

PERSPECTIVE

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CURRENT EVENTS

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Myanmar's Presidential Transition: There May (or May Not) Be Trouble Ahead

*By Robert Taylor**

EXECUTIVE SUMMARY

- Now that Myanmar has a free press, many rumours are spread via the international media. The latest spat is over whether or not there is a move afoot to name as president, Daw Aung San Suu Kyi, the leader of the victorious National League for Democracy (NLD) in last November's election, as she and her supporters wish.
- Under Clause 59(f), she is ineligible for the role because of her two sons' foreign nationality. Army sources have insisted that this cannot be changed, at least for now, if not for ever.
- However, persons in and close to the NLD still insist that there is a way to nominate Daw Aung San Suu Kyi as president on 17 March so that she can take up the post on 1 April. It is alleged that negotiations between the NLD and the army are underway to that effect. Others deny this to be the case.
- The rumours may just be rumours, and wrong at that. However, if some of them are true, a constitutional crisis could be looming. Only Daw Aung San Suu Kyi and the Commander-in-Chief of the Armed Forces, Senior General Min Aung Hlaing, would know for certain.

- The NLD has in the past refused to accept army conditions such as those in the current constitution, but in more recent years has accepted grudgingly the army's terms for power. If the rumours are true, there is a lot at stake for both the NLD and the army. Only time will tell.

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THE MYANMAR TEA SHOP RUMOUR MILL GOES INTERNATIONAL

Since the overwhelming victory of the National League for Democracy (NLD), led by Daw Aung San Suu Kyi, in last November's general elections in Myanmar, it has seemed that the path to the selection of a new NLD President was set. While many hoped that somehow Daw Aung San Suu Kyi could become President, she and her supporters seemed resigned, at least for the time being, to accept the terms of the constitution which bar her from the Presidency. Instead, she would take on a non-constitutional role over the president, a sort of 'mentor president', guiding his or her actions as she saw fit, while still leading her party. However, thanks to the Myanmar rumour mill, there are hints that a constitutional crisis is looming. Ms Suu Kyi, now 70 years of age, has long made it clear that the presidency is her ambition and her closest aids and confidants share that view.¹

The rumour mills of Myanmar grind endlessly and fine. Whereas before the reinstatement of a free press in Myanmar in 2011, one had to be on the ground to learn the rumours, now they are bandied about both in the domestic and international media. Thus, the BBC news website announced on 8 February that speculation was mounting "over Suu Kyi 'president move'."² This speculation follows on from a number of articles in recent days and weeks discussing the same topic.

The rumours centre on whether Daw Aung Suu Kyi is negotiating with the army commander-in-chief Senior General Min Aung Hlaing about finding a way around Chapter 3, Clause 59(f) of Myanmar's 2008 constitution which bars her from the presidency because her two sons by her late British husband possess United Kingdom nationality. Whether such talks are any more than rumour remains in doubt, at least if we are to believe the spokesman for the army representatives in the national legislature, Brigadier General Tin San Naing. He declared categorically on 7 February that "there is no discussion between the military and the NLD about Article 59(f)." On the same day the Brigadier was reported to confirm that the constitution cannot be amended without army approval,³ and the outgoing president and retired general Thein Sein wrote to the legislature, reminding its members of their oath to abide by the constitution.⁴

However, there are other reports that negotiations are underway between the NLD and the army to permit Ms Suu Kyi somehow to assume the presidency. *The New York Times* reported on 5 February 2016 that U Zaw Htay, an official in the office of President Thein Sein and a member of the government's transition team, said that "The negotiations had been between brokers." It was believed that one of the brokers is former general and speaker of the lower house of the legislature, Thura Shwe Mann.⁵ Shwe Mann, who is now a key advisor to Daw Suu Kyi, was ousted as leader of the army-backed party of President Thein

¹ Aung Thet Wyne, "NLD Patron Tin Oo: Suu Kyi Should be President," *Irrawaddy*, 2 February 2016.

² "Myanmar Speculation Mounts Over Suu Kyi 'President Move,'" BBC News, 8 February 2016.

³ Aung Hla Tun, "Myanmar Presidential Vote to Start on March 17 as Transition Talks Drag On," Reuters, 8 February 2016.

⁴ San Yamin Aung, "Thein Sein Tells New Lawmakers: Abide by the Constitution," *The Irrawaddy*, 8 February 2016; *Global New Light of Myanmar*, 9 February 2016, pp. 1-2.

⁵ Wae Moe and Thomas Fuller, "Myanmar Talks Could Open Door to Presidency for Aung San Suu Kyi," *New York Times*, 5 February 2016.

Sein, the Union Solidarity and Development Party (USDP) in August 2015.⁶ He allegedly arranged a meeting in January between Suu Kyi and former army chief Senior General Than Shwe in December.⁷

ARMY PAPER SAYS NO TO A SUU KYI PRESIDENCY

However, the army position was underscored forcefully in an article published on the day when the lower house of the legislature met for the first time, 1 February, when *Myawady* newspaper, an army outlet, published an opinion piece by one Sai Wai Luu, insisting that Clause 59(f) should never be amended. Justifying the clause in historical terms, he insisted that “someone whose family members are under foreign power should not be head of state.”⁸ His nationalist tone was matched by the words of Brigadier Tin San Naing: article 59(f) was “put in the constitution intentionally to protect our people from foreign invasion.”⁹ That a constitutional crisis between the NLD and the army is potentially brewing was, however, suggested when the first session of the Union Hluttaw, the body which will choose the next president met on 8 February. There the speaker, Mahn Win Khaing Than, announced that the nomination of the three candidates for the presidency and the two vice presidencies would not take place for more than a month hence, on 17 March, just two weeks before the transfer of power is to take place.¹⁰ Previously, however, Win Htein, an influential NLD leader, had said that the name of the NLD presidential candidate would be announced early in February.¹¹

Little other than whether Daw Aung San Suu Kyi will assume the presidency on 1 April 2016 seems to be dominating political minds inside and outside of Naypyitaw. A ban on NLD members of parliament travelling out of Naypyitaw for at least two weeks led to speculation that a deal, or at least an attempt, was about to be done to make that possible.¹² Of course, whether her assuming the presidency is the most important issue in Myanmar’s politics is, of course, debatable. Daw Aung San Suu Kyi said herself in her 4 January Independence Day address that peace was the most important thing. However, many in her party and perhaps the larger world want to find a way to make their and her dream come true.

⁶ Nirmal Ghosh, “Myanmar’s Influential Speaker Shwe Mann Removed from Ruling Party Leadership,” *Straits Times*, 13 August 2015.

⁷ “Suu Kyi Meets Than Shwe,” *Eleven*, 6 December 2016.

⁸ As reported in Lun Min Mang, “Army Newspaper Rejects NLD Leader as President,” *Myanmar Times*, 2 February 2016.

⁹ Aung Hla Tun, “President Election Vote to Start. . .”, Reuters, 8 February 2016.

¹⁰ *Ibid.*

¹¹ Hnin Yadana Zaw and Aung Hla Tun, “Travel Ban Fuels Talk of Myanmar Constitutional Challenge,” Reuters, 2 February 2016.

¹² Hnin Yadana Zaw and Aung Hla Tun, “Travel Ban Fuels Talk of Myanmar Constitutional Challenge,” Reuters, 2 February 2016.

BUT IT IS RUMOURED THAT THE NLD CAN FIND A WAY TO DO SO

One way mooted is to suspend clause 59(f). The chairman of the Parliamentary Bills Committee of the Myanmar legislature, NLD member U Tun Tun Hein mooted this in an interview with Radio Free Asia on 4 February before dismissing the idea.¹³ Ko Ni, said to be the NLD's legal expert, as well as Nyan Win, Aung San Suu Kyi's legal advisor, are both quoted as saying that suspension is possible. Ko Ni is quoted as saying, "There is an informal way (to amend the constitution) in which we have to enact a special law to temporarily suspend the provision in 59(f). This law can be enacted with a simple majority."¹⁴

This was contradicted by Information Minister and presidential spokesperson U Ye Htut, a former army officer, and also a member of the government's transitional team, who said that a constitutional clause could only be suspended in a state of emergency. In that circumstance, executive powers would be handed to the commander-in-chief of the armed forces.¹⁵

U Tun Tun Hein, while agreeing with U Ye Htut that a constitutional clause could not be suspended by a simple majority in the legislature, did refer to what he cited as a precedent to doing so in Myanmar's previous constitutional history. He was doubtless referring to one or the other, probably the latter, of the two times General Ne Win entered the cabinet as an unelected minister for more than the six months provided for by clause 116 of the 1947 constitution of Burma. According to a literal reading of clause 116, after six months, Ne Win should have left the cabinet. However, he did not.

WHEN IS A PRECEDENT NOT A PRECEDENT?

This was not, however, unconstitutional under the terms of that constitution. In the first instance, when he joined U Nu's cabinet in 1949 as deputy prime minister, and ministers of defence and home affairs, he did so under transitional terms of the constitution. Until the first general elections took place after independence, in 1951-52, the government was considered to be provisional and therefore the terms of the constitution did not rule out his serving as an unelected minister.¹⁶ This was done under the Transitory Provisions in Chapter XIV of the 1947 constitution.

When it was agreed that General Ne Win should become an unelected prime minister in 1958, he was initially appointed for six months under clause 116. At the end of his six-month term, in order to determine whether Ne Win's Caretaker Government could continue for another year before holding new elections, the matter was referred to the Supreme Court by the President under section 151 which allowed the judges to opine on the legality of proposed actions. However, before the Supreme Court ruled, Ne Win insisted that the

¹³ "Interview: 'No Such Thing as 'Suspension'. . . But There Is a Precedent' in Myanmar, Radio Free Asia, 4 February 2016.

¹⁴ Hnin Yadana Zaw and Aung Hla Tun, "Travel Ban Fuels Talk of Myanmar Constitutional Challenge," Reuters, 2 February 2016.

¹⁵ *Ibid.*

¹⁶ Maung Maung, *Burma's Constitution* (The Hague: Martinus Nijhoff, 2nd edition, 1961), p. 194.

parliament formally suspend clause 116 which it did with Act Number 4 of 1959. Under the 1947 constitution, the basic law in most circumstances could be amended by an agreement of two-thirds of the members of the two houses of the legislature in a joint sitting.¹⁷

The 2008 constitution, however, has a much higher threshold for amendment. Three quarters of the members of a joint sitting of the two houses of the legislature is required to approve an amendment. This assures that the army effectively has a veto over amendments. In addition, if the army members of the legislature agree on an amendment, a national referendum is required and for the amendment to pass, half of all eligible voters have to be affirmative in order to change certain core topics, including clause 59(f). Moreover, there is no provision such as those in section 151 of the 1947 constitution that a constitutional issue could be referred by the president to the Supreme Court for an opinion. The Transitory (sic, Transitional) Provisions in the 2008 constitution, chapter 14, are purely retrospective and say nothing about present or future actions. The constitution came fully into effect when the State Peace and Development Council passed state power to the Thein Sein government in 2011.

However, constitutions and laws are made for lawyers to argue over. The precedents of the past were precedents which pertained to one of the old constitutions of Burma, not the present one of Myanmar. Unless a judge or a panel of judges can be found to approve a way out, it would appear that Daw Aung San Suu Kyi's way is blocked for now. Or is it?

COULD A CLEVER LAWYER FIND A WAY?

It has been suggested that an existing exemption in the constitution, such as clause 121(j), which allows defence services personnel to sit in the legislatures despite the ban on civil servants and the military standing for election, would permit other exemptions. However, that is far from exempting the legality of an existing clause of the constitution, though one commentator suggested it was.¹⁸ A motion to exempt a clause is clearly not the same thing as an exemption clause.

It all seems a bit of a muddle but muddling through is often the way in politics. Rumours of deals between the NLD and the army continue to circulate. One is that the presidency for Aung San Suu Kyi would be traded for chief ministerships of four states or regions.¹⁹ However, given the relative powerlessness of those positions compared to that of the presidency, this seems very implausible even if a way around the constitutional ban could be found.

¹⁷ *Ibid.*

¹⁸ Nyein Nyein, "Even Without Puppetry, Suu Kyi Presidency Could Have Strings Attached," *Irrawaddy*, 4 February 2016.

¹⁹ San Yamin Aung, "Thein Sein Tells New Lawmakers: Abide by the Constitution," 8 February 2016.

WILL THERE BE TROUBLE AHEAD OR IS IT ALL A RUMOUR IN A TEA SHOP?

So, are the rumours just rumours, the stuff of tea shop conversations, or is there something afoot? Only two people really know, Daw Aung San Suu Kyi and Senior General Min Aung Hlaing. However, various scenarios appear to be possible.

One is that on March 17, the NLD nominates its candidates for president and vice-president, along with the army's candidate, and Daw Suu Kyi assumes her mooted role as 'mentor president'. In such a case, there is no constitutional crisis, though there is perhaps a constitutional anomaly which only time will resolve.

A second is that the NLD nominate Daw Aung San Suu Kyi as its candidate for President in a game of bluff with the army. This could lead to parliamentary or judicial challenges. If parliamentary, in the committee which vets candidates for the presidency, which will have an NLD majority, she would most likely be found to be eligible. This could then be challenged in the Constitutional Tribunal. The first time this Court made a decision found unfavourable by the parliament, it was threatened with impeachment, and all the members subsequently resigned.²⁰ Whatever would happen in a second instance, a constitutional crisis is the result.

A potential game of bluff between the NLD and the army would put the army's plan of creating a stable multi-party political system in place, with adequate protections for its interests and understanding of state security, in jeopardy. The acceptance of the present constitutional order by Western governments would be put at risk. The NLD leadership might think it finally has sufficient power to force the army to give way to their desire for Daw Suu Kyi to be president.

Is the past any help in understanding the future? In 1990, after the NLD won a landslide electoral victory, it felt it had the moral right to assume control of the government, ignoring the army's insistence that the NLD first draw up a new constitution and have it approved by a national referendum, followed by a second election. The army refuted that position and continued to rule in its own name for another 21 years.

Following the adoption of the 2008 constitution, the NLD declared it would not stand in any election until the constitution was amended to its satisfaction. Consequently, the party boycotted the 2010 elections which brought President Thein Sein to power. For reasons still unclear, however, in 2012 Daw Aung San Suu Kyi and more than forty other NLD candidates stood in by-elections and were subsequently elected to the country's legislatures. However, it seemed initially after the election that their assumption of their seats as legislators might be blocked by Daw Aung San Suu Kyi's refusal to take the oath of office as a parliamentarian to "safeguard" the constitution.²¹ However, for reasons unknown, a few days later, she did so.

²⁰ Dominic J. Nardi, Jr., "After Impeachment, A Balancing Act," *Myanmar Times*, 1 October 2012.

²¹ "Aung San Suu Kyi Refuses to Take Seat in Burma's Parliament," *The Telegraph*, 12 April 2012,

The calculus of power between the army and the NLD leader has clearly changed from 1990, 2008 or 2012. Both the army and the NLD have a stake in making the present constitution work. Until we see who is sworn in as president on 1 April we will not know. If the rumours are to be believed, there may be trouble ahead. But rumours are rumours, and usually, but not always, they are wrong.

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