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Asymmetric Territorial Arrangements and Federalism in Myanmar

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A protester sets fire to a copy of the 2008 Constitution during a demonstration against the military coup in Yangon's South Okkalapa township on 1 April 2021. Photo: STR/AFP.

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EXECUTIVE SUMMARY

- After the abolition of the 2008 Constitution, the opposition to Myanmar's State Administration Council regime is attempting to imagine and design a federal system of government for the country.
- That system will certainly include asymmetric territorial arrangements, and thus see territorial arrangements in Myanmar returning to the "mandala system" that characterized the precolonial period.
- Such arrangements will have to respect "the constraints of reality", and their realization will therefore present certain difficulties.
- To overcome these difficulties, the democracy movement must do more to focus on substantive issues of governance.

INTRODUCTION

Following the coup of 1 February 2021, members of parliament belonging to the National League for Democracy, which had won Myanmar's November 2020 general elections in a landslide, formed a body called the Committee Representing the Pyidaungsu Hluttaw (CRPH). In some of its first and most symbolic decisions, the CRPH abolished the country's 2008 Constitution, lifted the designation as terrorist organizations from all ethnic armed organizations, and appointed a National Union Government (NUG).¹ With the support of various organizations belonging to the democratic opposition, ethnic civil society groups and some of the ethnic armed organizations, organized as a National Unity Consultative Council,² the CRPH/NUG, produced a "Federal Democracy Charter".³ This document was meant to pave the way for a return to democracy and the adoption of a federal system.⁴

The issues of federalism and relations between the predominantly Bamar state and ethnic nationalities have been at the core of Burmese politics since 1947, when independence leader General Aung San and representatives of the country's Shan, Kachin, and Chin minorities signed the Panglong Agreement. Failure to resolve these issues has led to 70 years of internal conflict. As I have argued in an earlier analysis, "democracy, federalism and the role of the military cannot be separated, and together they form the basis of modern Myanmar politics".⁵

The Federal Democracy Charter⁶ is neither the first nor the only constitutional project to offer an alternative to the 2008 Constitution. This article also examines the "second draft" of the "Constitution of the Federal Republic of the Union of Burma", adopted on 12 February 2008 by the Federal Constitution Drafting and Coordinating Committee (FCDCC),⁷ as well as the 2008 Constitution itself.⁸

The FCDCC's second draft was the result of a process initiated in 2000 by organizations representing ethnic nationalities. This process was a response to a constitutional draft published in 1997 by the National Coalition for the Union of Burma and written by members of the Burma Lawyers' Council. The preparation of alternative democratic draft charters reflected tensions between, on the one hand, Bamar-dominated political organizations, first and foremost the NLD, and on the other, ethnic organizations. These tensions remain salient today, particularly in the relations between the NUG and ethnic political organizations.⁹

Beyond the text of these competing constitutional projects, and their significant differences, the aim of a federal constitution is to answer the demands formulated by organizations representing ethnic nationalities, through the transformation of a highly centralized state into a federal one. The expectation of the parties advocating such a constitution is that the adoption of a federal system would finally allow Myanmar to enjoy the peace and democracy that the country has never known.¹⁰

The process of building a federal order is also one through which Myanmar tries to heal the wounds created by the colonial creation of a "modern" Weberian state through the return to some of the dynamics of the pre-colonial political order. That order is often described as a "Mandala system". In constitutional terms, the return to that system is most evident in the

recourse to “asymmetric territorial arrangements”—that is, to the existence in the polity of territories enjoying a special status.¹¹

The 2008 Constitution, which enshrines the existence of Naga, Danu, Palaung, Kokang and Pa-O “Self-Administered Zones” and of a Wa “Self-Administered Division”,¹² provides for such arrangements.¹³ So too does the FCDCC’s second draft, with its “Autonomous Regions”¹⁴ and “Reserved Territories”.¹⁵ While the Federal Democracy Charter does not refer to autonomous zones, it is not impossible that a future full constitutional draft prepared by the CRPH/NUG will do so. The National Unity Consultative Council has announced that the process of drafting a federal constitution will continue throughout 2022 and beyond, during a press conference held on 16 November 2021.¹⁶

David Williams has shown the importance of autonomous zones in any future federal system for Myanmar, even while warning that “asymmetrical systems can be complicated, cumbersome, and difficult to operationalize, especially for those who have had more experience at waging war than at waging peace”.¹⁷

At a time when Myanmar once again looks to forge a federal future,¹⁸ this article describes elements of such a future that constitution-drafter must respect. In writing a federal constitution, the limits to the speed and the breadth of the technically possible changes to the structure and administration of the state, the reality of conflict, and the evolution of the aspirations, political loyalties and demography of the people of Myanmar, will constitute “the constraints of reality”.¹⁹

FEDERAL CONSTITUTIONS AND ASYMMETRY

The 1 February coup meant the de facto suspension of Myanmar’s 2008 Constitution. Popular rejection of the coup and the potential for violence—in particular the risk of assassination attempts against candidates—make its reinstatement unlikely, at least in the foreseeable future.²⁰ The Federal Democracy Charter and the FCDCC’s second draft are also unlikely ever to be adopted as the country’s constitution. Already in 2009, Williams noted that the objection “that these constitutions will never actually become law . . . is almost certainly correct, but even these early drafts may influence whatever constitutional settlement Burma ultimately achieves”.²¹

Indeed, Williams considers the aim of processes to draft these federal constitutions as, first and foremost, “to build up consensus” and “to educate the democracy movement in constitutionalism so that it can effectively negotiate a settlement when the time comes to go to the bargaining table”. Critically, and most importantly in the context of this article, a related objective is “to discourage symbolic politics and encourage focus on substantive governance issues”.²²

These considerations lead Williams to recommend that the first question that delegates to a constitution-drafting process in Myanmar need to address “in very concrete ways” is “how should power be divided between the [U]nion government and the states?”.²³ And it is this need that suggests a first level of asymmetry in a future federal constitution.

The Myanmar state was, until the end of January 2021, composed²⁴ of the Union, with its seat in Naypyitaw, seven states and seven regions, 74 districts, 330 townships, and more than 17,000 village tracts and wards. The latter were divided between more than 3,000 urban wards and more than 13,000 village tracts, and made of more than 70,000 villages. Critically, the 2008 Constitution also enshrined²⁵ five Self-Administered Zones—Naga, Palaung, Danu, Pa-O and Kokang—and the Wa Self-Administered Division. On the ground, the Myanmar state also devolved locally exercised power in security and other areas to various Border Guard Forces and to dozens of militias.²⁶ Outside of government control, a number of ethnic armed organizations struggle against the Myanmar military, and therefore the central state, and claim to administer territories. The United Wa State Army, the Kachin Independence Organization, the Restoration Council for Shan State and the Karen National Union are the most serious and the most advanced in their efforts to build proto-statehood, complete with taxation systems and the delivery of services.²⁷

The seven states and the seven regions²⁸ enjoyed equal status under the 2008 Constitution. They differed only in name, in a rare acknowledgement of Myanmar's ethnic diversity. An asymmetric federal constitution could grant "ethnic" states more autonomy from the centre than to the supposedly "Bamar" regions. The Melbourne Forum on Constitution Building in Asia and the Pacific explains that "asymmetry typically involves greater autonomy for one or more parts of the country than for others. Usually this means that a particular region has more legislative, executive or, sometimes, judicial powers to govern its own people than is the case elsewhere. Autonomy also can include distinctive governance arrangements".²⁹

None of the constitutional initiatives under discussion here appears to consider this solution, however. The FCDCC's second draft states that "the Federal Union shall be composed of States with full rights of self-determination and having equal political powers vested in by this Constitution [*sic*]" .³⁰ The Federal Democracy Charter affirms in its "Guiding Principles" that "the member states of the Union and the people in these states are the original owners of sovereignty", and that "the Federal Democracy Union is established with member states which have equal rights and right to self-determination in full. All the member states of the Union (all the federal units) are equal in terms of politics".

Furthermore, the Federal Democracy Charter stipulates that "member states of the Federal Union have the right to develop and enact State Constitutions", and the FCDCC's second draft states that "the Member States of the Federal Union shall have the right to draft and enact their respective State Constitutions".³¹

However, while the Federal Democracy Charter does not specify the number, the names or the boundaries of the states, the FCDCC's second draft offers a list of the states that would comprise the Federal Union.

Article 49. Member States of the Federal Union and Federal Territories
The National States and Nationalities States are:

- (1) Kachin National State
- (2) Karen National State

- (3) Karenni National State
- (4) Chin National State
- (5) Bama National State
- (6) Mon National State
- (7) Tenasserim Nationalities State
- (8) Arakan National State
- (9) Shan National State
- (10) Irrawaddy Nationalities State
- (11)
- (12)³²

This article thus provides for the moulding of the Yangon, Bago, Magwe, Mandalay and Sagaing Regions provided for under the 2008 Constitution into a single state. It offers a slight variation on the much discussed “8 states solution”.³³ The fact that the inhabitants of this “super” state would include well over half of the population of Myanmar seems likely to lead to an asymmetric arrangement. Such an arrangement would be required to maintain balance—ironically, in the interest of the “smaller” states. However, it would also arguably go against the desires, and the right of self-determination, of the people of the “Bamar” states for which the 2008 Constitution provided, who have grown attached to their subnational parliaments and governments.³⁴

That constitution also divided the powers of the Union, the states and regions, and the self-administered zones among, respectively, Schedules One, Two, and Three, as found in Articles 96, 188 and 196.³⁵ Interestingly, while the powers of the Union parliament are defined in some detail in Article 103 (A), (B), (C), (D), (E), (F), (J), (H), (I) and (J) of the FCDCC’s second draft, Article 108 simply stipulates that “the legislatures of the Member States shall retain all legislative powers not delegated exclusively or concurrently to the Assembly of the Federal Union by this constitution”. The logic being that the powers of the Union need to be specified explicitly, while the states would be responsible for an “everything else” left to the imagination. The Federal Democracy Charter, merely a charter offering a vision for the future rather than a fully articulated constitution, stops at recognizing that the “power of the Union, power of the states and concurrent powers shall be determined and enacted”. Like the FCDCC’s second draft, though, it suggests that “only the powers necessary to exercise for the common interests of the member states of the Union shall be conferred to the Union”.³⁶

In the interest of administrative and political coherence, it may be impossible to leave some powers to the complete discretion of each state, of course. Neither the Federal Democracy Charter nor the second draft of the FCDCC’s Constitution of the Federal Republic of the Union of the Republic of Burma mentions districts, townships, or village tracts and wards. Nor does either offer an alternative to dividing the country into those units. Each leaves, again, such details to subnational constitutions, or to future negotiations. Issues such as the dual powers of chief ministers under article 249 of the 2008 Constitution,³⁷ which the debates on amending that charter to provide for their election did not address,³⁸ demonstrate the impossibility of building a federal system without thinking through the relations

between the “federal” and the “subnational” levels first, just as Williams’s statement of priorities suggests.

In other words, not only do these documents leave the most difficult questions associated with the design of a federal system to an unspecified and unknown future, but the important debates on “substantive governance issues” for which Williams called a decade ago are still not taking place.

CONFLICT, PEACE, ASYMMETRY AND FEDERALISM

These lapses are nowhere so evident as with the issue of asymmetric territorial arrangements. Nevertheless, both the 2008 Constitution and the FCDCC’s second draft provide for such arrangements, in the form, respectively, of Self-Administered Zones and of “Autonomous Zones” and “Reserved Territories”.

According to the Melbourne Forum on Constitution Building in Asia and the Pacific, “asymmetry may be useful for conflict mitigation and peacebuilding. Asymmetrical arrangements can meet claims for (relative) autonomy and self-determination, counteract secessionist movements and resolve conflicts between the central government and substate units, while at the same time maintaining the integrity of the state as a whole”.³⁹

The 2008 Constitution offered a simple criterion for creating special administrative zones. Members of an ethnic nationality should be a majority population in a grouping of two or more townships, but not already have a state to their name.⁴⁰ Therefore, Kachin, Shan, Mon or Karen populations could not be granted a special administrative zone. The FCDCC’s second draft shares this approach.

Article 53. Rights of Indigenous Ethnic Minorities

- (A) The rights of indigenous ethnic minorities within member States of the Federal Union shall be safeguarded.
- (B) In order to protect the rights of the minorities, the Constitutions of the States shall designate and provide for autonomous regions, national areas and special territories, as necessary.
- (C) Nationalities that have not obtained the status of a National State have the right to seek the formation of an autonomous region or a national area within the state or states they reside.

Depending on the timing and the evolution of the peace process, however, it is possible that at the very least the most powerful Rakhine, Kachin, Shan and Karen ethnic armed organizations will be granted autonomous zones. From a military perspective, it is widely understood by observers of and participants in Myanmar’s seven-decade-old civil war that ethnic armed organizations cannot seriously threaten or “take”, let alone maintain control over, any significant town or city. The Myanmar military, for its part, cannot eradicate those armed organizations or dislodge them from their own capitals or the territory they most firmly control. From a political perspective, it is unlikely that a settlement that ethnic armed

organizations find satisfactory enough to lead them to disarm before the adoption of a federal constitution is possible. In that sense, the reality of conflict is liable to remain one of the most significant “constraints of reality” that the writers of a future federal constitution need to respect.

In addition, ethnic armed organizations provide education and health services beyond the territories that they control—both in the contested areas⁴¹ described as areas of hybrid governance⁴² and in government-controlled areas. In a federal system, it is likely that the education systems developed by those organizations will co-exist with the public education systems of the various states.⁴³ For instance, design of a federal system will need to take into account future relations between the Karen Education and Culture Department, the likely de facto public education system in a Karen autonomous region, on the one hand, and the ministry of education of Karen State, Mon State, or Irrawaddy State on the other.

This issue, in turn, begs the question of the relations among ethnic armed organizations, the ethnic service providers associated with them, and ethnic political parties.⁴⁴ Already, between early 2011 and January 2021, an unspoken division of labour emerged, whereby ethnic armed organizations worked within the framework of the peace process, and ethnic political parties worked within the framework of the 2008 Constitution—in the national and subnational parliaments in particular.

CONCLUSION

While the design and adoption of a federal system may be a long-term undertaking, the fact that Myanmar should adopt such a system has now been accepted in principle by all significant constituencies in the country’s body politic. It is therefore encouraging that debates are taking place, and constitutional projects being developed. It is less encouraging to see that these efforts often fail to tackle concrete issues of governance, not only because doing so would be helpful in reaching a consensus, but also because it would perhaps force parties toward greater realism about what a federal system could look like. The limits to the morphing—rather than the complete overhaul—of the Myanmar state, the capacity of its political and civil-servant corps, and “the constraints of reality” in designing a federal system are the ground on which debates should be based. The fact that “ethnic” states are in fact multi-ethnic, and that their population share a wide range of political aspirations—some different from the objectives of ethnic armed organizations and ethnic political parties—join the reality of conflict to create a situation where different relationships with the central state are very likely to demand translation into an asymmetry in the federalism that the country ultimately adopts.

- ¹ Mael Raynaud, “Asymmetrical Federalism in Myanmar: A Modern Mandala System?”, *ISEAS Perspective*, 23 November 2021 (<https://www.iseas.edu.sg/articles-commentaries/iseas-perspective/2021-155-asymmetrical-federalism-in-myanmar-a-modern-mandala-system-by-mael-raynaud/>, downloaded 23 November 2021).
- ² Aye Chan and Billy Ford, “A New Myanmar Forum Aims to Unite Democratic Forces”, *United States Institute of Peace*, 3 November 2021 (<https://www.usip.org/publications/2021/11/new-myanmar-forum-aims-unite-democratic-forces>, downloaded 16 November 2021).
- ³ The text of the Federal Democracy Charter is available on the CRPH’s website (<https://crphmyanmar.org/wp-content/uploads/2021/04/Federal-Democracy-Charter-English.pdf>, downloaded 16 November 2021).
- ⁴ Hkawn Htoi, Zarchi Oo and Carl Stauffer, “How Myanmar’s Coup Opens Opportunity for National Reconciliation”, *United States Institute of Peace*, 20 August 2021 (<https://www.usip.org/publications/2021/08/how-myanmars-coup-opens-opportunity-national-reconciliation>, downloaded 16 November 2021).
- ⁵ Tinzar Htun and Mael Raynaud, “Schedule Two of the 2008 constitution - Avenues for reform and decentralization and steps towards a federal system” (Yangon: Konrad Adenauer Stiftung, 2018).
- ⁶ It is not a full constitutional draft either. Rather, it is a charter that lays out a vision for the future and offers general principles that could serve as a basis for a future constitution. A final draft of the Federal Constitution is said to be due for publication in December 2021; Saw Thonya, “Draft Federal Union Constitution to be finalized in December”, *Burma News International*, 24 May 2021 (<https://www.bnionline.net/en/news/draft-federal-union-constitution-be-finalized-december>, downloaded 16 November 2021).
- ⁷ This draft is available at <https://www.mmpeacemonitor.org/images/pdf/The-constitution-of-the-federal-republic-of-the-union-of-burma-second-draft.pdf> (downloaded 16 November 2021).
- ⁸ For a comprehensive analysis of the 2008 Constitution, see Melissa Crouch, *The Constitution of Myanmar: A Contextual Analysis* (Melbourne: Hart Publishing, 2019).
- ⁹ For a history of the competing constitutional processes developed by the Ethnic Nationalities Council, the National Coalition for the Union of Burma, and drafters of the 2008 Constitution, see David C. Williams, “Constitutionalism Before Constitutions: Burma’s Struggle to Build a New Order”, *Texas Law Review* Volume 87 (2009): 1657-1693.
- ¹⁰ Tinzar Htun and Mael Raynaud, “Schedule Two of the 2008 constitution”.
- ¹¹ Mael Raynaud, “Asymmetrical Federalism in Myanmar: A Modern Mandala System?”.
- ¹² Article 56, Constitution of the Republic of the Union of Myanmar (2008).
- ¹³ Melbourne Forum on Constitution-building in Asia and the Pacific, “Asymmetric Constitutional Arrangements in Decentralized Systems”, *Melbourne Forum Constitutional Insights* n°3 (October 2018).
- ¹⁴ Article 53, second draft of the FCDCC’s “Constitution of the Federal Republic of the Union of Burma”.
- ¹⁵ Article 195, second draft of the FCDCC’s “Constitution of the Federal Republic of the Union of Burma”.
- ¹⁶ National Unity Consultative Council Press Conference, 16 November 2021, *Myanmar Now* Youtube channel (<https://www.youtube.com/watch?v=6O6ITKC19j4>, downloaded 19 November 2021).
- ¹⁷ David C. Williams, “Asymmetrical Federalism in Burma”, in *Social Difference and Constitutionalism in Pan-Asia*, edited by Susan H. Williams (New York: Cambridge University Press 2014), pp. 137-164.
- ¹⁸ Bertil Lintner, “Finding a Federal Model that Fits”, *The Irrawaddy*, 8 March 2014 (<https://www.irrawaddy.com/opinion/finding-federal-model-fits.html>, downloaded 16 November 2021).
- ¹⁹ Mael Raynaud, “Asymmetrical Federalism in Myanmar: A Modern Mandala System?”.
- ²⁰ Not everyone agrees; see “Myanmar’s 2008 Constitution cannot be abolished, can only be amended: Senior General Min Aung Hlaing”, *Eleven Media*, 2 October 2021 (<https://elevenmyanmar.com/news/myanmars-2008-constitution-cannot-be-abolished-can-only-be-amended-senior-general-min-aung>, downloaded 16 November 2021).
- ²¹ David C. Williams, “Constitutionalism Before Constitutions: Burma’s struggle to Build a New Order”, p. 1685.
- ²² *Ibid.*, p. 1659.
- ²³ *Ibid.*, p. 1682.
- ²⁴ Article 51, Constitution of the Republic of the Union of Myanmar (2008).
- ²⁵ Article 56, Constitution of the Republic of the Union of Myanmar (2008).
- ²⁶ John Buchanan, “Militias in Myanmar” (Yangon: The Asia Foundation, 2016).

- ²⁷ Mael Raynaud, “Asymmetrical Federalism in Myanmar: A Modern Mandala System?”.
- ²⁸ Article 49, Constitution of the Republic of the Union of Myanmar (2008).
- ²⁹ Melbourne Forum on Constitution-building in Asia and the Pacific, “Asymmetric Constitutional Arrangements in Decentralized Systems”, p. 2.
- ³⁰ Article 2, second draft of the FCDCC’s “Constitution of the Federal Republic of the Union of Burma”.
- ³¹ Article 50, second draft of the FCDCC’s “Constitution of the Federal Republic of the Union of Burma”.
- ³² Points 11 and 12 appear in the text of the draft charter, and are meant to show that the FCDCC is open to the creation of additional states.
- ³³ Mael Raynaud, “Panglong Spirit Under the 2008 Constitution”, *Tea Circle*, 16 August 2016 (<https://teacircleoxford.com/2016/08/16/panglong-spirit-under-the-2008-constitution-part-ii/>, downloaded 16 November 2021).
- ³⁴ Thein Than Win and Mael Raynaud, “Decentralization: Bamars Care About Governing Their Own Regions, Too”, *Tea Circle*, 8 April 2019 (<https://teacircleoxford.com/2019/04/08/decentralization-bamars-care-about-governing-their-own-regions-too/>, downloaded 16 November 2021).
- ³⁵ Tinzar Htun and Mael Raynaud, “Schedule Two of the 2008 constitution”.
- ³⁶ Federal Democracy Charter, Chapter IV, Part III: “Fundamental Policies for Building Federal Democracy Union”.
- ³⁷ The first part of Article 249 of the 2008 Constitution vests chief ministers with the power to implement the laws passed by their respective state and regional parliaments. The same article also provides that state and regional chief ministers be responsible for the local implementation of Union laws. This raises the issue of “federal good faith” when a chief minister belongs to a different party to that which controls the Union Government and is as a result tasked with implementing laws that she or he may oppose.
- ³⁸ Mael Raynaud, “The Pros and Cons of Electing Chief Ministers”, *Tea Circle*, 30 September 2019 (<https://teacircleoxford.com/2019/09/30/the-pros-and-cons-of-electing-chief-ministers/>, downloaded on 16 November 2021).
- ³⁹ Melbourne Forum on Constitution-building in Asia and the Pacific, “Asymmetric Constitutional Arrangements in Decentralized Systems”, p. 3.
- ⁴⁰ By the same logic, “national races with a suitable population” in a state or region not bearing their name were granted an “ethnic affairs” minister.
- ⁴¹ Adam Burke, Nicola Williams, Patrick Barron, Kim Jolliffe, Thomas Carr, “The Contested Areas of Myanmar: Subnational Conflict, Aid, and Development” (Yangon: The Asia Foundation, 2017).
- ⁴² Ashley South, “Hybrid Governance and the Politics of Legitimacy in Myanmar’s Peace Process”, *Journal of Contemporary Asia* (2017) (DOI: 10.1080/00472336.2017.1387280).
- ⁴³ Kim Jolliffe and Emily Speers Mears, “Strength in Diversity: Towards Universal Education in Myanmar’s Ethnic Areas” (Yangon: The Asia Foundation, 2016).
- ⁴⁴ Su Mon Thant, “Party Mergers in Myanmar: A New Development”, *Trends in Southeast Asia* 8/2020 (https://www.iseas.edu.sg/wp-content/uploads/2020/04/TRS8_20.pdf, downloaded 16 November 2021).

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