventy-five percent of all the representatives of the Pyidaungsu Hluttaw, after which in a nation-wide referendum only with the votes of more than half of those who are eligible to vote.

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

In order to understand the complexity of having two layers of entrenchment as a result of Section 436(a), we need to note which constitutional provisions are covered and which are not covered by this section. The point is that those not covered by this subsection are rather more easily amended, i.e. by an Act of the Pyidaungsu Hluttaw [both houses of the legislature sitting together], with the requirement of a special majority of 75% of the members. This special majority is still an onerous requirement compared to special majorities elsewhere, but the additional referendum requirement for major provisions is without doubt a real chill factor when it comes to constitutional amendment. It requires organizing the equivalent of a general election.

It is natural enough that, in one of the world's longest constitutions extending to 457 sections, provisions concerning the basic structure of the Constitution are protected from amendment at a higher level than more incidental provisions dealing with matters of detail. In effect the Constitution, by determining two levels of entrenchment, has defined its own basic structure. This could be of great importance if the Indian Supreme Court's doctrine of inherent limitations on the power of amendment, established in *Kesavananda* in 1973,⁴ comes to be argued in the courts in Myanmar. This doctrine, which has been argued in other constitutional systems too,⁵ holds that the amendment provision in the Constitution cannot apply to literally any amendment that complies procedurally with the Constitution; it maintains that no amendment can be valid which destroys the basic structure of the Constitution. Whether a given proposed amendment has this effect is for the court to decide. How this argument might play in Myanmar could become a very important issue in future, especially for minority populations. The answer is likely to be that, given the express double-level entrenchment, the doctrine of inherent limitations has no application. If the Constitutional Tribunal gets to decide this issue it will be deciding nothing less than the degree of entrenchment of the Constitution itself. The question would be, in effect, whether the 2008 Constitution represents a founding moment in Myanmar's constitutional history, or is just a stage of development in constitutionalism. This is a question that lurks beneath all of the issues regarding the current amendment process, including the issue of how to reformulate the amendment provisions themselves.

So which provisions are in fact protected at this higher level by the referendum requirement?

All of the general principles of the Constitution in Chapter 1 are protected, as is the entire chapter (11) on emergency powers. This is in contrast with the fundamental rights provisions

⁴ *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461.

⁵ The Bangladesh courts have upheld the doctrine (see *Anwar Hossain Chowdhary v. Bangladesh* (41 DLR 1989 App. Div. 165, 1989 BLD (Spl.) 1), while the Malaysia courts have not (see *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70).

(chapter 8), which are not protected. The point will inevitably be raised that the justification for entrenching all of the emergency powers but none of the fundamental rights lacks any obvious justification. With regard to the operation of the legislatures and structure of government at all levels, the courts and the judiciary, only the basic provisions as to the composition of these are protected. For example the 5-year term for the President and Vice-Presidents, the two-term limit on their tenure, and their separation from the legislature, are protected; but the extensive powers of the President are regarded as detail in this model. Details of appointments, tenure, impeachment, qualifications, procedure and executive powers are not in general protected; as are those concerning elections, political parties, the civil service, and the defence services. Therefore the rigidity of the Constitution, although real and significant, does not extend in fullest measure to the very large number of matters of detail that the Constitution deals with. This is important because, if one assumes two levels of entrenchment, the argument that the Constitution is very long and detailed (it has more articles even than the Indian Constitution which has 395) is not in itself a justification for converting the Constitution into a completely flexible one. Finally, sections 433-6 themselves – the amendment provisions – are of course protected at the higher level.

The following points need to be noted.

An amending bill must be explicitly an amending bill. Amending provisions cannot be wrapped up in a bill dealing with other matters. If it were otherwise it might be possible to amend the Constitution accidentally, if for example the bill happened to be supported by a majority and did not fall within Section 436(a). An amending bill must also be presented by 20% of the total membership of the two houses. Major amendments falling under Section 436(a) must be approved by more than 75% of *all* the representatives in *both* houses, and must also be approved by a simple majority in a referendum. Note that this majority is a majority of *all eligible voters*, not a majority *of those voting*. Accordingly the Constitution can truly be said to be very rigid.

However, rigidity and flexibility cannot be judged solely in terms of the amendment provision. In the Myanmar context the really significant point is that 25% of the members of each House are appointed by the military, giving the military effective control over constitutional changes. This was clearly the intended outcome, given the ‘discipline-flourishing democracy’ mantra of the 2008 Constitution.⁶ This is tantamount to saying that the head of the armed forces has a veto over major constitutional changes, since he is in a position to control the voting of military members. The Constitution states laconically at Section 342: ‘The President shall appoint the Commander-in-Chief of the Defence Services with the proposal and approval of the National Defence and Security Council’. No doubt this is an issue raised in the very large number of submissions that the Parliamentary Joint Committee for Review of the 2008 Constitution (PJCRC) has received.⁷

⁶ DI Steinberg, ‘Myanmar’s perpetual dilemma: Ethnicity in a “discipline-flourishing democracy”’, East-West Centre Working Papers, Politics, Governance and Security Series No22, April 2011.

⁷ ‘Burma creates a 109-member Committee to review constitution under uncertainty’, Asian Correspondent, 30 July 2013, <http://asiancorrespondent.com/111311/burma-creates-a-109-member-committee-to-review-constitution-under-uncertainty/>; ‘Public suggestions on constitutional amendment with Myanmar Parliament’, AGORA, 3 February 2014, <http://www.agora-parl.org/news/public-suggestions-constitutional-amendment-myanmar-parliament>.

2. Constitutional Review: Amending the Amendment Provision

The constitutional review process itself is not of course mandated entirely by the Constitution, which lays down the *minimum* requirements, but not necessarily the *desirable* requirements, for constitutional amendment. However, a structure for looking in detail at a range of possible amendments was clearly required, and nothing in the Constitution prohibits processes such as the present one being carried out. With the benefit of having gone through the current process, in reviewing Sections 433-6 Parliament might well consider whether it is a good idea to set out in more detail how a review process *should* be carried out. The current process will not, presumably, be the last. Indeed President Thein Sein is reported as saying that ‘a healthy constitution must be amended from time to time to address the national, economic and social needs of our society’.⁸ In this context, and anticipating the discussion of federalism that seems certain to occur, one wonders if this issue might need such protracted negotiation that it cannot be dealt with via the current amendment process.

This current process has proceeded as follows.⁹

The PJCRC comprising 109 persons, was appointed in July 2013 under the chairmanship of the Deputy Speaker of Parliament, to

Bring about a constitution that can build up longevity, stability, and development everlasting peace by building up national solidarity among ethnic nationalities ... [and] continue [the] democratic reform process of the state and its citizens without effecting [affecting?] its acceleration ...¹⁰

The PJCRC invited submissions, receiving reportedly more than 28,000 ‘advice letters’ by the postponed closing date of 31 December 2013.¹¹ The submissions came from political parties, legal experts, NGOs, government departments, the military, and individuals. The main opposition party, the NLD, proposed more than 100 amendments. This response in itself is a tribute to the engagement of the people of Myanmar and its various public and private institutions in constitutional issues. Interestingly enough, more than one third of these submissions relate to the amendment process. Other notable topics are the qualification provisions regarding the presidency, which is highly relevant to the position of Daw Aung San Suu Kyi herself given the impending general elections in 2015; and the continued role of the military in the Constitution. We do not presently have details of the content of these submissions. Obviously, given the need for the PJCRC to report back to the PH by the end of January, a very narrow opportunity was afforded for the PJCRC to look into the submissions. It formed five working groups who simply reduced the submissions to statistics according to the chapters of the Constitution being addressed in the submissions. It was clearly not possible to do anything beyond a purely statistical analysis. About two thirds of these submissions suggested changes to the all-important chapter 1 (basic principles).

⁸ Straits Times, 2 January 2014.

⁹ See *Report of Constitutional Review Joint Committee’s Findings and Assessment*, January 2014.

¹⁰ Ibid.

¹¹ In fact they also took account of letters received on 2-3/1/14.

However, the PJCRC offered a few comments. They stressed the need to ‘avoid the extremes of over-centralisation and over-decentralisation’; the need for negotiation of the right to self-administration ‘depending on ethnic nationalities’ political, economic, education and administrative situation’; and to prioritise those provisions requiring a 75% majority.¹² Essentially the PJCRC simply acted as a post office for the submissions. The PH then appointed¹³ a ‘Committee for the Implementation of the 2008 Constitution Amendment’ (CICA), comprising 31 members, including the Vice-Chairs of both Houses and seven military personnel; but a further nine MPs from minority areas were empowered to attend and make suggestions at CICA meetings. Its goals were expressed similarly to those of the PJCRC; but in addition they were mandated to draw up ‘a legal draft for the Constitution after discussing and realizing some facts [sc. provisions?] to be amended and a number of facts which it is unnecessary [sc. to amend]’. In doing this the CICA was empowered to ask advice and suggestions from the government and regional and state heads, the judiciary, representatives of the autonomous regions and states, political parties, and legal experts. It was further mandated to ‘ensure to completely implement the [relevant] orders and directions in time’ and report back to the PH ‘when the period of the Committee is over’; in fact the order does not say how long the CICA has to perform this task. Following this, the PH, when the time comes, will have to decide how – and crucially how quickly – to proceed.

One of the most controversial of the provisions that is being considered in the review process is Section 59, the provision preventing Aung San Suu Kyi from becoming President following the elections due in 2015. It states:

59. Qualifications of the President and Vice-Presidents are as follows:

- (a) shall be loyal to the Union and its citizens;
- (b) shall be a citizen of Myanmar who was born of both parents who were born in the territory under the jurisdiction of the Union and being Myanmar Nationals;
- (c) shall be an elected person who has attained at least the age of 45;
- (d) shall be well acquainted with the affairs of the Union such as political, administrative, economic and military;
- (e) shall be a person who has resided continuously in the Union for at least 20 years up to the time of his election as President;
Proviso: An official period of stay in a foreign country with the permission of the Union shall be counted as a residing period in the Union;
- (f) shall he himself, one of the parents, the spouse, one of the legitimate children or their spouses not owe allegiance to a foreign power, not be subject of a foreign power or citizen of a foreign country. They shall not be persons entitled to enjoy the rights and privileges of a subject of a foreign government or citizen of a foreign country;
- (g) shall possess prescribed qualifications of the President, in addition to qualifications prescribed to stand for election to the Hluttaw.

¹² This is puzzling, since all the Constitution’s provisions require a 75% majority at least, but perhaps they were referring to provisions falling under Section 436(b).

¹³ See Pyidaungsu Hluttaw Order No 20/2014, 3/2/14, entitled *Organising Implementation Committee for the Amendment of the Constitution*.

Several of these provisions stand as obstacles preventing Aung San Suu Kyi from assuming the presidency. This controversial issue is a good example of the fact that constitutional amendment processes can never be surgically separated from personal politics; this issue has been at the forefront of discussion since the start of the process.

It is quite usual for a Constitution to demand a clear and abiding connection between the chief executive and the nation; for example the US Constitution requires the President to have been born within the United States, which allowed President Obama to take office despite having non-American parents but being born in Hawaii, but prevented Henry Kissinger, born in Germany, from standing. However, Section 59 goes very much further with this principle. If it is amended it will have to be decided where the line is to be drawn. Section 59(d) creates an area of uncertainty. Would the Constitutional Tribunal disqualify an election to the presidency if they thought that the person did not in fact have acquaintance with the affairs of the Union, for example military affairs? My own view would be that paragraphs (b) (d) (e) and (f) should be removed. At least (f) should be confined to the person in question rather than extended to members of his/ her family. Given the immediate political significance of this provision the debate will no doubt be highly politicized. The PJCRC apparently received a large number of ‘signatures’ expressing a desire to keep section 59 as it is; and, inconsistently, went out of its way to remark that 106,102 people ‘advised with signature’ that this section remain unrevised, while only 592 people made ‘separate advice letters’ in favour of revision. This remark clearly begs a few questions.

3. Critique of the Amendment Process

It is hard to overstate the importance of the amendment provision in any Constitution. One could plausibly argue that ultimately the amendment provision is the most important provision, because it determines the extent of entrenchment of the Constitution itself. In this sense it is a rule enjoying a higher status than all the other constitutional rules.

However, we do not have any established theory or textbook that lays down what kind of processes for constitutional change are better than others, or what pitfalls are to be avoided, or even how each process might be bounded by the particular politics or jurisprudence or culture of the society in question. Current wisdom appears to say that in general one needs a great deal of public participation, and a referendum to legitimise the draft. This is often as much a matter of public education as of public participation. In Myanmar as we have seen a referendum is required for any change to the basic constitutional structure. A further problem is that processes of constitutional change are obviously highly political, it being (I think, reasonably) assumed that those who have most control over the constitution-making process are most likely to have their interests protected and their agendas fulfilled in the end product – the resulting constitution itself. It is of course also true that the politics of these processes of constitutional change are deeply intertwined with the ongoing general political narrative as we have just seen. It seems unavoidable that the Constitution will in some sense reflect the politics of the *moment* even as an attempt is being made to provide rules containing and directing the political processes of the *future*.

So addressing the amendment provision, we find a dilemma familiar in transitional contexts. Does a rigid constitution ensure there will be no backsliding from agreed fundamental principles in the early years of transition? Or does it, on the contrary, simply prevent the kind of rapid adjustment that is sometimes necessary in a fast-moving situation where power structures or normative considerations, or simply just political contexts, may change? In transition, flexibility may facilitate a regression into authoritarian government; on the other hand rigidity may facilitate its continuance. While the rigidity of the Constitution might seem to be a large obstacle in the way of change, it needs noting that it could also ensure that any changes that are eventually made carry broad legitimacy.

Of course Myanmar is by no means the first country to face this dilemma. The preference has usually been for flexibility in the amendment process as a means of accomplishing transition. Arguably the Constitution is always in some sense a work in progress, and has to adjust to changing times and concerns, as President Thein Sein himself has pointed out. Nonetheless in transitional situations it is the sheer rapidity of change and adjustment that justifies this approach. If one accepts this reasoning the issues do not, however, disappear. One still has to determine *how flexible* the Constitution should be; and if the rationale is linked to transition, then the question arises when 'transition' comes to an end and its opposite becomes manifest. (What is that - 'stability'? Is this even, one wonders, a plausible distinction to draw?) The process of transition may involve further changes at some point to the process of amendment. But should one place a time limit on flexibility? Does one specify in advance some kind of timed reversion to a more rigid rule? Does this all apply to the whole of the Constitution or only certain parts of it?

These issues are not made any simpler by the fact that, when it comes to rigidity versus flexibility, constitution-makers are faced with a very broad range of options. It is not unknown for constitutional provisions to be made completely unamendable in any circumstances. Beyond that there are degrees of flexibility ranging through special parliamentary majorities; special parliamentary procedures; consultation exercises; referenda; regional consensus; and finally total flexibility, in which any legislation inconsistent with the Constitution has the effect of amending it - in other words absolute parliamentary sovereignty. Beyond even this, flexibility and rigidity may take on a different aspect when considered against the actual political background, as we have seen in the case of Myanmar with the issue of military representation. For example, if the Constitution requires a special majority of two thirds, but the coalition in government commands more than two thirds of the votes, as was the case in Malaysia 1957-2008, then the apparent rigidity of the Constitution may turn out to be closer to flexibility in practice. By way of contrast the Japanese constitution also has a two-thirds' majority requirement, but has remained unamended since 1947 despite the historical dominance of one party. In practice it has proved rigid despite having a more or less similar rule to Malaysia.

In Myanmar's case the amendment process is inextricably linked with the main issue in the reform process, the role of the military. This role, extensive enough in the 2008 Constitution to excite much adverse comment on that Constitution as a whole, is evident in many respects, but no more obviously than in the military representation in both Houses to the extent of 25%. The special majority, taken with the presumed political alignment, leads to justification for the description 'rigid' in the case of Myanmar's Constitution, as we have seen.

The reason for this rigidity is clearly the desire of the military to retain control over the reform process. However, as is not unknown in such processes, the role of the military is itself transforming rapidly. For example, the constitutional review process itself was proposed by two generals. The implications for the amendment process are very clear. If the military is to withdraw to any extent from its present position under the Constitution, then significant changes are needed, and the amendment provision in particular will have to be amended to take account of the new situation, which means doing away with the de facto military veto over amendments.

This discussion then narrows to an overwhelming question: what *should* replace the present provision under Sections 433-6 on constitutional amendments, if anything?

In Myanmar's context it looks as though a critical consideration is the role of the ethnic and religious minorities. Creating unity in a deeply divided country entails creating confidence in the constitutional structure which is emerging. That confidence can only be created if the minorities have reason to believe that the Constitution will not be amended to their detriment or without recourse to consultation with them. This is crucial if there is to be a 'Second Panglong Agreement' as David Williams puts it in a recent paper:

In constitution-making, there are almost always second chances: if the first constitution was badly framed, it will usually lead to unrest and unhappiness, sometimes to civil war, and eventually the process will usually be re-opened. In Burma, the gap between the first and second Panglong agreements has been uncommonly long, and in the interim many ethnic minorities despaired of the future. It now appears, though, that the government and the minorities will reach some kind of agreement in the months or the years to come.¹⁴

There is another problem in this regard. David Williams argues that any negotiated solution to the demands of the ethnic minorities must be 'self-executing':

A second Panglong Agreement must be self-executing, because it would never be adopted through the normal constitutional amendment process, which requires the support of both the military and much of the majority ethnic population ... in recent years, self-executing peace deals that make constitutional change all by themselves have become an increasingly common international practice.¹⁵

However, it looks very much as though any such negotiation will indeed have to be processed via the amendment provision. How else can it be dealt with other than by adoption of a completely new Constitution, which not an option that is on the table? Negotiators can hardly be expected to give guarantees as to the parliamentary outcome of this process with regard to federalism/ autonomy/ devolution of powers.

¹⁴ D Williams, 'A second Panglong Agreement: Burmese federalism for the twenty-first century', paper presented at CALS workshop, 'Constitutionalism and legal change in Myanmar', 13-14 February 2014, 19.

¹⁵ *Ibid.*, at 2.

I suggest therefore that in the haste to move away from the rigidity of the present Constitution, flexibility should not be embraced too tightly; retaining some rigidity could actually provide a measure of stability that Myanmar seeks to attain. Assuming that the present process results in a constitution that is believed in and assented to, some rigidity in certain respects, *especially those affecting minorities*, should be maintained. In particular the issue of fundamental rights needs attention. Here one assumes that the ‘discipline-flourishing democracy’ the 2008 Constitution sought to establish is moving towards a more open democracy. In this respect it was probably considered that the fundamental rights needed some careful calibration, making them for this reason unsuitable for higher-level entrenchment. After more than five years of this Constitution and many changes in respect of fundamental rights, including the establishment of the Human Rights Commission,¹⁶ it might well be considered appropriate to entrench this Chapter by subjecting it to the stricter amendment process provided by Section 436(a). After all, its provisions contain a good deal of flexibility in terms of their own wording.

These considerations bring to the fore the issue of whether to retain the special majority of 75% and the referendum requirement. The 75% rule has been criticized for giving to the military what is in effect a veto over constitutional changes. For this reason the question of constitutional amendments is inextricably tied up with the large question of military representation in the various legislatures and their hold on the Government via the constitutional right to hold some of the portfolios, as well as enjoying, potentially, very broad emergency powers. A significant step forward would be to delink these two issues and reduce the constitutional role of the military. If Myanmar takes a cue from Indonesia, the military role would be reduced in successive stages as democratic aspirations become enacted into law. In Indonesia this was achieved only in four successive constitutional amendment processes.¹⁷ It will be a nice question in the review process how far or how quickly this role is to be reduced; but whatever position is taken on this tricky issue, it seems clear that a military stranglehold over constitutional changes is not in the interests of building up trust and a new order of democratic and constitutional government. In this context perhaps what would serve Myanmar better than the present rule is one that requires the consent of a proportion of the country’s states and regions instead of a referendum requirement. It is generally acknowledged that referenda create problems as a means of resolving such general issues. They tend to get caught up with other issues such as the popularity of the government in power, and are in any event hard to frame in a content-neutral fashion.¹⁸

Constitutional powers need to be shared amongst the Union, regions, states and ethnic self-administered areas. This process is under way, and, in conjunction with an amendment process that guarantees minority participation and consent, could provide a framework for trust and for emerging constitutionalism. How Myanmar stays together has been the perennial conundrum of the country since independence. It is fundamental to constitutional development and to legitimation. It is important in reform processes to keep in mind, in the words of the Constitutional Court of South Africa,¹⁹ which seem highly relevant in Myanmar, that ‘the

¹⁶ A bill to provide a statutory basis for the Commission is presently before Parliament.

¹⁷ T Lindsey, ‘Indonesian constitutional reform: Muddling towards democracy’, (2002) 6 *Singapore Journal of International and Comparative Law* 244.

¹⁸ S Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford, Oxford University Press, 2012).

¹⁹ *Shaballala and Others v AG of the Transvaal and Another*, 1996 SA 725 (CC).

Constitution ... retains from the past only what is acceptable and represents a radical and decisive break from that part of the past which is unacceptable'.