



Part C : Referendum and Constitution

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“The 2010 Election in Burma — A Hopeless Avenue for Human Rights” (June 25, 2008)

Burma’s military junta, the State Peace and Development Council (SPDC), recently approved *The Republic of the Union of Myanmar Constitution* in a sham referendum held on May 10 and 24, 2008. According to the SPDC’s roadmap, elections will be held in 2010 to provide for a “discipline-flourishing genuine multiparty democracy” as outlined in the Constitution. The Burma Lawyers’ Council contends that any optimism about the election’s prospects is ill-founded for two reasons:

- (1) the elections will be held in accordance with the constitution, which was produced and passed by the regime in an undemocratic drafting process and illegitimate referendum; and
- (2) the Constitution’s provisions demonstrate the government’s blindness to the entitlement of the people of Burma to their basic human rights – providing more reason to weep than to hope.

This paper asserts that the Constitution and the pretense of elections are an attempt to proliferate the SPDC’s harsh military rule under the guise of a constitutional democracy, providing no hope for human rights or democratic governance in Burma.

Part I.

An Analysis of SPDC’s Constitution Making Process

Article 21 of the Universal Declaration of Human Rights provides that the will of the people shall be the basis of the authority of government. It follows logically



from this provision that, in any nation, the will of the people should be reflected in the constitution which forms the foundation of government. It follows, too, that the manner and extent to which a nation includes the people in the production of its constitution signifies the importance that nation gives to the pivotal role of the process of constitution making. A free, fair and inclusive constitution making process – one which accurately reflects the will of the people – is certainly likely to guarantee a lasting constitution.

Contrary to the provision laid down by the Universal Declaration of Human Rights, the constitution making process in Burma was controlled by the ruling military junta with complete disregard to what the peoples of Burma might wish to contribute. Law No 5/ 96 proclaimed in 1996 is the existing law of Burma. Under its provisions, the people are prohibited from participating in the constitution making processes and any infringement of the law is punishable by a minimum of five to a maximum of twenty years imprisonment.

It will be helpful to explore the background to this situation more fully.

It is universally recognized that the National League for Democracy (NLD) won a massive landslide victory in the May 1990 elections in Burma. Despite this fact, the military junta ignored the expressed will of the people of Burma and refused to transfer political power to the legitimate democratic government. Instead, they issued a declaration (No 1/90). Article 20 of that declaration provided, among other things, that:

... The responsibility of the elected representatives is to draw up the constitution of the future democratic state.

However, the military dictatorship did not transfer power to the elected representatives to implement that declaration. Instead, the military attempted to add a further layer of artificial legitimacy to justify holding on to power through the setting up of a National Convention to draft its constitution. To ensure the dominant role of the military in politics, it formulated a National Convention Procedural Code which tightened control of the constitution making process.

When the National Convention held its first session in January 1993, in attendance were 703 members representing eight nominal delegate groups. The Procedural Code provides no indication as to how the delegates were chosen. Article 2 simply states that delegates “from the groups mentioned below are to attend to the National Convention”. The total number of delegates from each group was determined by the NCCC. Several of the groups are ambiguously defined such as “peasants”, “workers” and “appropriate persons”. Seven of the eight delegate groups did not exist as separate and independent organizations capable of nominating delegates to the National Convention.



In reality, the SPDC was free to nominate delegates to the National Convention in any manner it considered desirable, and took the opportunity to do so.

Despite SLORC's declaration No.1/90 that provides the elected representatives with "the responsibility to draw up the constitution of the future democratic State", only 99 positions were allocated by the NCCC to the elected representatives out of a total of 703 delegates. Furthermore, most of these elected representatives had later been dismissed, been disqualified or had resigned from the National Convention.

The constitution making process was controlled absolutely by that sham National Convention. No public meetings on the constitution were allowed, no suggestions from the people were collected and no comments from the people were printed in the media.

Once a session of the National Convention commenced under the chair of the SPDC's nominee, each delegate had very limited speaking rights. Delegates only spoke before the commission if he or she had permission of the National Convention Convening Work Committee (NCCWC) (art. 5(c), 16(c) & 37). In practice, delegates had to submit their discussion papers to the NCCWC for its approval prematurely. Delegates were permitted to speak in accordance with the discussion paper (art. 45(j)), which was edited and prepared extensively by the NCCWC.

All "discussions" (i.e., recitation of the discussion paper) during the National Convention were limited to the aims set out in Article 1 of the Procedural Code (art. 5(c)). This prevented effective discussion of issues essential for the development of a lasting democratic constitution in Burma, such as the causes of civil war and the instability in Burma and the failures of the 1947 and 1974 constitutions. Delegates were not permitted to analyze alternative constitutions or constitutional principles from around the world. The rights of ethnic minorities, human rights and genuine democratic principles could not be discussed. Through the NCCWC, the SPDC used these powers of censorship strictly to control all discussion at the conference. This eliminated any possibility of democratic leanings or criticism of the military. Any contravention of the SPDC's rules was dealt with harshly. One delegate, Dr Aung Khin Sint, was arrested and sentenced to 20 years imprisonment for distributing a paper among delegates.

All information in relation to the National Convention was strictly controlled by the SPDC. The NCCWC and Presidium could declare any discussion paper as "secret" (art. 47(f), 16(h)). These secrets were not allowed to be discussed, distributed or published in any manner (art. 47(f)). All "news" in relation to the National Convention was released merely by the NCCWC and was to be regarded as confidential up until the time of its release (art. 8(j)).



The control of the flow of information highlights another important feature of the National Convention. The delegates were not actually charged with the responsibility of achieving anything. They were simply asked to talk. The National Convention had no actual authority to lay down principles or to draft a constitution.

Delegates to the National Convention had no right to vote on any topic. There were no voting procedures in the Procedural Code. Delegates had no right to pass motions. Delegates had no right to approve or express any opinion, as a collective group, in respect of the principles on which a constitution was to be based, or on a draft constitution itself. The delegates had no role in the actual drafting of the constitution.

The control of all information emanating from the National Convention allowed the SPDC to complete the drafting of its constitution and to announce through the NCCWC that the new constitution had been drafted and endorsed by the National Convention.

Given the absolute usurpation of control over the constitution making process by the SPDC, 85 out of the 99 elected representatives, members of the National League for Democracy (NLD) led by Daw Aung San Suu Kyi, chose to withdraw from the National Convention.

The Constitution making process highlights the unacceptable means by which the Constitution was fabricated. Moreover, the fact that the referendum which passed the Constitution was entirely undemocratic is a further demonstration of its illegitimacy. In threatening, forcing and manipulating the Burmese people during the recent constitutional referendum, the SPDC showcased its abhorrence for democratic procedures. Elections to be held in accordance with the Constitution will simply be a continuation of the illegitimate and undemocratic methods of the SPDC.

Part II. A Critique of SPDC's 2008 Nargis Constitution

Introduction to the Status of the SPDC's 2008 Nargis Constitution

A constitution defines the relationship between the individual and the state. It should place limits on the government's power for the protection and promotion of fundamental individual liberties. Yet the SPDC's Constitution fails to provide important foundational principles such as democratic governance, a separation of powers, checks and balances, judicial independence and the protection of individual rights. Instead of limiting and defining the role of the state, the Constitution confers significant powers to the military elite, with the



name of “National Security and Defense Council”, seeking to justify and enshrine its hegemony within a constitutional framework.

1. Denial of Popular Sovereignty

Like a thread that binds the Constitution together, the powers conferred to the military elite are woven throughout each section of the Constitution. Of the six primary aims and objectives outlined at the beginning of the Constitution, one actually aims “for the Tatmadaw (or) armed forces to be able to participate in the national political leadership role of the State.” In guaranteeing 25% of all seats in both national assemblies and in each state legislature to the Tatmadaw, the military has secured significant representation in all legislative chambers – contrary to any definition of democratic governance; perhaps this is the meaning of a democracy that is “discipline-flourishing”. Actually, it is against the concept of popular sovereignty which constitutes a major component of constitutionalism. Contrary to popular sovereignty, in the SPDC’s constitution, the concept of military supremacy is exercised mainly by the military elite, led by the Commander-in-Chief of Defense Services.

2. The Constitution grants the Commander-in-Chief significant powers

The military’s involvement in national politics however, is not limited to legislative representation – it permeates each corner of the constitutional framework. The President for example, is not elected directly by the people. Instead, an unaccountable “presidential college” has the choice of selecting amongst three candidates for the presidency; one candidate being appointed by the Commander-in-Chief of Defense Services is guaranteed at minimum a position as Vice-President. Furthermore, the President must appoint army personnel selected by the Commander-in-Chief of Defense Services to certain positions in the executive, including the ministries of defence, security/home affairs and borders affairs. In fact, the Constitution grants the Commander-in-Chief significant powers, assuming all powers of the President during certain “states of emergency”, and unlike the President, there is no process for impeachment or accountability of the Commander-in-Chief’s position.

3. The Lack of Judicial Independence: The Constitution Fails to Provide Checks and Balances

The Constitution also fails to provide the checks and balances that are necessary for democratic governance. To protect the rule of law, the judiciary must be able to scrutinize the legislature and the states must be able to scrutinize the acts of the federal government. The Constitution however, confers significant executive control over the judiciary by allowing the President to exert full control over the appointment of the Chief Justice. The judiciary’s subservience to the



executive is also highlighted in its whimsy impeachment process for judges, adverse to judicial independence.

The Constitution states that the judiciary is to “administer justice independently, according to law”. The current laws however, provide ample means for abuse and avenues to violate human rights. The SPDC’s Constitution allows these current laws to remain in force past the 2010 elections. Therefore, the judiciary can use these laws to justify violations of human rights, provided they do so “independently” and in accordance with the injustice of the laws. There is no institutional independence in the constitution.

4. Rigid Centralization Fails to Provide the Right to Self-determination

The Constitution provides extensive control, allowing the military elite, led by the army chief of staff, to pervade all state and municipal institutions. The constituent units, in terms of states and regions, are provided minimal powers and the military elite can encroach on these minimal powers as it pleases. This makes the constituent units defenseless against the power of the military elite, rigidly exercised in the position of the central government. In the Constitutional structure, any notion of the right to self-determination, claimed by various ethnic nationalities, is therefore absent as it does not exercise the principle of division of legislative, executive and judicial powers within the framework of the federal union.

5. No Possibility for the Emergence of New Laws to Promote Human Rights

In conferring significant powers to the military elite, it is hard to imagine the emergence of new laws for the promotion of human rights. In the Constitution, the participation of the people of Burma in the law making process is systematically denied or excluded. As long as this is the case, there will be a stark deficit of laws which actually benefit the people, and the advancement of the country. Instead, laws that serve only to subjugate and repress Burmese people will persist.

6. “Exception Clauses” to Justify the Infringement of Basic Human Rights

The chapter titled Citizenship, Fundamental Rights and Duties of Citizens, which is hidden at the back of the lengthy Constitution, provides a limited scope for rights and freedoms. The abundance of limitation clauses and those rights that must be “prescribed by law” before becoming a legal reality provide ample avenues to infringe basic human rights. Section 10 for example, which ‘grants’ the fundamental freedoms of expression, assembly and



association, are “subject to the laws enacted for State security, prevalence of law and order, community peace and tranquility or public order and morality.” This broad limitation clause can be employed to rationalize almost any infringement of these fundamental freedoms – particularly with the military’s hands directing each branch of the government.

7. The Continuation of Previous Laws that Infringe Fundamental Freedoms

The Constitution not only prohibits the emergence of new laws to safeguard human rights, it also permits the continuation of previous laws that have infringed fundamental freedoms. For instance, the *1975 State Protection Law* is one of the most abusive laws as it allows for a person to be held in custody for up to five years without any charge or trial. Burma’s charismatic leader, Daw Aung San Suu Kyi, is currently being held under house arrest pursuant to this law. Even if the SPDC’s Constitution comes into force, this law and other similar oppressive laws will remain to continue to deny a person’s right to a fair trial and the right not to be held in arbitrary detention.

8. The Continued Suppression of Freedom of Expression

In allowing the existing laws of Burma to remain in force following the elections, the Constitution extends the injustice of the past far beyond 2010. Law No. 5/96, as one example among the many, allows the government to imprison any person who incites, demonstrates, delivers speeches, or makes oral or written statements that are counter to state “tranquility”. Such a law greatly undermines freedom of expression, yet will continue to remain in force following the 2010 elections. Even if it can be cancelled with the power of the people’s movement before 2010 elections, there is no provision in the constitution at all to prevent the emergence of similar laws, which will extremely limit freedom of expression, association and assembly, in the future.

A state that limits freedom of expression and the marketplace of ideas cannot possibly purport to be democratic. Freedom of expression is one of the cornerstones of democratic governance and basic human rights. Law No. 5/96 and similar laws will likely be rationalized by the military under the limitation clause of the constitution, justifying the silencing of people’s voices and the false imprisonment of those who have the courage to speak.

9. Lack of Institutional Mechanism to Promote or Protect Human Rights

The Constitution not only provides guidelines to allow human rights infringements, it also fails to provide necessary guidelines for their protection. As has been stated, while the judiciary is forced to be subservient to the



executive, there are no other institutional mechanisms to promote or protect human rights. In a country like Burma, where the rule of law has been abused for decades and the violation of human rights is the norm rather than the exception, the constitution must provide institutional safeguards – such as a human rights commission or other independent commissions - to check the powers of government from abuse and advance the basic rights of the people. The absence of institutional mechanisms demonstrates the absence of any real effort to advance human rights in the Constitution.

10. Lack of Process to Ratify or Facilitate International Human Rights Laws

Further to its silence in regards to institutional mechanisms, there is also no mention of the ratification or facilitation of international human rights law or norms. The Constitution provides no evidence of attempting to meet international human rights standards. In fact, it violates them in many areas, including its rigid citizenship rules and its many attempts to quell dissidence in its firm commitment to “national solidarity”. So while a Constitution ought to protect human rights from the whims of a legislature, the Constitution provides more mobility to violate individual rights than mechanisms to safeguard their protection. It empowers the authority of government at the expense of empowering the people, limiting citizens’ agency and fundamental rights.

Conclusion

The 2010 elections and the illegitimate Constitutional structure are simply attempts by the military junta to solidify its power under the guise of democratic constitutionalism. The Constitution promotes the powers of government and the military elite, while terribly limiting the rights of people, contrary to liberal democracy, the rule of law and the foundational principles of constitutionalism. The ill-fated prospects of the 2010 elections are reinforced by a broader examination of the socio-political context in Burma. During the aftermath of the destruction caused by Cyclone Nargis, the SPDC focused on manipulating its people through a sham referendum rather than aiding its victims after a tragic disaster. Any hope that the 2010 elections will be any different is quickly admonished by the Constitution and its blatant disregard for democracy and the rule of law. Despite the people’s entitlement to their basic human dignity, the 2010 elections will be yet another democratic façade. They are a hopeless avenue for the promotion and protection of human rights in Burma.

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