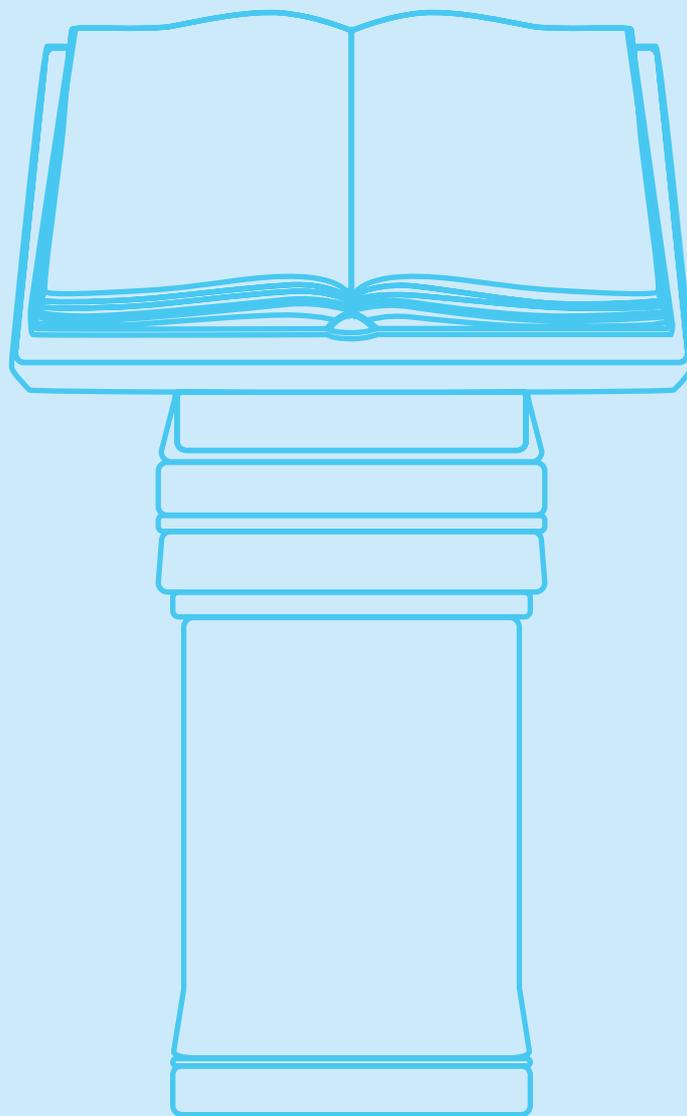


Framing the Constitution-Making Process for Peace-Building in Myanmar: The Perspectives of Ethnic Armed Organizations and Civil Society

Hnin Aye Hlaing and La Gyi Zau Lawn

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Abstract

Myanmar has been affected by long-lasting armed conflict. Along with Myanmar's complex history, the lack of a constitution guaranteeing political demands to diverse political entities is one of the main barriers to obtaining peace in the country. Consequently, constitution-making is essential for the peace process in Myanmar. Therefore, the aim of the present research was to examine how constitution-making can be applied as a conflict resolution tool in Myanmar's peace process. Qualitative data was collected through in-depth interviews with four experts, three stakeholders from ethnic armed organizations, and one member of a regional parliament of the current civilian government. The study found that constitution-making is a crucial tool for mitigating the conflicts in the country. This research

suggests that approaches to constitution-making need to be changed in order to achieve sustainable peace in Myanmar. Based on the findings of this research, there are two significant barriers to the peace-building process: 1) lack of political settlement through a peace agreement and 2) constitutional issues. Therefore, the research recommends parties to engage in peace negotiation to meet political settlement in the form of a peace agreement. The constitution-making process could then be initiated based on such an agreement, and potentially result in a new constitution guaranteeing genuine federalism. This study contributes to our understanding of stakeholders' views on constitutional issues, which need to be resolved when building peace, especially in a conflicted country.

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Introduction

The constitution is the foundational feature of a nation recognized as supreme law. A constitution sets out the fundamental framework for the legal, political, and social system of a country. As a legal instrument, the constitution itself lays out the functioning system of the state's power, provides for the rule of law, and limits power. By expressing shared values, identity, and aspirations of the people, constitutions are also formed to reflect and shape the society (Bulmer, 2017). Finally, constitutions are political instruments, which manage the separation of powers among governance institutions and produce mechanisms through which public policy has to be adopted (Hedling, 2017). Above all, constitutions are vitally important for nation-building, promoting common identity through the inclusiveness and involvement of all layers of diverse societies in the constitution-making process (Fleiner, 2002).

Furthermore, in many states, constitutions have been established not only to build and regulate the form of a government and its relations with its citizens, but also to provide them with crisis management tools. In fact, the traditional constitution-making process is still widely perceived as an essential element of governance after conflict, formulating settlement structures that aim to obtain balance and stability in the long term (Hart, 2001). Specifically, power sharing needs to be seriously considered as a factor in the constitution-making process, as it is the only way in which interests and demands of diverse groups in deeply divided societies can be accommodated (Lijphart, 2004). Since constitution-making is a process that provides the framework for the distribution and limitation of power, it is the context in which political elites from different divisions should proceed with negotiations regarding the claiming, holding, and sharing of power. Ideally, a constitution should then be a mechanism through which future conflict can be handled peacefully without turning back to violence.

At the same time, building peace only through the cessation of conflict is unlikely to be successful without

transformation of the political environment. Negative peace can be achieved through ceasefire agreements that only focus on ending violent conflict, but are not intended to build all-inclusive and sustainable peace; that is, to provide political and governance transition and a proper power sharing among diverse groups within a nation. Therefore, the design of a constitution and the constitution-making process can play an important role in conflict resolution by regulating and providing all these requirements that are needed for positive peace. Then, the model of constitution and constitution-making processes can be applied as an essential tool in transitional post-conflict periods (Samuels, 2006). At this point, the higher the involvement of the parties that experienced the conflict, the more sustainable the constitutional outcome will be. Therefore, with respect to strong public participation, the voices of marginalized people must be included in the power sharing process (Hart, 2001).

In Myanmar, one of the reasons why domestic armed conflicts still continue to happen is the lack of political settlement between conflicting parties. To solve such a problem, it is necessary to take into consideration the constitution crisis in parallel with the negotiation of peace agreements. In fact, the 2008 Constitution has been by some described as one of the main obstacles in the country's current peace process (e.g. Karen Information Center News, 2019). According to Hartery (2019), the reservation of 25% of parliamentary seats for the Tatmadaw as provided for in Articles 74, 141, and 161 is the most challenging factor. Furthermore, due to the Tatmadaw having authority over the Ministry of Defense, Ministry of Home Affairs, Ministry of Border Guard Force, and holding majority in the National Defense and Security Council, it can be argued that this constitution had been "monopolized" by the Tatmadaw. Considering the above issues, it is undeniable that the role of the constitution is a crucial tool for mitigating conflicts in the current peace process.

Methodology

This research used qualitative methodology; specifically, in-depth interviews with key participants were chosen. The interview questions were developed based on previous literature and the researchers' interests in constitution-making and the current Myanmar peace process. The interview questions were open-ended and not completely identical across all participants, because their background as well as their perceptions were different. First, the questions were formulated in English and then translated into Burmese. Before the actual data collection, the researchers conducted a pilot study with Saw Myo Min Thu, who was Executive Director of Thabyay Education Foundation at that time, in order to ensure the method and questions were appropriate.

In this study, purposive expert and stakeholder sampling methods were used. Since the research question related to very current issues, experts and stakeholders of the peace process, constitution, and laws were the most relevant people to provide insights to answer the research question. A total of eight high-level people from ethnic armed organizations (EAOs), civil society, and the current government were interviewed. The interviewees were:

- General Sumlut Gun Maw, Vice-Chairman of the Kachin Independence Council, Kachin Independence Organization (KIO; non-signatory);
- Khu Oo Reh, Vice-Chairman of the Karenni National Progressive Party (KNPP; non-signatory);
- Padoh Kwe Htoo Win, Vice-Chairman of Karen National Union (KNU; signatory);
- Dr. Khin Zaw Win, human rights defender;
- Sai Wansai, Shan political activist and commentator;
- Naw May Oo, Policy Advisor, Salween Institute for Public Policy;
- Gum Ja Naw, constitutional expert from Kachin State; and,
- U Kyaw Min San, National League for Democracy (NLD) Member of Bago Region Parliament.

Once all the data had been collected, the interviews were transcribed. Then, all the transcriptions were printed and coded by hand and the most important codes were organized into categories and themes. When it comes to ethical considerations, the participants of this research were experts and high-level members of EAOs, so building trust was a priority for their security. It was also important to promise confidential storing of the collected data. Finally, the researchers confirmed with the participants that they were happy to have their names mentioned in the published report.

Findings and Discussion

Participants' Views on the 2008 Constitution

Most of the interviewed EAOs, whether signatory or non-signatory to the Nationwide Ceasefire Agreement (NCA), are against the 2008 Constitution and have never accepted it. This is not only because of its contents but also because of the nature of the drafting process, which was not all-inclusive. Even though some representatives from EAOs participated in the drafting process, they had no real influence and viewed their involvement as tokenistic. General Sumlut Gun Maw explained:

“When we attended [the National Assembly], the principles had been already released. They [the Tatmadaw] formed the National Assembly in the 1990s. As we just started to attend in 2003, 2004, it was the time for discussion in detail about those basic principles. But, we submitted [a request] to the Assembly to re-discuss those basic principles, because we [EAOs] did not attend the prior stages of the Assembly. However, these discussions did not make it into the final decisions”.

Moreover, according to Padoh Saw Kwe Htoo Win from the KNU, although the 2008 Constitution has some features of democratic norms and principles, there is nothing to guarantee the ethnic rights that EAOs have been demanding. General Sumlut Gun Maw also said that “the 2008 Constitution does not have the important basic content which ought to be inserted. For instance, the principles of federal democracy, human rights norms, and the values of the 1947 Panglong Agreement have not been included”. U Kyaw Min San, NLD Member of Bago Region Parliament, maintained that “our constitution is quasi-federal and quasi-democratic, so if we amend the constitution with more relevant factors, I think that can make the ethnics satisfied”. However, expert Gun Ja Naw claimed that the 2008 Constitution is neither federal nor quasi-federal, stating that it “solely supports the role of the Tatmadaw”.

All-inclusive participation in the process of constitution-making is essential, since the shared identity and the common values must be preserved through the provisions of the constitution, as it is social document. Yet, because the 2008 Constitution does not represent the political will

of EAOs and safeguards the role of the Tatmadaw, they do not accept it. Moreover, the present findings show that the 2008 Constitution lacks ethnic rights based on the principles of federal democracy and the 1947 Panglong Agreement. In order for the constitution to be a political document for all the different ethnic political entities, it must include the demands of the EAOs.

Participants' Views on the Current Peace Process and the Role of the 2008 Constitution

According to the present findings, both the signatories and non-signatories to the NCA agree that a nationwide ceasefire agreement should be implemented prior to entering an all-inclusive peace agreement. Moreover, the EAOs interviewed for this study expressed a need for a common political vision (i.e. to form federalism) in order to effectively take part in the peace negotiation process. Khu Oo Reh from the KNPP clarified, “We need a common political goal and perception among the EAOs while we are entering the frame of political dialogues to achieve reliable political settlement through peace agreements”. Indeed, EAOs view the lack of political settlement as the main cause of the conflict, and the hard pressure from the Tatmadaw and concerns about the formation of a single army as the most considerable barriers. Furthermore, the commitment to follow the agreed terms of past and present agreements is seen as crucial for trust-building, which is in turn crucial for the peace process. General Sumlut Gun Maw from the KIO said, “We should not only talk about trust-building. We need practical action for building trust. The commitment to follow the promised agreement is very essential. Without this kind of commitment, the ‘trust-building’ will be easily broken”.

Two of the interviewed EAO participants strongly believe that the peace process is related with the constitutional matters, as the current 2008 Constitution does not fully provide for the rights of ethnics and democratic norms. Therefore, constitutional matters must be resolved in order to obtain peace. Khu Oo Reh from KNPP argued that “the 2008 Constitution must be amended, since it lacks strong provisions about self-determination rights and ethnic equality.” When it comes to the KIO’s decision not to sign the NCA, according to General Sumlut Gun

Maw, the 2008 Constitution is not the main influencing factor; the KIO believes that the issue of the constitution should be discussed separately. However, contrary to the KIO, the reason why the KNPP has decided not to sign the NCA is related to the 2008 Constitution. At the same time, both the KIO and the KNPP representatives said that there had been no specific discussion about the constitution with the Tatmadaw or the government. According to Sai Wansai, the EAOs' decisions to sign or not to sign the NCA are not influenced by the 2008 Constitution, since they do not accept it in the first place as it cannot cover their political aspirations and objectives.

Myanmar is very diverse country, so it is very important to recognize and respect diversity through democratic federal principles. Most of the armed groups are formed based on ethnicity, demanding political rights that can be described as minority rights and self-determination. Therefore, some of the EAOs strongly believe that the peace process is related to constitutional matters as the current 2008 Constitution does not fully provide ethnic rights or a fully democratic system. Reducing violent conflict might be the first step of the peace process; yet, peace cannot be obtained by a ceasefire agreement only. Since the main cause of the conflict is the lack of political settlement, it is essential to implement an effective political dialogue in the peace process.

Participants' Views on the Current Constitutional Amendment Process

According to the peace process road map of the NLD, the 2008 Constitution will be amended in accordance with the Union Peace Accord from the Union Peace Conference (UPC) also known as the 21st Century Panglong Peace Conference. The NCA signatory EAOs generally agree with this amending process. Padoh Kwe Htoo Win from the KNU stated,

“Some countries adopt the constitution based on the result of a political agreement. Therefore, with regard to the constitution amendment, it is required firstly to obtain a political agreement through a political dialogue. For our country, the Union Peace Accord from the UPC is the political agreement, so it is superior to the constitution from a political

point of view, as constitution-making is interrelated with politics and the peace process. Moreover, the representatives of the Hluttaw, the Tatmadaw, and the government also have been deeply involved in the UPC. Therefore, the Hluttaw cannot deny or abolish the proposals that came from the Union Peace Accord to amend the constitution”.

The current way the NLD is approaching the constitutional amendment is clearly laid out in written form; however, in reality, there are many serious challenges to this process. For instance, while EAOs and civil society organizations submitted proposals to the UPC with the hope of building a framework for a new constitution, the Tatmadaw, some political parties, and the Hluttaw approved the amending process mainly based on the frame of the current constitution. Moreover, the conferences did not allow for effective discussions related with constitutional issues. Padoh Kwe Htoo Win from the KNU described the conferences: “We could not openly talk about or discuss the constitutional amendment, the Tatmadaw did not want to talk deeply about it, as it is not the main subject matter of the conferences”. As a result, after UPC had assembled three times, the 51-point agreement is too general, according to the interviewed EAO representatives.

The NLD government has also failed to coordinate with Ethnic Political Parties (EPPs) and EAOs. Khu Oo Reh recommended that

“The NLD needs to have a well-prepared strategy to have a strong coordination with EPPs. If the NLD solely approves the amending process of the constitution without good coordination with EPPs, the process will surely fail. This is because the image of NLD is not as good as before, and they are losing some public support, from the allied parties' supporters as well”.

In relation to this, Sai Wansai pointed out that if the amendments lead to a minimum devolution of power, the ethnic conflict will go on. But with maximum devolution, the ethnic conflict could be defused. To achieve this, the NLD government has to coordinate with EPPs.

The interviewed signatory EAOs seem to pin their hopes on a drastically amended 2008 Constitution, which

should provide for the establishment of a genuine federal union. In contrast, the non-signatory EAOs want a new constitution that would provide a confederate type of system. Nonetheless, if the result of the current constitutional amendment provided for maximum devolution with a strong political decision-making power for the state level and less power in the union center, the EAOs would likely accept the amended constitution. Moreover, according to the EAO participants, the constitutional amendment must include articles that are undemocratic or go against the principles of federalism. Padoh Kwe Htoo Win stated that

“When it comes to amending the constitution, not only the sections of the constitution but also the basic principles must be amended. For us, amending the basic principles should be a priority, as they are the essence of the constitution”.

This view was echoed by U Kyaw Min San: “When amending the constitution, we have to change the related sections also. We cannot only focus on one particular section”.

Finally, since the aim of constitution-making is to build a developed country and guarantee sustainable peace and unification, not only the civilian government but also other stakeholders need to participate in the process:

“In my point of view, the constitution has to work two jobs in my country, one is peace and another one is country development. So, approaches are very important for that. So, we need to modify the approaches, which are from common deals of all stakeholders. The civilian government is not the only one to make the constitution. The main problem of the constitution is that it is not representing the unification of diversities of the country. Thus, we need all-inclusiveness”, said Naw May Oo.

According to Dr. Khin Zaw Win, the government needs to create different ways for the public to participate in the constitution-making: “We need to think about all-inclusiveness in the constitution-making. Firstly, law experts, especially constitutional law experts, and civil society organizations need to bring the voices from the public”. In

contrast, according to both U Kyaw Min San and Dr. Khin Zaw Win, if the current civilian government negotiates through an elite-level dialogue with closed-door negotiation, the constitution amendment cannot guarantee peace.

Ethnic Armed Organizations’ Preferred Constitution-Making Process

Some of the participants argued for the constitution-making to be applied in parallel with the peace process. For instance, General Sumlut Gun Maw expressed this by saying,

“When we describe the peace process, all the implementations of different parts, such as reconciliation, state-building, trust-building process, including the concern over the constitution, have to be done in parallel. However, in reality, the state-building process and peace-building process go on separately. Both of them have to go together.”

This view was shared by constitutional law expert Naw May Oo: “The constitution and the peace process have a direct relationship, so if we do not discuss the constitution in the peace process, it will not be effective for peace in the country”. In contrast, the participant from the KNPP believes that political settlement from a peace agreement is essential in order for constitution-making to take place in the first place. Therefore, a complete peace agreement should be established prior to entering the constitution-making process. Khu Oo Reh argued that

“We first need to achieve a peace agreement. After that, the constitution-making (whether adoption or amendment) should be initiated based on the contents of that peace agreement. This is the procedure of how the peace process should be. However, the real situation of our current peace process is not like this. We do not have a strong peace agreement yet. The NCA is just a ceasefire agreement, not a peace agreement”.

Sai Wansai also stated that “ideally, the peace negotiation process has to be in place or agreed upon first. And with this agreement, a new constitution can be drawn, which

would cater to the real genuine federalism that all could agree on and live with". In reality, the lack of a peace agreement is a serious concern for the constitution-making process within the framework of the NCA. Another challenge is the forming of the Union Peace Accord due to the rigid timeline:

"The timeline must not be too long. Right now, when each side of the platform goes on separately, the timeline can be made as long by the opposite sides as they want. One group can draw the timeline without containing mutual consent. This is an important issue", said General Sumlut Gun Maw.

Moreover, there are still a lot of difficulties and challenges to obtaining political settlement. For instance, the Tatmadaw and EAOs have different views on federalism, mainly related to the terms 'union' versus 'federalism'. Khu Oo Reh explained:

"Contrary to the concept of EAOs, Myanmar prefer to use the term 'union' instead of 'federalism'. For us, the term 'union' emerged from the concept of 'unitary' [as in a unitary system of government]. On the other hand, for the EAOs, federalism is the only common political target for all of us. Because, our country was actually formed by the principles of 'coming together', which means that independent states came together to build the federal country for the common interest, based on equality. So, currently, it is so necessary to write state constitutions [sub-state constitutions] if we accept the concept of 'federalism'".

The EAO participants are mainly concerned with achieving political and economic self-determination and equal rights; therefore, federalism is their main political target. Consequently, sub-state constitutions become crucial for them. Padoh Kwe Htoo Win from the KNU expressed his opinion:

"Sub-state constitutions are essential for EAOs in order to build the federal state. Moreover, according to the nature of our state, the nation should be formed by the togetherness of the

states based on the concept of 'coming-together'. By the federal term, the states must share mandate power and authority with the central government. However, in reality, the central government controls all the states, and provides some limited authority to the states. Obviously, this is incompatible with the federal principles. At this point, the federalism that is contained with the features of power sharing mechanisms, decentralization modes, must come about as a political settlement through the peace process".

Sub-state constitutions might result from political settlement, as they deliver improved constitutional space autonomy for the marginalized, sub-state entities, especially in fragile and conflict-affected countries. Accordingly, sub-state constitutional frameworks are essential for addressing sub-state demands for self-governance. Politically, the issue of 'no separation' status is a serious concern for the Tatmadaw, when it comes to writing the sub-state constitutions. However, EAOs prefer to focus more on the right to self-determination. These kinds of different concepts tend to create challenges for the making of sub-state constitutions. Even though it is difficult to apply, if the results of the constitution-making process provide enough space for the role of sub-state constitutions, violent conflict could be managed and prevented.

In Myanmar's case, political settlement through a peace negotiation process has to precede drafting the constitution, and not the other way around, if real reconciliation and peaceful co-existence are to be achieved. Since constitutions and constitution-making can be essential tools in transitional post-conflict periods, a peace agreement that is formed in parallel with political settlement needs to be established first. Indeed, the interviewed EAOs preferred transitional political arrangements (either in a peace agreement or a stand-alone document), which can lead to a final constitution along with the peace agreements. Unfortunately, though the forming of the UPC was intended to fill this gap, the results from the UPC did not fully support the constitutional arrangements. Moreover, the serious challenge for EAOs, the Tatmadaw, and the NLD government in discussions related to constitutional issues is the gap in the conceptual views of each party, for instance relating to the terms 'union' and 'federalism'.

Conclusion and Recommendations

The aim of the present research was to examine how constitution-making can be applied as a conflict resolution tool for the peace process of Myanmar. Moreover, the purpose of the current study was to determine the common points of concern and challenges for constitution-making with the aim of contributing to its betterment. The investigation assessed how the 2008 Constitution and constitutional issues were viewed and applied by different actors in the peace process, including EAOs and civil society experts, and how they would prefer the constitution-making process to be framed in order to build sustainable peace in Myanmar. The findings have shown that different stakeholders from EAOs (signatory and non-signatory to the NCA) and civil society have the same perception; namely, that the 2008 Constitution does not fully provide for federalism and democracy. EAOs do not accept the 2008 Constitution, since it lacks ethnic and self-determination rights as well as federal principles. Furthermore, the participants in this study expressed the need for an all-inclusive constitution-making process. According to our findings, the 2008 Constitution does not support peace- and state-building, and the participants in this study believe that the peace process is strongly related to the constitutional matters.

The present findings confirm that the current constitutional amendment process is not the preferred path for the EAOs; however, they agree that the results emerged from this constitutional amendment could contribute to the peace process if the amending process includes the concerns of other political entities, such as EPPs and EAOs. At this point, the implementation of the concept of 'federal principles' is really essential to be discussed, since it is generally the common political goal for both signatory and non-signatory EAOs. Taken together, these results suggest that the impact of the current constitutional amendment to the 2008 Constitution on the peace process depends on how bold the current NLD government is prepared to go when decentralization is concerned. This means that if the constitutional amendment only provides a minimum devolution of power, the ethnic conflict will go on. On the other hand, if it could distribute a maximum devolution,

with strong political decision-making power at state level and less power at national level, the ethnic conflict could be defused.

Taken together, there are a number of important changes that need to be implemented in the constitution-making process of Myanmar:

- 1/ The constitution-making process should be deeply, effectively discussed and resolved in the peace negotiations. Specifically, the current government should strongly assert the concerns related to constitution-making in the negotiation process through the National Reconciliation and Peace Centre. The government should deal with constitutional issues with the aim to build peace inclusively, not just as a political interest in itself.
- 2/ Political settlement between the conflicting parties needs to be achieved along with a peace agreement reached through political dialogue.
- 3/ The government should enhance the role of sub-state constitutions supporting federal principles by allocating effective participating powers to EPPs, both in the national constitution-building as well as sub-state constitution-making process. If there was a proper platform through which EAOs could be involved, this would really support the peace-building process by representing all the diverse entities and applying the distribution of power.

This study contributes to the understanding of the view of the constitutional issues which also needed to be resolved in the peace process; the constitution thus far has not been sufficiently included in peace negotiations. Moreover, the findings reported here shed new light on the fact that EAOs and civil society have serious concerns about the issue of constitution-making in the peace negotiations. However, one limitation of this study is the lack of opinions from the Tatmadaw, one of the main actors of the peace process. Therefore, further research should explore the views of Tatmadaw representatives on constitutional issues. In addition, further research should also focus on determining how the barriers to political settlement should be overcome.

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