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## MYANMAR: 2008 Constitution – The Cynosure of Current Political Debate

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*“We have to accept openly that the Constitution is not fair, not in accordance with democratic standards and not a charter that is good for our country’s future”* – Aung San Suu Kyi (04 January 2014)

### Introduction

With the 2015 general elections in view, there is a country-wide clamour for amending the 2008 Constitution. A wordy tussle is in progress between the government, the military and the ruling party-Union Solidarity and Development Party (USDP) on the one side and the opposition National League for Democracy (NLD) led by Aung San Suu Kyi and the ethnic groups on the other. The Government has bided time by appointing on 25 July 2013 a 109- member Joint Committee to review the 2008 Constitution, which is expected to submit its report in the next parliamentary session beginning on January 13, 2014.

The controversial provisions of this 2008 Constitution which are being demanded to be amended as well as the action taken by the Government and the opposition in this regard and the views expressed by various political parties, leaders, institutions and agencies are given in subsequent paragraphs.

### Historical Background

This (2008) is the third Constitution of the country after the 1947 and 1974 constitutions. The 2008 constitution was drafted over a period of 14 years and 11 months from January 1993 to December 2007 by a National Convention constituted by the military junta then called the

SPDC. The Constitution was adopted by a controversial referendum (with 92% in favour) in May 2008 when the country was ravaged by a Cyclone code named “Nargis”. For this reason some opposition groups call this as the Nargis Constitution.

### **Controversial Provisions**

This Constitution is heavily loaded in favour of the Tatmadaw (Defence forces) giving it a national political role with 25% of the seats reserved in the central and state legislatures (Sections 109, 141 and 161 of Chapter IV) and immunity for all actions earlier taken by the military junta (as SLORC and SPDC) under Section 445 - Chapter XIV (Transitory Provisions).

The National Defence and Security Council is the most powerful body under the Executive branch of the Union Government with the President, Vice-Presidents, the Speakers of both houses, the C-in-C, the Deputy C-in-C of the Defence Services and Ministers (presently Army Officers) of some key departments as members (Sec 201 of Chapter V-Executive). A study of the Constitution will reveal that on a number of instances the president has to act in co-ordination with or on the recommendations of this council.

The Commander-in-chief of the Defence Forces has been endowed with sweeping powers when a state of emergency is declared in the country or in a state as per the provisions in Chapter XI of the Constitution.

The procedure for amendment of most provisions of the Constitution (chapter XII) is very restrictive in that it requires the prior approval of “more than 75% of all the representatives of the Pyidaungsu Hluttaw (Union legislature - both houses) after which in a nation-wide referendum only with the votes of more than half of house who are eligible to vote”. Thus it gives virtually a ‘veto’ for any change in the constitution.

Sec 59 (f), Chapter III of the 2008 Constitution which stipulates the qualifications for the President and the Vice Presidents reads “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 a subject of a foreign power or citizen of a foreign country.” At the time, the Constitution was drafted, it was widely believed that this section was aimed at precluding Aung San Suu Kyi from taking up the post of President.

### **President Thein Sein**

President Thein Sein in his monthly televised address to the nation on 02 January, 2014 said *“A healthy constitution must be amended from time to time to address the national, economic and social needs of our society. I would not want restrictions imposed on the right of any citizen to become the leader of the country. At the same time, we will need to have all necessary measures in place in order to defend our national interests and sovereignty.”*

This statement is ambiguous at best. Does he mean that the Army’s hold in the parliament to continue? There is no hint either on any

change of heart regarding the eligibility of Suu Kyi.

President Thein Sein who is 68, by this statement has not spelt out his own future. Is he under pressure or will he retire? These are questions that need to be examined.

## **Aung San Suu Kyi**

In the last few months, Aung San Suu Kyi has on a number of occasions declared her ambitions to become the head of state. Her disqualification on constitutional grounds to become the president has made her launch a vigorous nation-wide campaign by holding rallies and public meetings in different cities for a change in the constitution. She has also sought the support from all quarters including the military, ethnic groups and foreign leaders. In all her foreign trips she has emphasised the necessity for revision of this constitution. She has taken a rigid stand in proclaiming that there could be no fair election under the present constitution.

Here are some of her views conveyed recently on the 2008 Constitution:

*“I respect those who say frankly that they absolutely cannot accept the amendment of the Constitution,”* she said before warning against casting a vote for *“those who try to convince the public with cunning tricks and phony smiles to amend only the very minor issues of the Constitution”*. – at a rally in Naypyidaw (The Irrawaddy-26 November 2013).

*“I believe that there are people who have dignity in the army and (other) political parties, or organisations. Those who have dignity should not join the 2015 elections unless there is an amendment to the Constitution. There will be no fair elections with the current Constitution.”*  
- at a NLD Party rally in Tharyarwaddy Township on 15 December 2013.

(Her statement gave rise to speculations that her party may boycott the elections in the present form. However the party has since clarified that it will contest the elections whether the constitution is amended or not).

*“The Tatmadaw must not remain in a dilemma about whether to take part in amending the constitution, it must take part in it”* – in her Independence day speech on 04 January at the NLD HQ.

When asked in an interview with Radio Free Asia on the proposal of USDP to amend the Article 59(F) to delete the provision that states that any of the spouses of children of a presidential candidate should not be a foreign citizen, she said *“I know the proposed deletion of this requirement is not to benefit me but I don’t know who will benefit from this”*. On the suggestion of the ruling party that her sons should take up Myanmar citizenship to make her eligible for the president’s post she said *“Anyone’s sons or daughters, if they are above 21 years old, we cannot legally make a decision for them. They are adults and have the right to make their own decision for their own good”* (RFA-06 January 2014).

*“It (the 2008 Constitution) was drafted in an undemocratic manner, without input from representatives elected by the people, and its clauses do not facilitate the establishment of a democratic union.....The agreement of the military is important to amend the Constitution. That is why*

*we need to convince them. The situation of the constitution is dividing the military and the people. If the military accepts the desire of the people to amend the constitution the change for the country will be easy”* – on 07 January 2014 at a rally in Tedim (Chin State).

## **Thura Shwe Mann**

*“Myanmar’s democratic reform attracts attention both locally and internationally. Failure to take correct measures for national unity and national reconciliation can cause difficulties in the reform efforts. That can also harm the process for peace, stability and development, provoking unexpected consequences,”* said Shwe Mann at the party’s (USDP) Central Committee meeting on December 28, 2013 according to the Eleven Media group.

Even though a direct reference to the Constitution has not been made in the above comments he seems to be inclined for amending the Constitution in response to the nationwide demand and for “national reconciliation”.

Thura Shwe Mann is the Chairman of USDP and the speaker of the Union Parliament and a former general ranked senior to Thein Sein. He is also a contender for the post of the President especially if Thein Sein is not to seek a second term. Some close rapport between him and Suu Kyi has also come to notice in the recent past.

## **The Government**

The Government (The Parliament), in response to calls from most political parties and ethnic groups, formed on 25 July, 2013, a Joint Parliamentary Committee to review the Constitution. It had 109 members (one had since died) with the Deputy Speaker of the Union Parliament as Chairman, and is represented proportionally by parliament members of both houses, political parties, military MPs and individuals. The committee is made up of 52 USDP members, 25 military representatives, 7 NLD members and 25 from ethnic parties. The committee sought suggestions from all stake holders by 31 December 2013.

By 31 December 2013 (the last date), over 300,000 suggestions have been received from various quarters, including some from abroad.

According to a Mizzima report of 09 January 2014, the committee has appointed five groups of its members to go into these suggestions, with each group being allotted some chapters of the Constitution.

The final report of the Committee is expected by 31 January 2014.

## **National League for Democracy (NLD)**

NLD with Aung San Suu Kyi at the helm is vigorously campaigning for the amendment of the 2008 Constitution by holding public meetings and rallies all over the nation. It has formed a Committee of its own to examine the Constitution, hold discussions with members and the general public and submit the recommendations. The NLD has also had discussions with other political parties and ethnic groups.

According to Zin Linn, Asian Correspondent (07 January, 2014), NLD has already put forward its proposition to revise 168 provisions in the Constitution to the parliamentary joint committee on Constitutional review.

The NLD also proposed for a preliminary quadripartite meeting among, the NLD, the President, the Armed Forces and the Parliament for a discussion of the process for amending the Constitution. However, this has been turned down by the President's spokesperson Ye Htut as premature and that decision to hold such a meeting will be taken after the report of the parliamentary committee and after ascertaining the views of other political parties also.

### **Union Solidarity & Development Party (USDP)**

The USDP (the military backed ruling party) had initially taken a stand to desist from the revision of the Constitution and warned grave danger and serious consequences if the 2008 Constitution is rehashed.

However, it has since softened its approach and has even come up with a proposal for 51 Constitutional amendments after discussion at a Central Committee meeting on 30 December 2013 at Naypyidaw.

The proposal includes the amendment to the controversial Article 59 (F) to allow the presidential candidate to take office if his or her children and spouse adopt Burmese citizenship (The Irrawaddy 31 December, 2013).

### **Ethnic Groups**

In a meeting of the ethnic groups held in Chiang Mai in July 2013, organised by the United Nationalities Federal Council (an umbrella body) it was decided to redraft a new constitution and submit it to the Government for consideration.

The main demands of the ethnic groups are for a federal set up and a federal army, both of which are not in accordance with the present 2008 Constitution.

### **The Military**

*"The military's role in Myanmar politics is to guard and protect democratic practices in compliance with the Constitution"* said Senior General Min Aung Hlaing, the C-in-C of the Myanmar Armed Forces during a goodwill visit to Kayin State for meeting military personnel and their

families according to a media report.

*“Brig-gen Wai Lin, the leader of the military MPs’ Constitutional Amendment Review Committee, said the officers had already discussed making potential changes to the Constitution. “We will disclose it soon,” he said, before declining further comment.” (The Irrawaddy, 31 December, 2013).*

The question is this. With all the privileges enjoyed for over 50 years, with immunity for past actions, and the guaranteed political role provided in the 2008 constitution, will the military agree to amending the Constitution on major issues especially where it affects its interests?

### **The General Public**

Media reports indicate that there was a public protest in front of the Yangon City Hall on 03 January 2014, with people numbering a few hundred in formal white shirts and longyi (mostly NLD supporters) demanding changes to the Constitution. Surprisingly there was no police action against this gathering.

With the liberalised rules on public gatherings, more such protests are likely to take place and may occur in other cities also as more and more heat is generated by the NLD public meetings and rallies. If the protests escalate, will the Army remain as onlookers? Very unlikely. The political leaders will have to think about it, before intensifying the protests.

### **Views of some Political Analysis**

*“I believe that there are, and they are the two elements already mentioned: first, her disability to be nominated as a presidential candidate; second, the control which the Commander-in-Chief effectively exercises over any constitutional review.....does the Tatmadaw have a deal up its sleeves which could resolve the issue and allow Daw Aung San Suu Kyi to be President while the Tatmadaw retains its constitutional dominance?” - Derek Tonkin, a former British ambassador to Vietnam, Thailand and Laos, and chairman of Network Myanmar.*

*“As an entrenched political class, the military men and all who are closely associated with them are not likely to yield either to Suu Kyi’s charm offensives or to her demonstrated ability to move the masses. Even though some—most notably Shwe Mann, the powerful speaker of the Union Parliament—have publicly backed her calls for constitutional changes, there are no guarantees that they won’t desert her at the end of the day.” Kyaw Zwa Moe / The Irrawaddy – 26 November 2013.*

*“Democracy activists on the ground consider amending the constitution crucial to achieving their goals. Daw Aung San Suu Kyi and other National League of Democracy (NLD) leaders emphasise amending the constitution, but recognise that the constitution itself, “adopted” by a spurious referendum in 2008, derails these efforts. Amendments require more than 75 percent majority vote of parliamentarians and the constitution guarantees that the military may appoint 25 percent of parliamentarians, effectively giving the military a veto over all legislation and amendments.*

” - Janet Benshoof – DVB 20 February, 2013.

*Of the two most immediate that struck me, the first one is the most obvious one that the military appoints a quarter of seats in parliament—at a minimum that needs to be phased out. Secondly, there is a provision in the Constitution that essentially legitimates a military coup in a state of emergency with the chief of the defense forces seizing political power.”* Larry Diamond - Stanford University democracy scholar, in an interview to The Irrawaddy (24 July 2012).

## **News Analysis**

Pressure is mounting by the day on the Government for amending the 2008 Constitution. The government has to relent and make some changes which may be cosmetic or substantive. However, the government is taking its own time by instituting this joint committee and waiting for its recommendations.

In view of the Government’s desire to keep Aung San Suu Kyi on board, more for the continued support of the western nations, it may amend the Constitution to make her eligible to become the head of state without affecting the dominance of the military enshrined in the Constitution.

As it happened in Indonesia, the military in Myanmar may agree for phasing out their political role over the next 10 to 15 years but may not be inclined to amend the clauses pertaining to its immunity for past actions, the National Defence and Security Council or on the powers of the C-in-C.

Aung San Suu Kyi is aware that, despite her vigorous campaign, any meaningful amendment to the Constitution cannot be made without the support of the military. She has avoided making any direct criticism of the Tatmadaw.

Aung San Suu Kyi is also under criticism for going alone in this struggle, without co-opting the ethnic groups and other political parties, though she has had consultations with them and ascertained their views. She does not appear to be in sync with the ethnic leaders on the twin issues of federalism and a federal army.

Despite Suu Kyi’s entreaties, the international community is most unlikely to interfere in this process except for some formal pronouncements.

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