



## The Burmese Constitution: "A Discipline-Flourishing Democracy" Is No Democracy At All

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The Constitution "approved" by the people of Burma in a May 2008 referendum has been widely condemned for being drafted by an unelected, unaccountable military government and imposed on Burmese citizens. Burma's "State Peace and Development Council" (SPDC) - the military regime which rules Burma - drafted the Constitution in part as a response to pressure from the international community to establish a more democratic political system. The regime also held a referendum on the Constitution as part of its "road map to democracy." Yet the SPDC's commitment to democracy is tepid at best. In fact, it took nearly 15 years to produce a final draft of the Constitution, during which time the SPDC presided over a sham National Convention that was ostensibly designed to produce a number of basic constitutional principles. In reality, the National Convention was used by Burma's military as a delaying tactic to forestall a transition to democracy that the army feared would jeopardize its wealth and power. The Convention was also a strategic political maneuver the army used to nullify the results of the 1992 election, which was overwhelmingly won by Aung San Suu Kyi's democratic political party. Not surprisingly, the constitutional principles drawn up by the convention, as well as the final draft of the Constitution itself (hereafter "the SPDC Constitution"), reflect the will of a military dictatorship unwilling to give up power rather than the will of the people.

In addition to its failure to reflect the will of the people, the SPDC Constitution violates Article 1 of the Universal Declaration of Human Rights by establishing an elite, privileged class of unelected army officers rather than adhering to the declaration's principle that all citizens are equal before the law. The SPDC Constitution does not create a government of limited powers, but rather a highly centralized political system where all facets of government are controlled by



the army. The new Constitution confers overwhelming powers to the Executive Branch, the Commander-in-Chief (CIC) and the National Defense and Security Council (NDSC), which the CIC oversees. The SPDC Constitution is designed so that the army will not only be able to handpick people to serve in these powerful positions, but also select individuals to serve in the legislative and judicial branches and in local governments throughout the country. The Constitution does provide for autonomous regions and recognizes the right of Burma's myriad ethnic groups to pursue self-determination. Although it also mentions a number of fundamental rights due to Burma's citizens, such as freedom of speech and assembly, these rights are subject to limitation clauses granting the army broad leeway to revoke them at any time.

The following article will demonstrate how the text of the SPDC Constitution fails to provide a framework for the junta's purported goal of realizing democracy in Burma. It will also shed light on how the new Constitution fails to adhere to international standards of human rights and democracy. Indeed, Burma's military regime is intent on establishing its own form of "democracy" based on a model drawn from the hierarchical structure of the military itself. Essentially, the SPDC Constitution perpetuates the current military dictatorship by placing the army in an all-powerful, extra-Constitutional role from which it can control the country and operate above the law. This political system, which the SPDC has dubbed a "discipline-flourishing democracy," is designed to stave off democratic change and preserve the power and wealth of the army.

Instead of creating a system of government that adheres to the rule of law, the Constitution's emphasis on discipline indicates that the army intends to rule the country as it sees fit. In other words, by interpreting the law to suit its needs and by punishing individuals who oppose the regime, the Constitution codifies the army's intention to continue ruling the country "by discipline." The following analysis will demonstrate how the text of the SPDC Constitution cements the SPDC's control over all aspects of the country's political structure under the guise of text which, purporting to be modeled after democratic constitutions, merely serves to realize the army's goal of legitimizing its dictatorial "discipline-flourishing democracy."

## **Constitutional Democracy**

In order to facilitate a transition to constitutional democracy in Burma, the Constitution must provide the foundation for popular sovereignty. That is, where sovereignty is derived from the people, where the will of the people is the basis of government and where the practice of the rule of law is central to the constitutional framework. Although a constitutional democracy is governed by the majority's aspirations, there must also be constitutional guarantees through



federalism, judicial independence and a bill of rights to protect the aspirations and fundamental rights of minorities. The Constitution must therefore limit the powers of government and promote the powers of people. Though the SPDC's Constitution purports to provide the mechanisms for the advancement of constitutional democracy, upon closer examination its provisions provide little hope for the realization of this goal.

From the outset, one of the six basic principles of the Constitution is to promote a "discipline-flourishing genuine multiparty democracy." Though the term "discipline-flourishing" remains rather ambiguous, there is no doubt that it means guaranteeing a fundamental role for the military in the governance of Burma. This priority was highlighted throughout the National Convention, and, like a thread that binds the Constitution together, the power conferred to the military (or the Tatmadaw) is woven throughout each section of the document. In essence, the military seeks to rule the country by independently interpreting the laws within the framework of a hierarchical political system where the military is above reproach. This stands in stark contrast to other countries where the rule of law is derived organically from the people's representatives and applied equally to all citizens.

An examination of the provisions for legislative representation demonstrates how the military has secured significant legislative powers. The Constitution guarantees 25% of all seats in both national assemblies and in each state legislature and town council to the Tatmadaw. This includes the bi-cameral Pyidaungsu Hluttaw and each of the seven regional and state Hluttaws. For example, the Pyidaungsu Hluttaw consists of two legislative chambers. In the Pyithu Hluttaw, the seats are apportioned among the states by population, with a maximum number of 440 seats. Of these seats, 110 are guaranteed to the Tatmadaw and selected by the Commander-in-Chief. The second chamber, the Amyotha Hluttaw, contains an equal number of seats from each state and region, with a maximum of 224 seats, 56 of which are guaranteed to the Tatmadaw.

The Tatmadaw's involvement in national politics is not limited to legislative representation; it extends to guarantees for the presidency and the executive branch. Under the Constitution, the President is the head of state. In a rather ambiguous "electoral-college" process both legislative chambers as well as the Tatmadaw each nominate a vice-president. From amongst these three nominees the electoral-college selects the head of state. The Tatmadaw is thus guaranteed at minimum the position of vice-president, and most likely the presidency as well pending the outcome of the electoral-college. As for the executive, the President is obliged to appoint members of the Tatmadaw selected by the Commander-in-Chief of Defense Services to the ministries of defense, security/home affairs and border affairs.



The Constitution also limits true democratic representation in a number of ways. For instance, the central government is authorized to enact laws for the formation of political parties that practice "discipline-flourishing genuine multiparty democracy." The meaning of this form of "democracy" is open to abusive interpretation, and all political parties must practice or risk being disbanded. This provision may therefore allow the state to refuse status to any political party that practices genuine democracy or seeks to create a more democratic political system.

The election process also violates international democratic practices by limiting certain citizens' rights to vote and stand for office. Members of religious orders, for example, are barred from voting or becoming candidates, contrary to article 25 of the International Covenant on Civil and Political Rights (ICCPR), which grants every citizen the right to vote regardless of religion. This voting restriction also extends to individuals who are deemed to be of "unsound mind" as well as individuals who are banned from voting under future election laws. Such a fundamental democratic right should be guaranteed in the Constitution, not left to the whim of a legislature. For example, the article conferring democratic rights in the Canadian Constitution reads as follows: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." Although there are certain limits on voting rights in Canada (minors, for instance), it is unconstitutional for the Canadian legislature to withdraw this right.

A further flaw in the election process lies in the commission charged with holding and supervising the election process: the Union Election Commission. The Constitution grants the President the sole power to appoint the five members of the Commission, and allows him to impeach its members for a number of vague reasons including the "inefficient discharge of duties." This executive control over the body greatly reduces its potential for neutrality and the administration of free and fair elections. In contrast, the Chief Electoral Officer of Canada is appointed by a resolution of the House of Commons. He is required to report directly to Parliament and is thus accountable to all political parties, not simply the head of government.

Many other provisions in the SPDC Constitution run contrary to true constitutional democracy. For instance, the Constitution guarantees freedom of speech to legislative members "except where prescribed under the law." This provision can be used to restrain the voices of opposing perspectives in the legislature. Likewise, the qualifications for assuming the presidency are exceptional. She must have resided in Burma for the past twenty years, effectively excluding members of the opposition in exile from assuming the office. She may not have been married to a foreigner, purposively excluding Daw Aung San Suu Kyi's candidacy. Furthermore, she must have a basic knowledge of the military,



a restriction that some analysts have said is designed to exclude women from the presidency. Because the military is immune from civilian administration, only members of the Tatmadaw are likely to have a fundamental awareness of military matters. As such, the Tatmadaw will be able to limit all three nominees for the presidency to members of the military.

The powers conferred to the president must also be compared to those of the Commander-in-Chief of the Defense Services to determine where the real power lies. Though the President is offered seemingly significant powers, she is granted no power over the military, which remains under the sole direction of the Commander-in-Chief. Furthermore, the powers of the president can be entirely usurped by the Commander-in-Chief, who assumes all legislative, executive and judicial powers during a "state of emergency." Unlike the President, who can be impeached for misconduct or an inefficient discharge of her duties, the Constitution confers no removal powers with respect to the Commander-in-Chief's position.

The Universal Declaration of Human Rights grants everyone "the right to take part in the Government of his country, directly or through freely chosen representatives" and provides that "the will of the people shall be the basis of the authority of Government; this will shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." Unfortunately, the SPDC Constitution fails to realize this aspiration; rather, it merely serves to perpetuate Burma's existing power hierarchy.

## **Federalism and Ethnic Rights**

A federalist political system may be the only way for Burma's myriad ethnic minorities to peacefully co-exist while retaining their right to self-determination. The SPDC Constitution, however, does not provide any degree of autonomy for individual ethnic groups, but rather perpetuates the domination of the Burman ethnic group over the country's politics and society. Burmans constitute the majority of citizens. Other major ethnic groups include the Chin, Karen, Karenni, Kachin, Mon, Shan and Rakhine, all with their own languages, literatures and cultures. Though the various nationalities were historically granted a large degree of sovereignty and independence, the right to self-determination for ethnic minorities has been curtailed since the military assumed power in 1962.

The SPDC does not confer any degree of political autonomy to ethnic groups, and unlike the second draft of the Constitution created by the Federal Constitution Drafting and Coordinating Committee ("FCDCC 2<sup>nd</sup> Draft"), there is no Chamber of Nationalities designed to represent the interests of Burma's ethnic groups.



Moreover, ethnic groups do not have the right to choose their own leaders at the local level because regional political leaders are hand-picked by the central government under the SPDC Constitution. And while the SPDC Constitution allows for the "development" of ethnic languages, ethnic groups are not guaranteed the freedom to use their languages for education, cultural preservation or dissemination of information. In addition, the Constitutional right granted to ethnic groups to "develop" their cultures is limited by an exception clause (discussed below) that gives the government leeway to restrict efforts on the part of ethnic groups to assert and preserve their cultures if their actions "affect the interests of one or several other national races."

The language, culture and physical security of ethnic groups are not necessarily guaranteed protection under the new Constitution. Rather, Article 22(a) gives citizens the right to "develop" their languages and cultures, but fails to prescribe a mechanism to achieve this vague objective. The text does not charge any central or regional governmental body with the task of helping ethnic groups to "develop" their languages. By contrast, Article 36 of the FCDCC 2<sup>nd</sup> Draft grants every citizen "the right to freely speak and learn the language of his/her own nationality."

There is also no indication that ethnic languages will be considered official languages at either the national or local level, and there are no provisions that guarantee ethnic groups the right to use their languages for education, cultural preservation or dissemination of information. In contrast, Article 183 of the FCDCC 2<sup>nd</sup> Draft states: "In the various Member States, the national languages of the respective States may be designated as the official language." Additionally, the use of language such as "national solidarity" (Article 6(b)) and "national races" (Article 22) not only precludes self-determination and autonomy, but also perpetuates the process of "Burmanization"—precisely the opposite of what Article 22(a) is designed to achieve. Article 53 of the FCDCC 2<sup>nd</sup> Draft, on the other hand, not only requires the central government to "protect the rights of minorities" by designating and providing for "autonomous regions, national areas and special territories," but also grants "Nationalities that have not obtained the status of a National State...the right to seek the formation of an autonomous region or a national area within the state or states they reside."

Furthermore, the ethnic groups' Constitutional right to "develop" their cultures is limited by an exception clause (Article 22(a)) that gives the government leeway to restrict ethnic groups' efforts to assert and preserve their cultures if their actions "affect the interests of one or several other national races." This clause may simply be designed to preclude ethnic groups from seeking autonomy or self-determination. However, it may also serve to hinder language and cultural preservation efforts anywhere in the country because the army could devise a



variety of explanations as to how a particular act of language or cultural "development" "affect[s] the interests of one or several other national races."

Federalism is a decentralized system that divides powers between various levels of government, such that each level is supreme within its jurisdiction. A federal constitution provides for autonomous regional units within a national structure with clear demarcations of jurisdictional autonomy. Many countries have adopted federalism to accommodate minority groups, including Switzerland, Canada, Belgium and Spain. Their experiences have demonstrated that increasing the autonomy of ethnic minorities and their regional units also increases the likelihood of peace, security, democracy, individual rights, economic prosperity and inter-group equality.<sup>1</sup> While the SPDC's Constitution purports to provide a federal structure, the Constitution's ironclad commitment to national solidarity and the military's firm grip on federal power negates this potential.

Non-disintegration of the union is one of the main priorities of the Tatmadaw and is one of "guiding principles" mentioned at the beginning of the Constitution.<sup>2</sup> As a result of this commitment, the federal government can override the legislative powers of states and regions and the Commander-in-Chief has the right to assume all the powers of states or regions that threaten the disintegration of the union.<sup>3</sup> Similarly, every citizen is under an obligation to share the Constitution's primary objectives of non-disintegration of the union and national solidarity.<sup>4</sup> In fact, political parties must also share the objective of non-disintegration and must be loyal to the state, effectively excluding separatist parties from forming and precluding political dialogue on the issue of autonomy.<sup>5</sup>

The desire for territorial integrity by ethnic minorities is universal, and citizens of genuine democracies are free to express differing opinions on this topic. In addition, many scholars argue that democracies should only be fearful of the possibility of disintegration if it actually threatens a country's fundamental values. As Will Kymlicka states in "Federalism and Secession: At Home and Abroad":

[I]t is the attempt to remove secession from the agenda that threatens [fundamental] values, since this can only be achieved by suppressing political speech and democratic rights, and by increased political surveillance. Such actions are likely to force secessionists underground, where they are likely to become more militant and potentially violent.<sup>6</sup>

The army's fear of national disintegration and ironclad commitment to national solidarity is replete throughout the Constitution. The President of the Union, for example, is provided with significant powers over the states and regions, greatly





limiting their autonomy. The President has the ability to prescribe the duties of regional and state ministries and the right to appoint the Chief Minister of the Region or State.<sup>7</sup> The Chief Minister is therefore directly accountable to the President and must work alongside the President in the course of allocating duties to the ministries.<sup>8</sup> Thus, rather than providing for jurisdictional autonomy and self-government, the new Constitution gives the federal government a large measure of control over state and regional governments, forcing their leaders to report to the leaders of the federal government.<sup>9</sup>

Although there are a number of provisions that provide the basis for a federal structure and self-government - such as the Amyotha Hluttaw, which serves to counterbalance the Pyithu Hluttaw insofar as an equal number of seats are selected from each state and region - a closer examination of the relevant provisions demonstrates the superficiality of the federal structure laid out by the SPDC Constitution. Despite a list providing for the division of powers, for example, the central government has the constitutional ability to encroach on the limited powers provided to the states and regions and also retains all residual powers. The Chief Minister of the Region can be impeached for such nebulous grounds as an "inefficient discharge of duties," a provision which is open to significant abuse. Furthermore, few provisions recognize the diverse cultures and minority languages of Burma, and there is only one official language: Burmese.

Federalism is often said to be more efficient and can provide many advantages, such as encouraging jurisdictional experimentation and preventing the emergence of a tyrannical government. In Burma, however, one of the primary advantages of a true federalist political system is that it would protect the rights of ethnic minorities. Yet the Constitution fails to provide even the slightest commitment to federalism. With its ironclad commitment to national solidarity and a highly centralized political structure, the Constitution will continue to suppress the rights of ethnic minorities in Burma.

## **Judicial Independence**

The judiciary is one of the most important organs of government; not only does it apply existing laws to individual cases, but it also interprets the law. Judicial independence ensures that all citizens will be treated equally before the law, and the success of democratic governments largely depends on the impartial and independent nature of the justice system and the rule of law. Lord Bryce once stated that there "is no better test of excellence of a government than the efficiency of its judicial system."

Notwithstanding the provision stating that the judiciary is to "administer justice independently, according the law," the reality of the new Constitution's structure





is far different from that implied by the provision. Structural and political factors necessary for an independent judiciary are absent from the Constitution. Accordingly, the judiciary does not enjoy institutional independence because it is not free from interference by the military or the government. There are a number of factors to consider when analyzing judicial independence, including how and by whom judges are appointed, whether or not judicial tenure is guaranteed, how judges are removed from office, how judge's compensation is managed, how the budget for administering justice is allocated, how the laws which govern the justice system are enacted and how much power the courts are entitled to. An examination of a number of these factors demonstrates the SPDC Constitution's failure to provide for the impartial and independent administration of justice.

Regarding judicial appointment, under the Constitution the Parliament cannot reject the President's nominee for Chief Justice except for a limited number of reasons, such as failing to meet the age requirement. In spite of the limited ability of Parliament to reject a judicial appointee, the Constitution essentially provides the President with unrestricted power to appoint the Chief Justice. Similarly, the President has the power to appoint other justices to the Supreme Court and shares the power to appoint judges to regional and state courts with the Chief Minister of the given region or states. By contrast, under the 1947 Constitution appointments were made by the President on the advice of the Prime Minister and with the approval of both chambers of parliament in a joint session. This process provided a much more accountable and transparent method of appointing members to the judiciary, and the SPDC Constitution's failure to provide similar measures highlights its undemocratic priorities.

As for judicial tenure, the Constitution vests the President with full executive power to propose the termination of the Chief Justice's term of office. Moreover, the Chief Justice's tenure may be terminated on such nebulous grounds as "high treason" and "any other cause rendering them unfit to carry on duties." Given the lack of guidelines for these provisions, it may be argued that the Chief Justice can be dismissed by the President at any time, undermining judicial independence. A similar procedure is also provided for the Attorney General and the Deputy Attorney General. By contrast, under the 1947 Constitution, dismissal of a Chief Justice was only permitted pursuant to a fair procedure in Parliament rather than conferring unrestricted power on one individual.

The Constitution distributes judicial power amongst the Supreme Court of the Union, Region and State High Courts, a Constitutional Court, Military Court and lower courts in the self-administered zones. Perhaps most precarious about this arrangement is the fact that the Military Court is a court of final jurisdiction. As the Commander-in-Chief's decisions are final in matters of military justice, this creates a court system entirely unaccountable to civilian administration.



Furthermore, rather than providing for a fixed number of justices, the Supreme Court is composed of 7-11 judges while the High Court of every region and state is composed of 3-7 judges. This provision allows the authorities to appoint more judges in order to ensure continued control over the judiciary. At the very least, this Constitutional provision opens the door to potential abuse, and given the undemocratic nature of the greater constitutional structure, there is ample reason to believe it will be used by the army to control the judiciary.

## **Human Rights and Basic Rights**

Chapters and provisions concerning fundamental rights typically appear at the beginning of democratic constitutions. This is consistent with the notion of constitutionalism, which empowers citizens and strives to place limitations on the power of the government in order to prevent abuse and tyranny. In the SPDC Constitution, however, the chapter entitled "Citizenship, Fundamental Rights and Duties of Citizens" is positioned somewhere near the end of the lengthy document. A careful examination of its provisions reveals that its position near the end of the Constitution reflects its lack of commitment to these fundamental values.

Although an initial reading of the Constitution might lead readers to assume that Burmese citizens are granted considerable rights, a closer examination reveals that the Constitution often grants rights and then greatly curtails them. Section 354, for example, "grants" the fundamental freedoms of expression, assembly and association, but then limits these rights by subjecting them to "laws enacted for State security, prevalence of law and order, community peace and tranquility or public order and morality." While limitation clauses are not uncommon in constitutions that exhibit a high regard for the rule of law, the limitation clause provided in section 354 is particularly broad. A similar provision was included in the 1974 Constitution:

Every citizen shall have freedom of association, freedom of assembly and procession, freedom of speech, expression and publication to the extent that the enjoyment of such freedom is not contrary to the interests of the working people and of socialism.

Believing this provision conferred citizens with the right to assemble, workers demonstrated on the streets for an improved race relations. The Ne Win regime however, cracked down on the demonstrators with armed violence, claiming their actions were unconstitutional and contrary to socialist beliefs. And the broader scope of the limitation clause in section 354 of the new Constitution provides even greater leeway to justify an infringement on the right to assemble.



Throughout the Constitution, a number of rights are granted with one hand and then revoked with the other. In regard to gender equality, for instance, women are granted equality in the workplace and guaranteed equal pay for equal work. Yet two subsequent provisions read as follows: "nothing in this section shall prevent appointment of men to the positions that are naturally suitable for men only," undermining the previous provisions.

In general, language used throughout of the Constitution raises doubts about the army's commitment to human rights. For example, as opposed to guaranteeing rights, a number of provisions declare that the "State shall enable citizens to enjoy equal rights." Furthermore, the Constitution merely "recognizes other religions" aside from the state religion of Buddhism. In fact, in a likely attempt to quell dissidence from members of religious orders, the Constitution outlaws the abuse of religion for political purposes. Rights of citizenship and the freedom of mobility are also subject to restrictions that provide ample means for the legislature to minimize whatever "right" is provided as opposed to providing a constitutional guarantee.

The Constitution also allows existing laws to remain in force provided they are not contrary to the Constitution. While seemingly harmless, this clause poses a great challenge to human rights. For instance, the 1975 State Protection Law, under which Daw Aung Suu Kyi was held under house arrest, allows a person to be held in custody for up to five years without any charge or trial. Moreover, the Constitution remains silent on the process of judicial review for existing laws and it does not create any human rights commissions or other organizations designed to ensure that fundamental rights will be protected. Such institutional mechanisms are particularly important considering the current disempowerment of civil society in Burma.

Without an adequate foundation for democracy and judicial independence, the Constitution provides little hope for the advancement of human rights. Furthermore, under the SPDC Constitution fundamental rights are curtailed by broad limitation clauses, the preservation of Burma's existing authoritarian laws and the absence of a human rights commission.

### **Role of the Military**

The 2008 Constitution serves to codify the absolute power of the military regime over Burma's political system in a number of ways. The "guiding principles" of the SPDC Constitution require the army to play a central role in politics "in the future state" and authorize the army to be the primary governmental organ responsible for protecting the Constitution. In addition, as mentioned below in the section on Constitutional democracy, the Constitution guarantees that the



military will retain control of Burma's legislative, judicial and executive branches. Finally, this section will describe military immunity from control by civilian authorities as well as the powerful role of the CIC and the NDSC under the SPDC Constitution.

Although the Constitution is designed to preserve the military's control over Burma, the precise role of the military is not clearly spelled out. Rather, the Constitution declares quite vaguely as one of its six "guiding principles" that the military shall play "a leading role in national politics in the future state." There are, however, a number of provisions that effectively cement the military's control over all aspects of Burma's government and society. In particular, the Constitution confers the military with broad powers by virtue of the pivotal role played by the CIC and the NDSC.

Tellingly, the powers of the NDSC are laid out in the chapter of the Constitution which describes the powers of the executive. This chapter describes the power to control the president by virtue of a provision authorizing the CIC to dismiss the president if he is a civilian and cannot be controlled by the CIC.<sup>10</sup>

The new Constitution requires the NDSC to consist of the following 11 officials: State President, both Vice Presidents, Speaker of the People's Assembly, Speaker of the National Assembly, Commander-in-Chief, Vice Commander-in-Chief, Minister of Defense, Minister of Foreign Affairs, Minister of Home Affairs and Minister of Border Affairs. Among these positions, the Commander-in-Chief, Vice Commander-in-Chief, Minister of Defense, Minister of Home Affairs and Minister of Border Affairs are required to be active-duty military personnel, while the remaining positions (State President, both Vice Presidents, Speaker of the People's Assembly, Speaker of the National Assembly and Minister of Foreign Affairs) may be ex-army personnel. Given the stringent qualifications that all public officials must meet prior to assuming office (see section entitled "Qualifications for Office") the army will be able to ensure that most of the latter positions will be occupied by current or former army personnel.

The NDSC is also authorized to exercise broad powers during states of emergency (see following section entitled "Emergency Provisions") and is immune from prosecution for actions taken during states of emergency.<sup>11</sup> Unlike the practice in many democratic countries, the executive does not play the role of "commander-in-chief." Rather, Article 340 requires the NDSC to "form the people's militia strategy."

Moreover, the Constitution vests the military with the authority to "defend and protect the Constitution," giving the military broad leeway to both interpret the Constitution and compel intransigent actors and institutions to comport with its interpretation. The military would most likely interpret this clause to permit the



use of force in order to deal with such intransigent actors, all under the pretext of protecting the Constitution. Indeed, some observers have bemoaned that under the new Constitution the military is essentially an "ultra-Constitutional body" that is above the Constitution and above the law.<sup>12</sup> This analysis is reinforced by the fact that, unlike in the great majority of countries, under the new Constitution the military is not subject to civilian control. For instance, Article 20(b) provides that the Tatmadaw has the right to independently administer all affairs concerning the forces. Furthermore, the Constitution also immunizes the military from prosecution in any non-military judicial forum because the Commander-in-Chief has the final say on issues of military justice.<sup>13</sup> Under the new Constitution military personnel are accountable only to military courts and any alleged crimes committed by army personnel are to be adjudicated by the army's internal justice system. This system is seriously flawed and has failed to prosecute countless crimes against humanity committed by military personnel. This lack of accountability further cements the army's position as an organ of state that operates above the law.

### **Emergency Provisions**

The Constitution gives broad rights to the President and to the army during times of emergency. There are three different types of emergencies, and the army assumes more power as the nature of the threat becomes more severe.

A stage one emergency arises when a local government is unable to perform its Constitutional duties, which themselves are not defined, leaving the military to establish the duties at a later date. (Article 276(1) provides that "Duties, rights and privileges of the Okkahta and members of the self-administered division leading bodies or self-administration zones shall be prescribed by law"). Under the Constitution this type of emergency enables the President to "exercise the executive power of the Region or State or Self-Administered Area concerned [and] form a suitable body and entrust the executive power to an organization concerned, or to a suitable person."<sup>14</sup> In addition, fundamental rights may be restricted or suspended altogether<sup>15</sup> and the President is authorized to declare martial law, under which "administrative and judicial powers and functions" may be dictated by the Commander in Chief. A stage two emergency arises if "life and property" of a region are "threatened," in which case the army is permitted to take action to "prevent the danger and provide protection in accordance with the law."<sup>16</sup> Finally, a stage three emergency arises when an event threatens to cause the "disintegration of the union," in which case the President is required to transfer all legislative, judicial and executive power to the CIC to "enable the latter to take the necessary measures to restore the nation to a normal situation."<sup>17</sup>

In effect, during a stage three emergency the army is essentially authorized to dissolve and take over local governments. Even more troubling is the fact that



the army is responsible for organizing new local elections in the aftermath of the emergency, and there are no safeguards in the Constitution to ensure that the elections will be conducted in a fair and unbiased manner.

In addition to the foregoing issues, there are a number of other problems associated with the emergency provisions of the new Constitution. For example, the President and the NDSC are given up to 60 days to notify the legislature of stage one and two emergencies. Moreover, there is no time limit for stage three emergencies, so the army can delay notification until the sitting legislature's term expires, thereby precluding the legislature from objecting to the state of emergency. In the event of a stage three emergency the NDSC also exercises "state sovereign power" until a new President is elected. Finally, the army and other authorities are immune from prosecution for acts committed during a state of emergency.<sup>18</sup>

### **Economic Development**

Under the new Constitution economic development is hindered by the absence of rule of law and by insufficient protections for individual property rights insofar as the state is the ultimate owner of all land. Moreover, local governments are not given the power to create their own budgets or administer economic development within their jurisdictions; rather, all funds derived by the local government are funneled into the national treasury and doled out according to national and regional budgets drawn up by the executive branch. Although national and regional budgets must be approved by the legislature, it is unclear how much power the legislature will have to reject budgetary provisions given that all of the MP's will either be hand-picked or approved by the army, if not army personnel themselves.<sup>19</sup> The Constitution confers upon the national government a long list of exclusive taxation powers and economic activities - including natural resource development and extraction—that it alone is authorized to administer. By contrast, local governments are conferred with a very few enumerated taxation powers and economic activities that they are permitted to carry out. And unlike in other democratic countries, all residual economic powers rest with the national government.

There is no mention of the army's budget in the Constitution, and presumably it will continue its policy of self-sufficiency, in which the army derives its budget by exploiting Burma's natural resources and local army units use predatory tactics that have devastated villages across the country.

### **Qualifications for Office**

The laundry list of criteria that must be satisfied by individuals running for



parliament under the SPDC Constitution presents a formidable obstacle to a number of worthy candidates. It is most likely designed to preclude dissidents and other individuals disfavored by the army from assuming any position of power in the government.

For instance, individuals who have been convicted of a crime and are currently serving out their sentence are prohibited from running for parliament.<sup>20</sup> This provision enables the army to disqualify those who are already serving time for political and trumped-up offenses. It also enables the army to disqualify anyone simply by charging them with a jailable offense.

Individuals who have "obtained and made use of state property," with the exception of army personnel, are also prohibited from running for parliament.<sup>21</sup> Similarly, this provision enables the army to disqualify anyone by alleging that they have somehow misappropriated state property.

In addition, individuals who have not been living in Burma continuously for 19 years prior to the date on which they would assume office are prohibited from standing for election.<sup>22</sup> This restriction is most likely designed to disqualify people who have had contact with foreigners, including opposition figures such as Aung San Suu Kyi, and others who have been living outside Burma as exiles and/or refugees. The army is known to be extremely suspicious of outside interference, and there is an additional provision that prohibits individuals who have had any contact with foreign governments or organizations and individuals who have family members who have received benefits from foreign governments from running for parliament.<sup>23</sup> This provision is likely designed to weed out families who have been influenced or received support from foreign individuals or governments, including Aung San Suu Kyi and her family.

Individuals who are affiliated with religious organizations are also prohibited from participating in parliamentary elections.<sup>24</sup> This provision is targeted at monks who participated in the "Saffron Revolution" as well as anyone else the army deems to have opposed the government in association with a religious movement.

Additionally, individuals who are deemed to be of "unsound mind" or who have "not yet been cleared of being destitute" are restricted from running for parliament.<sup>25</sup> This vague provision gives the army broad leeway to disqualify potential political candidates.

Finally, both of the would-be candidates' parents must be Burmese citizens.<sup>26</sup> This is one of many Constitutional provisions that is out of step with global standards. It is probably designed to ferret out foreign influences and disqualify children born to stateless people and others living in Burma or along the Thai-Burma border who have not obtained Burmese citizenship - many of whom are ethnic minorities who oppose the junta.





In addition to satisfying the criteria set forth under the Constitution for parliamentary candidates, presidential and vice-presidential candidates must meet a more stringent standard. Presidential and vice-presidential candidates must be familiar with economic, diplomatic and military affairs. They must be at least 45 years old and must have lived continuously in Burma for the past 20 years.<sup>27</sup> These provisions are likely designed to ensure that senior military officers who are free from foreign influence occupy these important positions of power.

## **Conclusion**

Although couched in language that bears resemblance to democratic Constitutions, the SPDC Constitution will not bring true democracy to Burma. It is riddled with exception clauses that deny Burma's citizens the essential freedoms that democratic countries are founded upon, and only serves to codify the army's grip on power. In addition, Burma's myriad ethnic groups are not conferred with any degree of autonomy or guaranteed the freedom to use, express or preserve their languages or cultures. All branches of the central government, as well as local government leaders, are controlled by the army pursuant to Constitutional provisions that give the army the power to disqualify political candidates that it disfavors, occupy at least 25% of parliamentary seats, and select judges and executive officers at both the national and local level without the consent or approval of parliament. The army also has wide discretion to prohibit political parties on spurious grounds and has completely banned individuals associated with religious groups from standing for political office.

Moreover, the complicated set of emergency powers provisions enables the military government to assume extraordinary powers and abrogate basic rights (to the extent they existed at all) during various stages of emergency, the definitions of which are not clearly stated in the Constitution and are therefore open to abuse by the army. The powerful NDSC and its figure head, the Commander-in-Chief, are authorized under the Constitution to assume absolute power in the affected area(s) during emergencies that have been deemed by the army as "stage two" or "stage three" emergencies. In addition, the NDSC and the CIC also wield extraordinary power absent a state of emergency, and the army itself is immune from civilian control, unlike in most democratic countries.

Rather than creating a political system that adheres to the rule of law, the SPDC Constitution has placed the army in an extra-Constitutional role where it is free to operate above the law and rule the country as it sees fit. Indeed, the "discipline-flourishing democracy" that the army has sought to codify in the new Constitution is not a democracy at all; on the contrary, it is a political system that perpetuates the army's grip on power and denies the most basic rights to its citizens.



**(Endnotes)**

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1. Will Kymlicka, "Federalism and Secession: At Home and Abroad" (2000) 13 *Can. J.L. & Juris.* 207-224.
2. Section 20(e).
3. Section 40(c).
4. Section 384(a) & (b).
5. Section 404.
6. *Ibid* at para. 20.
7. *Supra* note at 248(c) & (e).
8. *Ibid* at 262(f).
9. *Ibid*.
10. U Aung Htoo, *The SPDC's 2008 Constitution; National Defense and Security Council Analysis*, July 26, 2008, p. 2
11. Article 432; see also Article 214
12. "A Brief Analysis on SPDC's Constitutional Principles," *Legal Issues on Burma Journal*, No. 16 (December 2003), *Burma Lawyer's Council*
13. Article 343(b) provides that "The decision of the Commander-in-Chief...is final in military justice"
14. Article 411(a)
15. Article 414(b)
16. Article 412
17. Article 427(a)
18. Article 432
19. Under Article 109(b) 25% of parliamentarians are required to be military personnel. Moreover, the long list of factors which can disqualify potential candidates for political office (see "Qualifications for Office" section below) gives the army broad leeway to stack the parliament with army officers
20. Article 121(a)
21. Article 121(g).
22. Article 121(f).
23. Article 121(e).
24. Article 121(h-i).
25. Article 121(c-d).
26. Article 121(f).
27. Article 59.

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