



Part D: Constitutional Issues

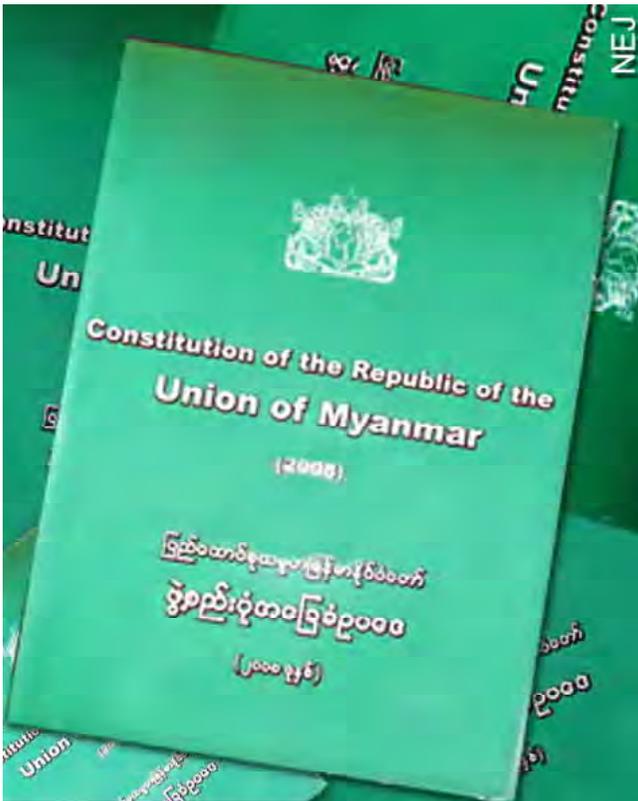
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Analysis of the SPDC Constitution from the Perspective of Ethnic Nationalities

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Introduction

A monarchy ruled Burma for centuries with various nationalities living under the nominal suzerainty of the kings who were of Barman nationality. The ethnic nationalities lived in a self-governance system under the control of their nobles and lords known as Swabs, Dumas, etc. They wielded power over their people



and were virtually sovereign. The British then came and ruled Burma. They made Burma distinctly British. The Federation of States (frontier areas) was constituted from among the ethnic nationalities such as Shan, Kachin, Chin, and Karen. Burmans were the major ethnic nationality and they formed British Burma. Under colonial rule, the division between the majority nationality and the others widened, sharpened and took the form of nationalism. On the eve of Independence, there was great danger

that the country would be partitioned like India and several sovereign States would emerge on the assertion of their right to self-determination. In their wis-



dom, the leaders of all nationalities met at Panglong and resolved to remain as the Union of Burma. The Panglong Agreement is the greatest milestone in the history of the country. The first constitution of the country, known as the Union of Burma Constitution of 1947, evolved from the principles laid down in the Panglong Agreement. The Union of Burma was born and governance of the people, by the people, and for the people prevailed in the country's first journey. It is therefore natural and befitting that posterity studies this constitution framed by the founding fathers. No constitution is permanent. Amendments and revisions are necessary but not at the cost of the original constitution's basic character.

Constitution-Making Process

The first question is whether the referendum held in 2008 can be challenged after apparently having been accepted by the people of Burma. It may be argued that because the people voted for it, how can a few dissidents repudiate it? The answer is that the 'voting' and referendum were not free and fair. The people voted under fear and intimidation while not knowing what they were voting for. It is an acknowledged fact that the constitution was not discussed, debated and was devoid of transparency. It was entirely the product of the National Convention of 703 delegates from various imaginary groups. The convention comprised handpicked people of the junta. The 1947 Constitution was debated in a Constituent Assembly, which was elected on the basis of universal suffrage. Different political parties competed in the elections for the Constituent Assembly and there was complete freedom of expression. There were also a



number of newspapers that voiced their differences. It was an open society and the international community watched and judged the fairness and free nature of the election.

In the case of the 2008 Constitution, which took fifteen years to be formulated, the reverse has happened; no political party was allowed to campaign and there was no freedom of expression. To the contrary, under Law Number 5/96, which prohibits any discussion of the constitution, hundreds of dissidents were held as political prisoners. Human rights violations were widespread. The referendum was held in a threatening atmosphere

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that could never reflect the free voice of the people. The constitution-making process itself was so vitiated that a constitution emerging from such a situation was bound to be fraudulent. The 2008 constitution is a fraudulent constitution and it violates the mandate given in the elections of May 1990. These elections were held by the junta itself and thereafter it passed Order Number 1/90, which states that 'the responsibility of the elected representatives is to draw up the constitution of a democratic state.' Clearly, it was for the elected representatives, the NLD and SNLD, to draft the constitution. After an objective analysis, the irrefutable conclusion is that the referendum and the 2008 constitution are illegitimate and motivated to perpetuate military rule. On its merits the constitution also does not pass the necessary tests, as it fails to address the paramount need of the nation, namely autonomy in a multipolar nation.



The Legislature Manipulated

Each state or region will send in members to the Upper House. The regions are Burman dominated and therefore 84 representatives will be Burman. The states are comprised of ethnic nationalities and they will have 84 representatives. There is an appearance of equality, but in reality there is ethnic rivalry. The Burman majority will in all probability slice off and control a majority in the Upper House. The 1947 constitution established a bicameral system establishing a system of checks and balances on legislative power. The equal representation of ethnic



nationalities vis a vis the Burman majority was to a great extent met and the State Councils were given autonomous powers, though with some limits. The 2008 constitution has abolished this balance and created an imbalance in favor of a Burman majority. In creating seven ethnic states, the constitution created seven territorial units/regions where a Burman majority resides. The Upper House has fourteen units. In the Lower House, the Burmans dominate as it is composed on a population representation basis. The Army chooses 25% of the members of the Upper House. Apart from the 25%, some are from specially designated territories and self administered areas within the ethnic states. The result is that the Army will always have a stronghold on the legislative bodies in addition to occupying the presidency. Overall, one can come to the conclusion that structurally the 2008 constitution is built to provide Burman supremacy in all matters of governance. The provision for the distribution of powers is such that there is no concurrent power or division of powers between the central and state governments. There is, in fact, as before, no distribution or separation of powers.



There is no provision for a prime minister and the constitution is a presidential type which is potentially risky in a multi ethnic country. The parliamentary type of constitution with an election system based on proportional representation would better serve the needs and aspirations of countries such as Burma. The 2008 constitution is not a presidential system or a republic but a hybrid of different constitutions inflated with army powers called 'discipline.' The Commander in



Chief of the Defense Services has been given wide power without accountability. Each state and region has the same number of representatives regardless of its population, twelve each. This arrangement created the seven regions where one majority nationality, the Burmans, resides and thereby gives them majority representation. The entire balance was upset, the ethnic nationalities were divested of their right to equality, and control of the Upper House was vested in a majority Burman rule. The noble principle of power sharing was blatantly destroyed because the Army will choose twenty five percent of the members of the Upper House, which amounts to more than four representatives from each region or state, inclusive of union territories.

Sweeping centralization of all powers is the hallmark of the constitution. The avowed aim is not only suppression of the Burman majority but also marginalization of the ethnic nationalities. The president controls the 'leading bodies' which means domination of all three organs of power. It is clearly stated that the Army shall have a 'national political leadership role.' The president himself is required to have army experience. As a whole, the 2008 constitution has put the death-knell to democracy and ensured supremacy of the Army. The hidden agenda is to keep the ethnic nationalities in line.

The president must appoint personnel selected by the Commander in Chief to specific positions in, for example, the Ministries of Defense Security, Home Border Control, etc. The 2008 constitution essentially provides for rule by the Commander in Chief beginning in 2010. The Lower House consists of 440 members and the Upper House consists of 224 members. Ethnic groups comprise 35 percent of the entire population. On that basis they will have 154 representatives in the Lower House and 84 representatives in the Upper House, making their total number of representatives in Parliament 238. In contrast, Burmans will have a total of 426 representatives. Thus, Burman majority rule is maintained. The centralization of power, the abolition of power sharing, attacks on the separation of powers, and suppression of federal principles of a constitution are the basic principles of the 2008 constitution. Underlying is the suppression of ethnic nationalities.

Administrative and Legal Spheres Eroded

The 2008 constitutional article on states of emergency violates the Universal Declaration on Human Rights. The president has been given arbitrary power to declare a state of emergency on grounds of state security which are vague and jargon heavy. If a state of emergency is declared on the grounds of a special situation in a state, the state council should be consulted and should give consent before it is exercised. No such provision is in the 2008 constitution. The constitution should also provide that the central government cannot, without a state's explicit consent, deploy and order the presence of military and paramilitary forces



in a state which is considered as experiencing an 'internal disturbance'. There must be a time limit for the president to approve bills passed by state assemblies. The residual powers of legislature should lie with the state assemblies. There should also be a formal, institutional structure requiring consultation between the central government and the state governments. Under the constitution, there should be a provision for an interstate council as a supreme body to ensure concurrence on legislative matters between the central and state governments along with a national development council to ensure even growth. (Only 99 seats were allocated to members of the NLD and SNLD parties, all of which were either disqualified or resigned. The National Convention Procedure Code controlled the entire constitution making process. No public meeting was allowed and there was no flow of information).

Judiciary

The 2008 constitution does not provide any institutional safeguards such as a supreme court with the power of judicial review for infringement on the rights of ethnic nationalities. This absence leaves the ethnic groups in a helpless state where they cannot seek any judicial cessation of or retribution for the wrongs they suffer. The 2008 constitution has made the judiciaries of the ethnic states subordinate to the central judiciary. There is no provision for representation by justices of ethnic nationalities in the highest courts of the land. All decisions regarding appointment, tenure, and removal will be made by the Burman majority. Even the states' judicial systems will remain under the Burman majority domain. The lack of independence of the judiciary is another casualty of the 2008 constitution. The constitution does not provide the mechanisms to correct the imbalance of the central and state governments. The constitution is wholly unitary in character. Centrifugal tendencies have been preempted. The constitution promotes uniformity at the cost of diversity and emphasizes the need for a strong center. Feelings of neglect by the center have contributed to a growing sense of alienation among the various members of the Union of Burma, resulting in the exacerbation of armed conflict. The 2010 constitution has provisions which will deepen and sharpen the sense of alienation and the country will become more and more entrenched in perennial ethnic conflicts. Only a state with equal resources and power can successfully counter disunity and strengthen the relationship between the ethnic groups and the majority Burmans.

Gross inadequacy of resources in the states in relation to their developmental needs is the direct result of revenues remaining with the central government, which has been the basic cause of conflict. The 2008 constitution contains no provision for the transfer of revenues (to the ethnic states) from income taxes, corporate taxes, customs taxes and service taxes. The constitution must provide that states control 50% of taxes in a divisible pool, and furthermore that states be allowed to issue tax-free bonds. Without such provisions, the central govern-



ment will appropriate the entire power to levy service taxes. The constitution fails to mandate that states be given the power over service taxes.

The Web of Control

The 2008 constitution has not addressed a crucial national problem; namely, the cease-fire agreements. Since the seizure of power by the army, its role in the suppression of ethnic nationalities has increased by leaps and bounds. In the 1974 constitution it went to the extent of abolishing the chamber of nationalities, which under the 1947 constitution guaranteed equal representation by the ethnic states. The 2008 constitution has created seven geographical divisions, which on the surface appears to create a balance of power. However, it was with much consideration that the central government created these divisions in such a way as to maintain a Burman majority in each division. The ethnic nationalities, however, were not deceived because the lack of a constitutional provision for an honest balance of power was obvious. The true intentions of the central government were clear, as open aggression, looting, dislocation, forced labor, torture and rape became daily occurrences. When there was resistance, it was countered with annihilation. The Army provoked a civil war and the ethnic nationalities fought in defense of human dignity. Any constitution must address the root cause of this civil war. Further, the civil war was brought to a tempered halt by the Army when it realized that the resistance could not be eliminated. It offered and entered into cease-fire agreements with the various armed ethnic nationalities. The question is how the government in the context of the 2008 Constitution will tackle issues with the cease-fire groups. The 2008 constitution has miserably failed to offer any solution. It will lead to a break down of the cease-fire agreements and the conflict between the ethnic nationalities and the army will be aggravated, failing to bind the ethnic nationalities in its web of control. Burma will remain in a state of instability and disintegration.

Conclusion

The 2008 constitution will cast doom and disaster on the ethnic nationalities. The army is intentionally planning to rekindle the civil war. The prison sentences of respected Shan leaders have sent a clear message that the army junta intends to rule forever. From the perspective of ethnic nationalities, the constitution of 2008 is destructive, disempowering and dehumanizing. All people comprising the nationalities, majority or minority, must prepare to bury the 2010 constitution in 2009. The tripartite dialogue between the SPDC, NLD and ethnic leaders is the genuine roadmap for change in Burma and the only hope for ending the misery of millions of people in the land of golden pagodas.

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