

The Inaugural Bus Tour on Constitutional Awareness

Organised by the Myanmar Lawyers Association,
Myanmar Legal Aid Network and others

November 2013



Alex Goodman and Naina Patel



British Institute of
International and
Comparative Law

Objectives of the Workshop

- Joint Committee for Reviewing the Constitution
- Meetings on 23 August and 30 September 2013
- Goals of peace, unity and democracy
- Seeking advice through Parliament
- Seeking advice from political parties, organisations and individuals through MPs or directly
- Submissions to be sent to the Committee at Office of the Joint Committee for Reviewing the Constitution of the Republic of the Union of Myanmar, Office No. 20, Hluttaw Office, Nay Pi Taw by 31 December 2013

Objectives of the Workshop

- Myanmar Lawyers Association consortium seeking to raise constitutional awareness and participation in the process
- A clear understanding of the purpose, place and contents of a Constitution (15 mins)
- The main provisions of the current Constitution of the Republic of the Union of Myanmar 2008 (1 hour)
- A discussion of possible avenues for reform of the current Myanmar Constitution (1 hour)
- Assistance drafting submissions to the Parliamentary Drafting Committee (45 mins)

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PART I: THE ROLE OF A CONSTITUTION



Purpose of a Constitution

- A contract between the citizens and their state
- Protection of citizens' rights (Myanmar's "eternal principles" of human dignity, equality and liberty)
- A framework for all decisions by government officials with consequences for failure to observe that framework
- As a result there is rule of law: no-one, not even government, is above the law

Place of a Constitution

- A constitution sits above the laws passed by the legislature.
- Laws adopted by the legislature must be in conformity with the constitution.
- Such conformity will be decided by the courts, sometimes specialised constitutional courts.
- Harder to amend than ordinary laws, but contains amendment provisions (*too rigid in Myanmar?*)
- Suspension of rights under the Constitution, emergency powers (*too broad in Myanmar?*)

Contents of a Constitution

- A preamble which gives the Constitution a context
- The main characteristics of the state: national language(s), flag, citizenship
- A Bill of Rights (*to be improved in Myanmar?*)
- The structure of the State: regional versus central allocation of power (*right balance in Myanmar?*)
- The role and composition of the Executive
- The role and composition of the Legislature
- The structure and appointment of the Judiciary

Contents of a Constitution

- Economic fundamentals: market or socialist economy
- The role of the armed forces (*right balance in Myanmar?*)
- Other checks and balances
- Emergency powers
- Amendment provisions

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PART II: THE MYANMAR CONSTITUTION



The Bill of Rights

- Who is protected?
 - Often only citizens (ss.348, 354, 356)
- What type of rights?
 - Civil and political rights
 - Economic and social rights
 - Third generation rights
- What degree of protection?
 - Absolute rights (ss.347-8) and limited rights (ss.354, 359)
 - Derogable and non-derogable rights (ss.414, 420)
- The role of international treaties

Structure of the State

- There are three main structures:
 - Unitary States: power is concentrated within central government.
 - A constitutionally decentralized union: some power is devolved to the regions. The power enjoyed in the regions may be symmetrical or asymmetrical.
 - Federal States: the Constitution shares power between the central government and the regions.
- Myanmar is a constitutionally decentralised union

Structure of the State

- There are Union and state/regional legislatures, but
 - With different competencies (Schedules 1-3).
 - The laws of the Pyidaungsu Huttlaw remain superior (s. 198(b)).
- There are Union and state/regional executives, but
 - The President appoints his Cabinet and the Chief Justice
 - He also appoints Chief Ministers of Regions and States (s. 261(b)) as well as Chief Justices of the High Courts of the Regions and States (s. 308(b)).
- Any regional powers can be removed in a state of emergency (ss. 411, 413).
- There is no right of secession.

The Legislature

- The Legislature is a body of elected representatives that passes laws and holds the Executive to account.
- The Legislature can be composed of two chambers (a lower and upper chamber) or one (bicameral versus unicameral system). The Pyidaungsu is bicameral (s.74):
 - The Pyithu Hluttaw has up to 440 representatives (s. 109), 330 of whom are elected and represent townships by population and 110 of whom are Defence Services personnel selected by the Commander-in-Chief of the Defence Services.
 - The Amyotha Hluttaw has up to 224 representatives (s. 141), 168 of whom are elected to represent States and Regions and 56 of whom are Defence Services personnel selected by the Commander-in-Chief of the Defence Services.
 - They serve 5-year terms (s. 119&151).

The Legislature

- Legislative powers may include the power to legislate and refuse to ratify appointments or other Executive decisions
 - The Pyidaungsu Hluttaw is responsible for making law (s. 95&96).
 - A proposed law passes if it achieves a majority of support in both Hluttaws (s. 95(a)). If there is disagreement, the issues must be discussed and resolved in the Pyidaungsu Hluttaw (s. 95(b)).
 - The Pyidaungsu Hluttaw plays a role in approving or limiting spending in the Union Budget Bill proposed by the President (art. 103), but there are certain items it cannot reject.
 - S.89 prevents publication of the minutes of the Pyidaungsu Hluttaw if their publication is forbidden by law.

The Executive

- The Executive is responsible for putting the law into action, supervising the civil service and the military.
- The Executive may be indirectly or directly elected as demonstrated by Parliamentary versus Presidential systems.
 - Today Myanmar has a Presidential system (cf. 1947)
 - The President is indirectly elected by three groups of Hluttaw representatives from Regions and States, townships by population and the Defence Services (s. 60(a)-(b)).
 - Each group selects a Vice-President and one of these three people is elected President by all the Pyidaungsu Hluttaw representatives (s.60(c)-(e)).
- The President serves a maximum of two 5-year terms (s. 61).

The Executive

- Who can be President? (s. 59)
 - ❖ A person loyal to the Union;
 - ❖ A citizen whose parents were both born in Myanmar;
 - ❖ Is at least 45 years of age;
 - ❖ Has been residing in Myanmar continuously for the last 20 years before becoming President; and
 - ❖ Does not have a spouse, parents, child or child's spouse who is the citizen or subject of a foreign country.
- Compare this with who can be an MP (ss.120, 152) or who can be a Judge (ss.301, 310)

The Executive

- What are the powers of the President?
 - The President selects the members of the Union Government with approval from the Legislature. The Legislature has limited powers to oppose his choice (ss. 232, 237).
 - The President may start or end relationships with other States (s. 206), enter into agreements with other States (s. 209), make a speech to the Legislature (s. 210), may call an emergency session of the Legislature (s. 211), put into effect a law which is urgently needed when the Legislature is not assembled (s. 212) and take military action in the case of an aggression against the Union (s. 213).

The Judiciary

- The Judiciary administers justice between private persons or private persons and institutions or between private persons and the State.
- In order for their to be rule of law:
 - Everyone should be subject to the same judicial system;
 - Judges in that system should be impartial and independent and appointed based purely on merit.
 - Judges should be able to take decisions without fear of being removed.

The Judiciary

- There are three judicial systems:
 - The general system of the Supreme Court, the High Courts of the Regions and the States and Courts of different levels including in Self-Administered Areas (s. 18).
 - The court-martial system
 - The Constitutional Tribunal, responsible for interpreting the Constitution and ensuring that the laws passed by the Legislature do not violate the Constitution (s. 46). But what effect do its decisions have?

The Judiciary

- How are Judges appointed?
 - The President chooses the Chief Justice of the Union with the agreement of the Legislature. The Legislature's ability to oppose his choice is very limited (s. 299). He appoints the rest of the judges for the Supreme Court and the High Courts of the Regions and States (s. 299&308).
 - He chooses a third of the judges of the Constitutional Tribunal (s. 321). The members of the Constitutional Tribunal serve 5-year terms (s. 335).

The Armed Forces

- All formed forces are under the command of the Defence Services (s. 338).
- The Defence Services are responsible for safeguarding the Constitution (s. 20(f)) and protecting the Union from internal and external dangers (s. 339).
- The Defence Services have the right to involve anyone in Union security and defence (s. 20(d)).
- There is no provision for any civilian oversight or control of actions of the armed forces.

Emergency Powers

- Three types of emergency
 - Where administrative duties can no longer be carried out by a Region, State or Territory (s.412)
 - Where there is a threat to human life, shelter or property in a Region, State or Territory (s. 414).
 - Where there is a risk of disintegration of the Union, the President can declare a state of emergency for a year which covers the entire Union (s. 421).

Emergency Powers

- Consequences
 - Depending on the nature of the emergency, executive and legislative powers will pass to the President or the military (s. 411&413).
 - During a state of emergency, citizens' rights may be withheld as required (s. 414&420).
 - No legal action may be taken against the actions of those in power during a state of emergency (s. 432).

Amendment

- A three-stage process
 - A suggested amendment must be submitted to the Pyidaungsu Hluttaw by 20% of its members (s. 433, 434&435).
 - It must have the support of 75% of its members to be approved (s. 436).
 - Amendments to certain parts of the Constitution must also be approved by a majority of voters (s. 436(a)).

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Break out Session



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Break-out Groups

- Group 1: Bill of Rights
- Group 2: The Executive
- Group 3: The Legislature
- Group 4: The Judiciary
- Group 5: Emergency and Amendment Provisions

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PART III: POSSIBLE AVENUES FOR REFORM



Bill of Rights

- Some rights are for citizens only
 - The Constitution gives a limited definition of citizenship.
- Voting and election rights
 - The right to vote or stand for election is limited to citizens.
 - Citizenship is difficult to acquire.
 - Members of religious orders and prisoners are prevented from voting and standing for election.
- Ethnic minorities, women, children and the disabled
 - There is no explicit protection of the rights of ethnic minorities under the Constitution.
 - There are also no specific rights for women, children or the disabled.

Bill of Rights

- Some rights are not protected
 - Presumption of innocence.
 - Protection from being tried twice of the same crime
 - Freedom from torture and cruel punishment.
 - Right to administrative justice
 - Environmental rights.
- Some individual rights are limited
 - Freedom of expression and assembly
 - Ban on actions that damage life and freedom.
 - Ban on forced labour.
 - Such limitations should be proportionate and compatible with life in a democratic society.

Bill of Rights

- The Human Rights Commission
 - President Thein Sein has created a Human Rights Commission.
 - The Constitution does not currently outline its duties and responsibilities (e.g. ensuring compatibility of national laws with international human rights standards, cooperating with other human rights institutions, promoting human rights education and collaborating with the human rights bodies of the United Nations).

The Structure of the State

- Is power balanced appropriately between the Centre and the State?
 - Power is currently highly concentrated at Union level in Myanmar.
 - Chief Ministers of Regions and States are not democratically elected.
 - State Legislatures have limited powers in comparison with the Pyidaungsu Hluttaw.

The Three Branches

- Is there fair representation?
 - The President is not directly elected by the people.
 - Are the criteria for his/her eligibility reasonable?
 - 25% of the members of the Legislature are non-elected Defence Services personnel.
 - Judges are not appointed by an independent appointments commission.

The Armed Forces

- Is there sufficient accountability?
 - There is no civilian oversight over the Armed Forces.
 - There are no qualifications required for the role of Commander-in-Chief.
 - Currently, no military crimes may be judged by civilian courts.

Emergency Powers

- Is there rule of law?
 - Should there be review of the President's right to declare a state of emergency without any review by the Legislature or the Judiciary.
 - Are the situations under which a state of emergency may arise clearly defined?
 - The first two situations give the President the right to declare a state of emergency without any time limits.
 - Under a state of emergency, individual rights can be suspended indefinitely.

Amendment

- Is the process stable or rigid?
 - Changes to the Constitution are currently difficult to pass (75% + 1).
 - They can be defeated by the unelected Defence Services if they vote together.
 - Half of the voting population must accept key changes to the Constitution.
 - It is important to weigh the ease of amending the Constitution against an attack on its credibility if it is amended too often.

Transparency and Consistency

- Does the Constitutional Tribunal provide sufficient transparency and consistency in interpretation?
 - There is no direct right of access to the Constitutional Tribunal (s.325)
 - The powers of the Constitutional Tribunal are not currently set out in a lot of detail
 - The effect of its decisions are not set out at all

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Submission Drafting



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