Of Cyclones and Constitutions:
Notes from the Field*

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Author Biography
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*I have omitted all names and affiliations in order to protect my correspondents. Likewise, I have paraphrased all actual conversations.

I looked at my audience of perhaps one hundred, one hundred fifty people. The conference room managed to be both large and crowded, with rows of plastic chairs covering most of the floor space. Fortunately for my PowerPoint presentation, this was also one of the few places in town with a reliable power source.

I'd given similar presentations about comparative constitutional law to lawyers in the Philippines and Indonesia. I had a few jokes (making fun of legalese usually elicits polite laughter) and a list of key messages I hoped to impart. Yet, this time felt different.

This time, I was in Myanmar, the perennial black sheep of Southeast Asia.

This time, my audience was a group of young pro-democracy activists and politicians.

This time, if I said anything inappropriate, I could put either my audience or myself at risk...

On its face, Myanmar seems like the last country one would want to give a presentation on constitutional law. Except perhaps for North Korea or Somalia. Myanmar (formerly known as Burma) had not had a written constitution since 1988, when the current junta seized power. Moreover, the constitution it suspended was no exemplar of liberal democracy.

Sad, this was not always the case.

Upon independence, Burma's 1947 Constitution was perhaps the most progressive in Southeast Asia. The Supreme Court regularly upheld habeas corpus and freed political prisoners who had been wrongfully detained. Judicial review was alive and well even as ethnic divisions tore the country apart.

In 1962, General Ne Win launched a coup that overthrew parliament and abolished the Supreme Court. Ne Win had regularly lambasted the judiciary for impeding the counterinsur-
In its place, he established a hierarchy of military tribunals.

In 1974, the regime promulgated a new constitution that enshrined its socialist ideology. It also formalized the judiciary’s deterioration. The constitution established “people’s courts,” with a judge, military officer, and layperson presiding over each case. At the top of the judicial hierarchy lay the Council of People’s Justices, mostly comprised of former generals. While it could theoretically enforce constitutional rights, it never did.

The system proved so irredeemable that when the military seized direct control to thwart student protests in 1988, it abolished the people’s courts and suspended the 1974 Constitution. Officially, Myanmar reverted to the pre-1962 judiciary. However, the modern Supreme Court lacks the spirit of its predecessor. The junta vets all judicial candidates and has dismissed judges without formal impeachment proceedings. Corruption and procedural irregularities plague the court system.

However, the nascent junta faced larger challenges than judicial reform. The opposition National League for Democracy, led by Nobel Laureate Aung San Suu Kyi, won elections held in 1990. Decisively.

The military announced that, rather than form a parliament, election winners would hold a convention to draft a new constitution. Furthermore, to ensure that the draft reflected its vision, the military also appointed “representatives” for intellectuals, peasants, workers, and ethnic minorities. When the National Convention began in 1993, less than a quarter of delegates had been actually elected.

Sure enough, the draft constitution drafted called for a “discipline-flourishing democracy” (this phrase actually appears in the text). The constitution guarantees the military a quarter of the seats in the legislature, as well as exclusive purview over management of the armed forces affairs.

When formally unveiled fourteen years later, the constitution was condemned by Burmese dissidents, Western governments, and human rights organizations. One constitutional law scholar went so far as to call it the worst in the world.

In May 2008, I returned to Myanmar in the hopes of learning more about this notorious yet fascinating document.

Coincidentally, the same month I planned to visit, Myanmar planned to hold a referendum to approve – there was no doubt as to the outcome – the new constitution.

Coincidentally, the night of May 2 a category five cyclone struck southern Myanmar. Over the next few weeks, the toll from Cyclone Nargis reached 140,000 dead and over a million homeless.

In most countries, it would have been needless to say the government responded promptly and postponed referendum. But Myanmar’s junta at first seemed to ignore the crisis. After days of indecision, it postponed the referendum in areas hit by the cyclone – by just two weeks.

Fortunately, I had heard the news before leaving the U.S., so I packed medicines and dry foods to distribute.

Unfortunately, at the time the military refused to allow foreigners (i.e., Westerners) into the Irrawaddy Delta to bring aid. As such, I could only deliver my supplies – which seemed trivial in the face of such a disaster – to friends and hope they managed to deliver it to those in need.

Upon arriving in Yangon, the trees startled me. Or really the lack of trees.

Yangon had previously been known as the garden city because of its abundant greenery, yet the storm had knocked over almost every tree in sight. This marred the landscape and made the 95-degree heat even more unbearable than usual.

Fearing that attempting to assist cyclone victims would only cause more trouble, I spent much of that week observing the mood of the city.

I remember seeing one boy who must have been about 10 – but looked much younger – as he scurried across the roof of a two-story house fixing tiles. Curious, I asked somebody nearby if this wasn’t a bit dangerous.

“Oh no,” he said, “He’s like a little monkey; he’s good at fixing things.” After talking with the man further, he explained that the boy was from a Wa village, one of the many ethnic minorities in Myanmar. After his father was recruited into the local ethnic insurgent
militia, his parents sent him to Yangon to get a better education. He stays with a host family, who provides his food, lodging, and other necessities. In return, the boy assists with chores around the house.

Apparently, this practice is quite common amongst the Yangon middle class. The lawyer in me screamed “child labor!” Yet, I had become familiar enough with Burmese Buddhism to realize that this was first and foremost viewed as an act of charity. A way for the host family to earn merit for nirvana.

In its own way, the incident reminded me that the legal standards of international human rights conventions and constitutional law did not always mesh well with the nuances of modern Burmese culture.

I just silently prayed the boy didn’t fall.

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One thing struck me upon talking with residents: they openly criticized the government. Although not in the form of public protests. After all, it was only the prior September that the military cracked down on Buddhist monks – revered in this devoutly Buddhist country – for protesting against the regime.

Rather, I sensed citizens could no longer contain their frustration with the regime’s incompetence. As I visited one friend, his neighbor – whom I had never met – shouted in passable English, “These guys” – obviously referring to the ruling generals – “are so stupid. We hate them!”

If my friend had been an informer for Military Intelligence, his neighbor would probably have been arrested later that night.

In fact, during one of my few interviews that week, I worried a minder was watching me. I had requested a meeting with a lawyer to hear his thoughts on the constitution. We stepped into his office, when I noticed a fairly plump gentleman seated in a reclining chair. He didn’t introduce himself, my host didn’t introduce him, and I didn’t ask. He listened to our conversation without comment.

Even in retrospect, I realize he may well have been an informant, but if so certainly one of the oddest on the payroll. During a lull in the conversation, this large man gathered his sarong and asked me:

“So, what do you think about Obama?”

While Obamamania was then raging in the U.S., I had not expected it to infiltrate Myanmar. I later learned that the government newspaper, The New Light of Myanmar, criticized John McCain for his support of sanctions. However, I also got the sense that many Burmese latched onto Obama’s message of hope and change in the hopes that change would come to Myanmar.

Needless to say, I did not accomplish much research that trip. Too many phone lines and generators were down for efficient communication. Besides, Cyclone Nargis had rewritten the meaning of the constitution and how Burmese interpreted it.

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By the time I returned in June 2010, Myanmar’s new constitution replaced cyclones and Obama as the topic of conversation.

The government had announced elections later that year for a new parliament. However, the National League for Democracy announced a boycott because the military had placed Suu Kyi under house arrest. Despite this, several pro-democracy activists split off to form their own parties and contest the election.
My first meeting was with one of these activists. He was optimistic about the elections. Perhaps unduly optimistic, given what I’d heard in the news. But I enjoyed hearing his thoughts because, unlike so many in Myanmar, he viewed the constitution not as a straitjacket, but as a law to be interpreted and analyzed.

As he spoke, one hand held a cigarette, while the other shook with excitement.

“Look, this constitution, it has three branches of government: a president, two houses of the legislature, and a judiciary. It’s got separation of powers, just like yours.”

Comparing Myanmar’s “discipline-flourishing” constitution to Madison’s masterpiece seemed like a stretch. However, upon further reflection, I had to admit he had a point.

Constitutional structures come in all shapes and sizes. Many former British colonies established parliaments that combined executive and legislative power, but permitted independent courts. By contrast, most countries with a continental European legal system place their courts under the ministry of justice.

Surprisingly few have adopted the American combination of a presidential executive, bicameral legislature, and common law judiciary. The list is short: the Philippines, Liberia...

And now Myanmar.

In subsequent meetings, I asked friends how they construed this “convergent evolution.” Quite a few speculated that the constitution was in fact an elaborate retirement plan.

Nearing 80, the senior general and head of the junta, Than Shwe, wanted to oversee a political transition that would promote his cronies and protect his family after he retires. Of all men, he knows the dangers of early retirement; after consolidating his own power, Than Shwe arrested two of his predecessors.

“By creating separation of powers, he ensures nobody becomes powerful enough to challenge him,” another activist explained. “Divide and conquer.”

Ironically, the U.S. Founding Fathers also sought to prevent the rise of a tyrant by separating the branches of government. Only, in Myanmar, it was the tyrant himself who sought to hide behind the constitution.

My next meeting was with a retired lawyer and former political activist. While critical of the regime, my host also disapproved of Suu Kyi and her party.

“While she’s fine, but she’s surrounding by communists,” he exclaimed. Repeating a joke I had heard before, he continued, “When the NLD registered for the 1990 elections and submitted its list of candidates, Ne Win looked it over and said, ‘Why so red?’” Red was the label for the Communist Party of Burma, the largest outside any communist nation until the party’s collapse in 1989.

When I tried to direct the discussion back to the constitution, he stated that the real problem is not laws, but the lack of trust. “We have very few people whom both the military and the ethnic minorities trust.” According to some estimates, Myanmar has 135 ethnic minorities, several of which have waged a decades-long insurgency against the central government. “We need a leader whom everybody can accept. Otherwise, there will be war.”

For a lawyer, he did not seem to place much faith in the law.

He ended his discourse by revealing his involvement in the formation of a new political party, the Democratic Party (Myanmar). The party’s central executive committee would include daughters of Burma’s first prime minister, sons of former cabinet members, and other prominent offspring.

Given what I knew about the importance of family legacies in Southeast Asian politics, I was duly impressed. It was as if the Roosevelts, Kennedys, and Clintons decided to campaign on a single ticket.

However, when I mentioned this to a friend over dinner later that night, he laughed and said, “You know, he sounds quite overconfident. I don’t think people will vote for them just because of their family histories.”

His skepticism turned out to be prescient: on November 7, the party placed 15th and won just three seats.

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On November 6, 2005, Myanmar’s junta shocked the world and its own people by announcing that all government ministries must move from Yangon to a location 200 miles north in the middle of a jungle.

That morning, at 6:37 a.m.
The site, eventually dubbed Naypyitaw (“abode of kings”) has since been held up as an exemplar of the military’s callous attitude towards its people. Some Burmese note dryly that penguins in the new Naypyitaw zoo had air-conditioning, a luxury beyond the reach of all but a few citizens.

Yet, in person, Naypyitaw seemed much less sinister. If anything, it seemed empty.

While Myanmar’s constitution might bear some resemblance to America’s, its capital couldn’t be more different from Washington, D.C.

For one thing, Naypyitaw has none of the Parisian-style avenues that so enthralled Pierre Charles L’Enfant. Instead, it has an eight-lane highway system, with buildings few and far between. The city itself is segregated into residential, government, embassy, and hotel districts. If you are unfortunate enough to live here without a car, a bus comes to a select few stops every half hour. The result looks more like a suburban office complex in northern Virginia than a national capital.

According to Myanmar analysts, the military designed the city not for ease of living or national pride, but rather to thwart potential protests, such as those that occurred in 1988 and 2007 in Yangon.

“Naypyitaw’s not a city, it’s a bunker,” one expert proclaimed to me.

Driving along the highway, in the middle of a vast plain, to my right I caught a glimpse of a sprawling complex. I was probably still over two kilometers away, but already it had become the dominant feature of the landscape.

It was Myanmar’s new legislative building, the Hlut-taw.

Built in a classical Burmese style, with plain white walls and red tiled roofs. Each building was at least five stories tall, although they looked even taller from afar.

“Can we get any closer? I’d love to get a tour,” I hinted wistfully to my host.

“Well, it’s not really finished,” she said. “My friend has gone in. There’s nothing really there yet. I heard it’s about eighty percent complete.” I never got any closer.

Like D.C.’s Capitol rotunda, this leviathan will probably become the symbol of Myanmar’s new constitutional order. I can only imagine how it will seem to the new legislators, as they take their seats later this month. Will its facade be a source of pride or intimidation?

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After all these experiences, I knew intuitively that Myanmar was both the least expected and most appropriate venue for a discussion of comparative constitutional law. Behind the official news reports of gloom and despair, I sensed a vibrancy and thirst for knowledge.

The main portion of my lecture described the constitutional systems of the U.S., Philippines, Japan, China, and Iran. I chose these countries because they demonstrate the diversity of constitutional systems. More importantly, I wanted to share experiences relevant to Myanmar’s political transition.

While I tried to avoid legalese, given the language barrier, I could never be sure if the audience understood anything I had said.

However, as is often the case, their questions revealed both comprehension and insight.

One gentleman, somewhat older than the rest, asked in a gravelly voice and halting English:
“In Myanmar, we sometimes receive visits from Hu Jintao, sometimes from Wen Jiabao. My question is, who is superior under the Chinese constitution?”

Tough question, especially because real power in China derives not from constitutional offices but rather one’s rank in the Communist Party. I responded by emphasizing that a constitution can only explain a fraction of the power dynamics in any given country.

While I did not say so explicitly, my audience understood the inference that Sr. General Than Shwe might still retain his power even if he does not hold any formal office after the elections.

A young woman with long, back hair speculated aloud, “It seems that even though Japan is a democracy, it doesn’t have much checks and balances. Is that correct?”

“Great insight. Yes.” For me, this was the moment when I dared to hope that, despite the language barrier and my occasionally inartful explanations, these young leaders had begun to appreciate the subtle distinction between constitutionalism and democracy.

Of course, trivia concerning foreign constitutions would also be of limited value to these young activists and politicians. While I merely wanted to publish articles, they wanted to change a country.

“So,” one young man asked, a smile beaming on his face, “what do you think of our new constitution?”

I refused to be drawn into direct criticism of the constitution or the regime. Part of this stemmed from a conviction that, as an aspiring political scientist, I had to draw a line between analysis and involvement.

With an eye towards the dozen or so tape recorders and iPods recording my talk, I also worried that anything I said might wind up in Military Intelligence the following morning.

So, I dodged.

“Well, for obvious reasons, I’m not going to comment too much.” Everyone knowingly laughed. “But it is important to remember that Myanmar’s constitution isn’t the best in the world, but it’s also not the worst.”

Despite the caustic criticism directed towards Myanmar’s constitution, I thought that a fair assessment. “For example, as we saw, China’s constitution does not even allow for any elections or enforcement of constitutional rights.”

I also reiterated my general argument about how the meaning of a constitution provision depends as much on the judges interpreting it as on the text itself. “In other words, your constitution might change and adapt over time – if you appoint the right people to the Constitutional Tribunal.”

“Next question.”

“So, given all of your knowledge about these different constitutions, can you give us any advice on using the constitution to bring about change?”

“Didn’t I just address this question?”

Laughter erupted throughout the room.

“My goal today was to expose you to other constitutions and allow you to draw your own lessons.”

The final question was so simple yet seemed to tie together everything I had witnessed in this country.

“Do you have any hope that this constitution will bring political change?”

Hope. Change. “I don’t really know; I’m not an astrologer.” More laughter. Astrology is a national obsession in Myanmar.

My response seemed like another dodge, yet it was also fundamentally true. I could only draw lessons from history and political science. Who was I to make predictions?

Later that afternoon, I stopped by the conference organizer’s office and caught him lounging in a chair reading yet another book about political transitions. I recounted the audience’s questions and asked for his thoughts on the prospects for change after the elections.

“Well,” he said, peering through his narrow glasses, “that’s up to them to decide.”