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2010 Election in Burma from the perspective of Rule of Law

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2010 has at last arrived. The momentous event of the decade, in fact in the country's history, will be the election to be held under the 2008 constitution. It will provide a historic opportunity to put the military rulers in the dock as per their promise for fair and free elections to elect a new civilian democratic government according to the Constitution ratified in 2008. Perhaps we will witness a great turning point in the history of Burma. In 2008 the ruling military junta held a referendum on the Constitution drafted by its appointed National Convention. Having done that, which took 14 years, it was time to have a general election to elect a government according to the provisions of the constitution. It is of paramount importance that we bear in mind the process which gave birth to the 2008 constitution. A National Convention was established through the direct appointment of the overwhelming majority of its members. At the outset the National League for Democracy, the main opposition party, was given a small space. But eventually it was forced to leave the Convention because of the ways in which the proceedings were carried out. In effect the 2008 constitution was devoid of the will of the people and the draft was created without the mandate of the people. It was a prudent exercise in power politics by those who hold guns to stick to power to rule the people.

The million dollar question is: Is that constitution based on the rule of law? A true constitution will have the following facts about it very clearly marked: first, how the various agencies are organized; secondly, what power is to be entrusted to those agencies; and, thirdly, in what manner such power is to be exercised.

The 2008 constitution does not conform to any of the above mandatory principles. The constitution making process is the litmus test of a genuine constitution. Look in our own history, it is the path finder and will convince all, that the National Convention cannot be equated to a constituent assembly which is *sine qua non* in any constitution drafting process. What is a constituent assembly? The 1947 constitution is a crucial guide not because the founding fathers envisioned it but also because it was crafted during a critical period of our history, people being enslaved under the mighty colonial Raj. The constituent assembly at that time was elected. A general election was held to elect the representa-



tives to the constituent assembly which would deliberate, debate and evolve a constitution by majority votes of the elected members. They appointed a 111 member- committee which drafted the constitution. It was hotly contested by various political parties and the media including Bamakhit, Kyemon, Hanthawaddy, the Nation and a host of other privately-owned daily newspapers. The army role at that point of time was null and the 1947 constitution evolved. The National Convention-produced constitution and the 1947 constituent assembly-produced constitution were radically different in process and contents. The former has no historical roots and is a great insult to the martyrs, their dreams and visions. The 2008 constitution is not a constitution of the will of the people but it is will of one man, General Than Swe. The adage "king can do no wrong" has been embedded in the law of Burma. Power vests in Than Swe and not on people who elect their representatives to run the government, accountable to the people and legislature. The doctrine of sovereign immunity means the state cannot commit any wrong and is not answerable to anyone. A doctrine which has disappeared from the land of its birth has become a hallmark in the country where the great teacher Lord Buddha is worshipped by millions of people in the country. The 2010 election under these circumstances will only become a mockery.

The 2010 election is supposed to be the fifth step of the road map to democracy which the military leaders proclaimed years back. The six basic principles and the seven steps have been rejected by the people and the international community. It means that the constitution, a product of rejection, is also unacceptable. The international community has asked the junta to make the election free and fair and the first step is to release Dawn Aung Su Kyi and the 2000 political prisoners. The UN General Secretary visited Burma, met Than Swe, and made this demand. The United States President, Barack Obama, also reiterated the demand. There was no response. Su Kyi herself wrote to Than Swe, stating that she wanted to meet him to discuss cooperation with junta, lifting the sanctions, and other related political matters. These actions have been taken in order to reestablish the rule of law so that the people of Burma can develop in peaceful way. Against this back drop the 2010 election is destined to be a farce.

The rule of law determines that nothing arbitrary shall be done under the legal system. A clear violation of this principle includes the May 1990 election result which was flouted by the junta notwithstanding its solemn promise to hand over power to the winning party. Now the junta is holding the 2010 election. Can it be legally done? Can the 1990 election be nullified, having accepted it as fair and legal and officially listing the names of the winning candidates? The 2010 election will be null and void in the eye of law. The legal fiction that the referendum of 2008 is deemed to have abrogated the earlier election cannot be invoked. It is not a child's play. After the 2010 election, the junta will surely



reverse its stand if its results go against them. The child's play will go on and on. The rule of law predetermines that the election be fair and free, and conducted by an independent body far less biased than the junta. In the lexicon of rule of law, an election commission is a prerequisite. What has the junta done to constitute an Independent Election Commission? It will continue with the one it has in its grip or reshuffle it to suit its designs in a better way. It has become obvious that the junta is marking time to announce at the last moment the paraphernalia of the election so that it can manipulate and rig it in the way it likes.

The 2010 election vis-a-vis the rule of law also comes into play when the official existence of cease-fire agreements between the government and the insurgent groups is taken into consideration. To buy peace and perform governance the junta allowed the ethnic groups to retain their arms and remain within the limits of their respective states but cease political activity. The election cannot be held under this condition. Without a settlement with the cease-fire groups, the junta therefore tried to negotiate with the ethnic leaders with suggestion of transforming ethnic armies into Border Guard Forces with equal pay as regular soldiers. But the catch was that the Tamadaw officers were to oversee all operations. It meant that the Tamadaw will remain supreme.

All ceasefire groups refused this arrangement. To enforce the junta's rule, military operations have been started in the northeast of the country. This indicates that the junta wants the election and will enforce the constitution by bulldozing the aspirations of the ethnic nationalities. In this context the election of 2010 can neither be free nor fair. The country will be plunged into greater crisis. The objective of a constitution is to guarantee governance under rule of law for the people by the people and of the people. This very objective will be defeated and the country will be pushed towards a civil war. Who in his/her senses will support such an election? It is even more evidence that the rule of law will be emasculated.

The election is not far away and yet the junta has not removed the draconian laws which restrict citizens to voice their opinion or to ask for redress of the violation of the fundamental rights. When the 2008 constitution was placed before a referendum, 69% of the population claimed to have "no awareness of the details of the proposed constitution. Citizens cannot publish their own newspaper not speak of circulating the same. How will they participate in the election if their names are not on the electoral roll? When there is an infringement of the election rules, where is the forum where these matters can be decided? Tribunals have not been formed and the right of the judiciary to oversee these matters have not been provided. What will be requirements of political parties? Will they be allowed to operate? Chapter 10 of the 2008 constitution outlines them and some of the terms laid down are acceptable. But the clause (c) reads "--- directly or indirectly receiving and spending financial, material and other assis-



tance from a foreign government, a religious association, or other association or a person from a foreign country---" is not only broad, vague, and ambiguous; it is in conflict with the concept of rule of law and wipes out the other innocuous rights appeared to have been given in its articles. Who will determine this matter, the Election Commission or the judiciary? Who will constitute the Election Commission/judiciary? All key appointments having been vested with the military, it is obvious that the junta will continue to call the shots. The junta's own stooge, the Union Solidarity Development Party, will be propped up. From polling officers, counting and the various steps involved on voting day, the USDP members will man the services.

The role of political opposition will be visibly undermined. Liberal institutions and civil society will be prohibited from airing their critical views on the constitution. Supposing there is a call not to go to polling station and cast their votes, that will be dubbed as anti-state and actionable. No amnesty for political prisoners, which is the general practice, has been yet declared and the election remains heavily loaded. Perhaps a few days before the date of election, some political prisoners may be released. They will not be able to campaign. On the contrary, through the generosity of the junta they can be left out. The delay in preparation and announcing the electoral roll and calling for non-inclusion or wrong inclusion predict that the election will be rigged. The exiting electoral roll is archaic; there has been huge demographic change for decades, there has been migration of workers, there has been massive displacement of ethnic people, large number of refugees are out of the country, and there are number of political exiles living abroad. An election on this ground will be untenable and will not reflect the will of the people and will be in violation of the principle of "equal voting power for all citizens" and the international norm of right to vote. In short, the 2010 election will be held in total violation of the norms of a fair and free election. This is further confirmed as international monitors are not allowed inside although their presence lends legitimacy to election results if they are perceived to be independent. However all the countries that want democracy to be maintained go by the norms and tenets which the rule of law mandates but do not have any relevance to the junta for the simple reason that they do not want democracy.

There are other reasons to reject the 2010 election. The constitution is strengthens the executive and the contents of the constitution show that there is no federal feature making it a strictly centralized one. Burma is a country where 30 % of the population is comprised of ethnic minorities on distinct territorial demarcation and constitutional experts have opined that a federal constitution with an electoral system with proportional representation is the right way to protect the minorities. To deceive the ethnics and minorities the 1974 constitution created 7 ethnic states and divided the remaining Burmese territory into 7 regions. The present ruling junta has sugar-coated the device by creating the



Amyotha Hluttaw (Upper House of the Nationalities) by an equal number of representatives (12) from each region and state. This has not rendered the 2008 constitution into a semi-federal one. The Upper House will not be in a position to veto the legislation of the Lower House and there is no provision in the constitution underlining the protection of their rights in case conflict arises between the two. The right of secession was guaranteed in the 1947 constitution. The question of self-determination was never properly addressed by the majority Burmans and the national crisis continued. The 2008 constitution deserves to be thrown out as the core issue is as to whether a Presidential system or a federal Parliamentary system should be fit for the country. A hybrid constitution has been put in place to fortify authoritarian rule.

On merit, the constitution deserves contempt. Detailed provisions have been discussed elsewhere. A few salient points are stressed. None of the provisions can lead to good governance. Participation of the people is fundamental. By its very appearance, the constitution keeps the people secondary and puts the military on top. The reservation clause for the military does not exist in any constitution. The Burmese people are very peace loving and want to keep away from the gun-wielding soldiers. The denial of self-determination and refusal to share power with ethnic people cannot deliver good governance. There is no separation of powers. The executive, legislature and the judiciary are centralized in the hand of the President unelected by people and the minimum tool of checks and balances has been denied. The very composition of the Parliament has been flushed out of the peoples' representatives. In the Lower House 110 out of 440 and in upper house 56 out of 224 are reserved for military personnel. The whole of the Union Parliament is dominated by President, who will be a person with a military background and 25% of Parliament's members will be appointed by the Defense in Chief from the military. The executive forms the National Defense Security Council composed of 11 members out of which 6 are military personnel and the other 5 are from the Parliament who invariably will be those with a military background. The judiciary is a façade. No power of writ has been given to the apex court, not to speak of judicial review. Even when there is violation of fundamental rights or human rights, there is no forum where the citizen can go and have redress. The judiciary is just a department under the executive. There is no provision which can be stretched to be read as accountability of the rulers. The political system that the 2008 constitution will generate will make the people apolitical on the one hand and on the other hand make the junta uncrowned king with its triumvirate.

In conclusion we must remember that we have to bear in mind two things. The first is not to be carried away by thinking that there is dawn of a new era. We must acknowledge the mindset of the military leaders. It is not the case that they are in a deep crisis and are negotiating for survival. A well-entrenched military power has no reason to abdicate. It has successfully and physically



suppressed all protests like Debayin massacre, the 2007 saffron uprising, trials of Suu Kyi and Shan leaders, and the imprisonment of hundreds of political prisoners. They have abolished the rule of law and perpetuated thousands of human rights violations including acts of sexual violence and forced displacement. All with impunity. Nobody dares to touch them. This arrogance is further demonstrated when the regime refused the Secretary General of the UN and defied the President of the United States.

The second thing is that the opposition has to bargain from the position of comparative weakness. The revision of the constitution, or holding a free and fair election, release of the political prisoners and all other norms of a democratic election can be enforced if the opposition is in a position of strength.

The question therefore arises: what should the opposition do? Whether it should rally the people to vote for no for candidates after going to the polling booth or boycott the vote? The 1990 election cannot be a guide as the situation was totally different. That election was held with the backdrop of the great 1988 uprising. The political situation was volatile. If that path is followed (participate in voting), the military leaders will get the legitimacy to rule. On the contrary, if the voters stay away and the votes cast are few and far between, it will establish that the military leaders have no legs on which to stand. That may propel a new upsurge and pave the way for reestablishing the rule of law. Burma is at the crossroads and the rule of law is in the dock.

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