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Analysis of the SPDC's Constitution from the Perspective of Human Rights

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A Brief Introduction to the SPDC's 2008 Constitution

A constitution that reflects the will of the people, addresses the underlying issues of the respective state, fulfills the particular needs of society and is underpinned by equality before the law, can be valued as the supreme law of any respective state, which will lay down the foundation for the rule of law. However, the constitution, drawn up and approved forcefully by the military junta, known as the State Peace and Development Council (SPDC), in Burma in May 2008, has never had these qualities.

The regime totally neglects the will of the people. It has prohibited the people from participating in the constitution making process by enacting an abusive law, namely Law No 5/96, with a penalty of twenty years imprisonment. In addition, the regime never endeavors to address the underlying issues of Burma. The delegates, handpicked by the regime to produce constitutional principles in its sham National Convention, were not allowed to discuss the problems encountered by the people such as land confiscation, environmental degradation, corruption, HIV/AIDS, poverty alleviation, power abuses by the authorities, lack of the rule of law, etc.

To be worse, the essential requirements of Burma, the particular needs of society, have never been fulfilled given that the constitution keeps silent on the implementation of the results of the 1990 May election, which is still valid and whose legitimacy has as yet not been abrogated even by the regime itself, officially and publicly, while ignoring the application of rights of 'self-determination' for various ethnic nationalities in Burma. In addition, the Constitution denies the equality principle to be practiced among citizens, which is an intrinsic value enshrined in Article (1) of the Universal Declaration of Human Rights, by formulating a military elite, as a privileged class.

With this background scenario, this compilation attempts to scrutinize the status of the SPDC's 2008 Constitution from the perspective of human rights, centering on the right to liberty and basic freedoms.



The Relationship between Human Rights and Constitution

The Preamble in the Universal Declaration of Human Rights provides, inter alia, as follows:

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law;

The abovementioned provision will become a reality only when the rule of law prevails in any society, centering on the effective application of the constitution, as the supreme law of the land, while it is essential that the constitution itself guarantees basic human rights. In this respect, the UDHR, in its preamble, continues to elaborate as follows:

----- every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

With reference to the term 'national and international' in connection with the magnitude of the rule of law provided for in the aforementioned paragraph, Louis Henkin, Professor Emeritus at Columbia University, New York, USA, and human rights icon, elaborated that human rights may become a reality only when national laws – the constitution as a centerpiece and its organic laws - in every nation state adopt the concept of human rights and make it applicable. In terms of the current and future society of Burma, it is worth considering how international human rights law concepts can be incorporated into national laws, centering on the constitution to be applied as the supreme law of the land.

Unfortunately, during the overall constitution making processes of the SPDC military regime, which have taken about 14 years, from 1993 to 2007, the term 'human rights', even as a vocabulary, never appeared in any formal discussion of the National Convention.

When the issue on drawing up a constitution is to be dealt with from the perspective of human rights, there are two extremes: one is that all human rights norms, which have been adopted by the international community, should be reflected in the national constitution of a respective state; and, another is that the constitution is a national law of the state and as such, it should address



only the national issues and values of a respective society, without the necessity of having to reproduce human rights concepts. Both extremes should be avoided.

A reasonable middle path is that the constitution of a nation state should, at minimum, guarantee basic rights, in terms of liberty and basic freedoms of individual citizens, out of those enshrined in the UDHR, while addressing societal values, essential needs and underlying issues of a respective state. An analysis on these aspects shows that, in spite of superficially having the relevant provisions, almost none of the basic rights in the SPDC's 2008 Constitution can be enjoyed by individual citizens because they include exception clauses which enormously limit the basic rights in their application.

Limitation of rights and application of limited limitation

Despite the UDHR's enshrinement of all rights without any limitation intrinsically, provision for limitations of rights can be observed in Article 29 (2) as follows:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations **as are determined by law** solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The above mentioned provision can be simplified as follows:

Limitations can be made in accordance with law:

- to protect the rights and freedoms of others;
- to promote morality;
- to maintain public order; and
- to foster the general welfare in a democratic society

It can also be construed that although rights can be limited in accordance with law, the legislative bodies of any state cannot enact a certain law, which greatly deprives the basic rights of individual citizens, simply because they have power to do so if that state agrees to adopt the human rights concept primarily. Furthermore, the governments which are authorized to enforce the laws shall not interpret the constitutional provisions as they wish, transcending over the legal framework of each and every article of the constitution, and apply laws to oppress their own people and to stifle the democratic opposition, particularly in such countries ruled by authoritarian regimes, including Burma.

In spite of the fact that limitations of rights are acceptable, limitations in the constitutional provisions should be comprehensive enough; they should be in line with the Article 29(2) of UDHR but not for other purposes; and more



importantly, the concept on limited limitation should be applied. Only then, the power of government which may intervene in the individual freedoms of people can be circumscribed within the precise scope of law while power abuses of governmental authorities, invoking the controversial and inexplicit provisions for limitation in the constitution, may be shunned.

Comparison between the 1947 Constitution and SPDC's 2008 Constitution

In regard to application of liberty and basic freedoms of individual citizens in practice, a comparative study can be made between the two constitutions of Burma: the first one is the 1947 constitution which was effective after independence of Burma; and, the second one is the SPDC's 2008 constitution. Both constitutions exercise the concept of limitation.

For the provisions relevant to liberty and basic freedoms of individual citizens, Article 17 of the 1947 Constitution provided as follows:

17. There shall be liberty for the exercise of the following rights *subject to law, public order and morality*:-

- (a) The right of the citizens to express freely their convictions and opinions;
- (b) The right of the citizens to assemble peacefully without arms;
- (c) The right of the citizens to form associations and unions. Any association or organization whose object or activity is intended or likely to undermine the Constitution is forbidden;
- (d) The right of the citizens to develop their language, literature, culture they cherish, religion they profess, and customs without prejudice to the relations between one national race and another, or among national races and to other faiths.

Article 354 of the SPDC's 2008 Constitution can also be observed as follows:

There shall be liberty in the exercise of the following rights *subject to the laws enacted for State security, prevalence of law and order, community peace and tranquility or public order and morality*:

- (a) The right of the citizens to express freely their convictions and opinions;
- (b) The right of the citizens to assemble peacefully without arms;
- (c) The right of the citizens to form associations and unions;
- (d) The right of the citizens to develop their language, literature, culture they cherish, religion they profess, and customs without prejudice to the relations between one national race and another, or among national races and to other faiths.

Contrasting the two articles, it is discerned that, exception clauses in Article 17 of the 1974 Constitution and Article 354 of the SPDC's 2008



Constitution commonly provide the terms - *public order and morality*, and they are virtually in line with Article 29(2) of the UDHR. The remaining parts of those exception clauses, nevertheless, are no longer identical. In accordance with the 1947 Constitution, the citizens were able to enjoy basic rights as the constitution modestly mentioned the term '**law**' as a required framework when those rights were applied in practice. Contrary to this, the SPDC's 2008 Constitution magnifies the scope of law, by using the term - *the laws enacted for State security, prevalence of law and order, community peace and tranquility* - with enormous vagueness and ambiguity.

If effort is exerted to construe the abovementioned difference, in terms of an exception clause, it is required to observe a brief background of the two constitutions. When the 1947 Constitution was approved by the Constituent Assembly to apply it after independence of Burma, there existed no draconian law which blatantly deprived liberty and basic freedoms of individual citizens. When the SPDC's Constitution was approved by its sham national referendum held in May 2008, a number of draconian laws including the "1975 Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts (hereinafter to be known as the 1975 State Protection Act)", which conspicuously restricts liberty and basic freedoms of individual citizens, had already become effective.

The Existence of the 1975 State Protection Law Which Deprives Liberty and Basic Freedoms of Individual Citizens

The 1975 State Protection Act authorizes the executive body or government to impose wide-ranging restrictions on individuals: anyone suspected of having committed, or who is committing, or who is about to commit any act which endangers the sovereignty and security of the state or public peace and tranquility, can be ordered by the Council of Ministers to be imprisoned for up to five years without trial.¹

With regard to a detainee or a suspect, the internationally accepted fundamental principle regarding criminals is the right to be presumed innocent until proven guilty in accordance with the law.² The national principle in Burma, inherited from common law tradition, bestows that it is better that several guilty persons escape than one innocent person suffer.³ This is mainly to protect the liberty of an individual citizen who becomes a suspect. The State Protection Law gives insufficiency of evidence a premium to hold a person's liberty ransom.

Admittedly the Law refers to detention of a person without trial in circumstances that there is no sufficient evidence to make a legal charge or secure conviction by legal proof, but may still be sufficient to justify



detention in the interests of national security. It is left to the understanding of the arresting authority to determine what **sufficient** means.⁴

After five years of consecutive detention under this law, the SPDC military regime has not yet released Daw Aung San Suu Kyi and extended the detention period again invoking the same law, the State Protection Act. Detention pursuant to the State Protection Act is now a continuous process; Daw Aung San Suu Kyi may continue living under detention one five year term after another until death, if effective pressure on the regime is not in place.

Detention under the State Protection Law is an inverted death sentence without charges and without trial. For instance, Si Thu Ye Naing and Aung Kyaw Moe were both detained in Tharawaddy Prison under the State Protection Law. Both of them died while under detention.⁵

Arbitrary Detention and the Relevant Provision in the SPDC's 2008 Constitution

Article 376 of the SPDC's 2008 Constitution provides as follows:

No citizen shall, *except [for] matters on precautionary measures taken in accordance with law for the security of the State or prevalence of law and order or the peace and tranquility and interests of the people or matters permitted under an existing law,* be held in custody for more than 24 hours without the remand of a competent magistrate.

In the abovementioned provision, it is noteworthy that the scope of the exception clause, mentioned in italics, is greatly expanded. There, the main provision - "No citizen be held in custody for more than 24 hours without the remand of a competent magistrate" - applies to ordinary offenses specified in the penal code and other criminal laws, especially for the crimes committed by one citizen against another citizen or citizens. However, for others whose actions might be criminalized by the government through accusations that the suspect or suspects endeavor to threaten the security of the State, as provided for under the aforementioned exception clause, the limitation of a 24 hour detention period will assuredly not be applicable.

More importantly, the exception clause mentioned in Article 375 can be read with the similar one provided for in Article 354. The connection between the two exception clauses will be discerned and then it can be construed that arbitrary detentions under the draconian laws, including the 1975 State Protection



Act and others, will continue taking place thereby denying the right to a fair trial of every individual citizen in Burma.

The Right to a Fair Trial

From a fair trial perspective, the protection of human rights for a defendant needs to be taken into account not only at the trial or hearing stages, but also throughout pre-trial and post trial events. After being arrested, the detainee is not allowed to communicate with the outside world or seek the assistance of legal counsel. In the event that the detainee suffers from mental or physical torture during the pre-trial stage detention period, he or she will not be able to defend his or her case effectively and efficiently.

Detention can be simply defined as: a person restricted to a confined area of a lockup or detention center in which freedom of movement is deprived. As soon as this situation takes place for any individual, the concept of a 'fair trial' should be applied.

In every society, detention is a necessary measure to take effective criminal action against the perpetrator of a crime. This measure is intended to prevent further crimes and other human rights violations from being repeated. Whenever justice is sought for victims whose rights are violated by a perpetrator's criminal offense, detention is a beginning step in furtherance of prosecution and a hearing at a formal trial. In theory, by so doing, impunity for perpetrators is supposed to be denied, and justice for victims is supposed to be promoted. The question remains: How can arbitrary detention⁶ against innocent victims be avoided? Arbitrary detention leaves detainees vulnerable to torture and inhuman treatment at the hands of law enforcement authorities,⁷ setting the stage for a denial of a fair trial.

SPDC's 2008 Constitution:

Hopeless for protection of liberty and basic freedoms of individual citizens

On countless occasions, innocent people are detained as suspects; and human rights violations inevitably take place, particularly for the powerless and poor people in Burma. Invoking the effective draconian laws and aiming to harass the democratic opposition, the ruling military junta in Burma has been detaining several thousand people arbitrarily, as a common practice, for several decades, resulting in serious damage to liberty and basic freedoms of individual citizens while denying the right to a fair trial.



So long as such draconian laws continue to exist, people cannot dream of protection and promotion of human rights in Burma. Unfortunately, the provisions in the SPDC's 2008 Constitution cannot be invoked by the people to abrogate such laws. To the contrary, more numbers of draconian laws will come to existence under the provisions mentioned in the exception clauses of the SPDC's 2008 Constitution.

(Endnotes)

¹ Chapter 3, Article 7 of the 1975 State Protection Law

² Article (14)(2) of ICCPR.

³ U Phoe Thar. (Third Publication), Commentary of evidence act. Rangoon; Gondoo Press, p. 269.

⁴ Gutter, P., and Sen, B.K., Burma's State Protection Law; Bangkok, Burma Lawyers' Council, December 2001. p. 38-39.

⁵ Ditto

⁶ Article (9) of UDHR and ICCPR.

⁷ Gutter, P., & Sen B.K. Burma's state protection law: An analysis of the broadest law in the world. Published in Bangkok by the Burma Lawyers' Council, (December 2001). p. 44.

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