

A Brief Analysis on SPDC's 2008 Constitution:  
By U Aung Htoo, General Secretary, Burma Lawyers' Council  
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Analysis  
on  
SPDC's 2008 Constitution

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## What is the Constitution?

- (1) The Constitution is the Supreme Law of the Land which grants the rights to the people while prescribing and limiting the power of the government.
  
- (2) The constitution should be laid down on the ground of:
  - (a) reanalyzing the events that happened in the past;
  - (b) finding out the causes of the problems facing in the present; and,
  - (c) laying down foundation for future to avoid repeated disadvantages.
  
- (3) The constitution should facilitate resolving conflicts by peaceful means.

(2)

**SPDC Constitution:  
Lacking Values of a Democratic Constitution  
That Practices Constitutionalism**

**I. Sovereignty Issue**

**State Centered Sovereignty (Replaces popular sovereignty)**

1. Aim of the state
  - (a) Non-disintegration of the Union
  - (b) Non-disintegration of the national solidarity
  - (c) Perpetuation of sovereignty

Non-disintegration of the Union

- \* Oppression of all peaceful attempts of the people to reform the union.
- \* Justification of government's actions by arguing that the union must be protected at any expense.
- \* The union will not collapse if all ethnic groups and all social strata can enjoy **equality and equity**, subject to practical and reasonable restrictions.

(3)

Non-disintegration of the national solidarity

- \* In history, no society can guarantee national unity as an eternal value to be preserved at all times.
- \* the application of the right to **self-determination** not only by citizens, as individual rights, but also by ethnic groups and social strata, as collective rights.

Perpetuation of sovereignty (Sovereignty of a State)

1. Practically deny the popular sovereignty concept, that is, sovereignty derives from the people.
2. The sovereignty of a state can no longer be a shield under which governments can enjoy impunity for whatever crimes they commit within their national boundaries.

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**II. Democracy and the Rule of Law Issue**

“Discipline-flourishing democracy”

- \* In Democracy, practicing **the Rule of Law** is essential.

1. Everybody is equal before the law.
  2. Laws shall be just.
  3. Laws usually reflect the will of people.
- \* SPDC intentionally ignores it and replaces it with '**discipline**'
1. The military is to be placed above the 'discipline'.
  2. Justness issue will not be allowed to publicize.
  3. In making disciplines, the authorities usually decide.

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### III. The Issue on Majority Rule and Minority Rights

**In democracy,  
majority rule is to be guaranteed while protecting minority rights.**

**Comment:**

**SPDC Constitution does not guarantee majority rule.**

- (1) The election winning party will not enjoy any opportunity to form a government.
- (2) The Union Assembly does not have any power to check the actions of the executive, led by State President.
- (3) The National Defense and Security Council, an elite military dominated group, will mainly exercise the State Powers.

**SPDC Constitution does not protect minority rights.**

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### IV. Individual Liberty Issue

Individual rights to life, liberty, and property should be protected by the guarantee of due process of law.

### V. Limited Government

- (a) Separated and Shared Powers
- (b) Checks and Balances (Independent Governmental Institutions)
- (c) The existence of civil society organizations and free Media

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Analysis of the SPDC's Provisions on  
**“Citizenship, Fundamental Rights and Duties of  
Citizens”**

(From the Perspective of Human Rights)

**Provision relevant to Individual Liberty**

Article 376: “No citizen shall, **except 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”.

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**Provision relevant to basic freedoms**

“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 relation between one national race and another, or among national races and to other faiths.

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Effective laws in Burma, **which protect the security of the state**, and restrict freedom of Expression, Association and Assemblies.

(1) **1975 State Protection Act**

- (2) **Printers and Publishers Registration Law 1962**
- (3) **Law relating to Formation of Organizations 1988**
- (4) **The Television and Video Law 1985**
- (5) **The Motion Pictures Law 1996**
- (6) **The Computer Science and development Law 1996**
- (7) **Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbance and Oppositions 1996**

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#### 1947 Constitution of Burma

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

- (i) The right of the citizens to express freely their convictions and opinions,
- (ii) The right of the citizens to assemble peacefully and without arms,
- (iii) 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.
- (iv) The right of every citizen to reside and settle in any part of the Union, to acquire property and to follow any occupation, trade, business or profession.

#### 1974 Constitution of Burma

“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**”.

(11)  
**Analysis on Legislative Bodies**

The legislative power of the State is apportioned to:

- (a) The Union Assembly;
- (b) The Regional Assemblies; and
- (c) The State Assemblies.

The Union Assembly

The People's Assembly

The National Assembly

- (1) Out of the 440 representatives, 110 military personnel nominated by Chief of Staff of the Defense Forces will be the members of the People's Assembly.
- (2) Out of the 224 representatives, 56 military personnel nominated by Chief of the Staff of the Defense forces will be the members of the National Assembly.
- (3) Military personnel, submitted as representatives by Chief of Staff of the Defense Forces, whose number shall be equal to one third of the number of representatives, will be the members of the Regional and State Assemblies.

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The Status of Legislative Bodies in accordance with the SPDC's Constitution

- (1) The military representatives will occupy one fourth of Members of Parliament.
- (2) Former military personnel and cronies of the military may also be elected as civilian representatives.
- (3) The representatives of the Union Solidarity and Development Association (USDA), which is similar to Golkar Party in Indonesia, will participate in the election and form a major component.

These three sectors will assuredly constitute a solid position and reject all attempts to be made by other civilian elected representatives to:

- abrogate unjust laws; and,
- enact just laws.

Contrarily, the legislative Body will continue enacting unjust laws with reasons for **prevalence of law and order, community peace and tranquility or public order and morality.**

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## Law Making Processes

Past and Present Problem -----

**(Lack of People's Access to Law Making Processes)**

While legislators are making laws in Parliament:

- (1) People should enjoy the right to express their opinions through media;
- (2) The civil society groups should also be able to submit their comments;
- (3) The academics should be allowed to present their research findings;
- (4) Debates should be allowed in Universities and public meetings;
- (5) The judges, Bar associations and prosecutors should have access to judicial committees of the legislative bodies for the emergence of the judicial laws;
- (6) Respective people that may be impacted over by the new laws should be invited and listen to their voices;
- (7) Taking video of the legislative sessions and distributing them among the public should be granted.
- (8) Discussion records within the legislative secessions should be published and distributed among the public regularly, systematically and publicly.

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## Judiciary

Adopted Principles by Democratic Societies:

- (1) The independence of the judiciary
- (2) The impartiality of the judiciary.

The SPDC's principle on Judiciary

“Administering justice independently according to law”



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### **Independence of the Judiciary**

To what extent the judiciary is independent should be mainly determined by the following seven factors:

1. How the judges are appointed and by whom.
2. How the Judicial Tenure is guaranteed.
3. How the removal of judges from the office is to be done.
4. How the remunerations and the compensation of judges is managed.
5. How the budget for administering justice is allocated.
6. How the laws which govern the justice system are enacted.
7. How much power the courts are entitled to.

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### Analysis on Appointment of Chief Justice

1947 Constitution of Burma

- (1) On the advice of the Prime Minister
- (2) With the approval of both chambers of parliament in joint sitting
- (3) The chief justice was appointed by the President.

(Ceremonial President)

SPDC's 2008 Constitution

- (1) The Chief Justice is to be appointed by the President.  
(President will exercise full executive power.)
- (2) With the approval of both chambers of parliament in joint sitting
- (3) The parliament cannot reject the chief justice nominated by the State President.

Article 299 (C) (2)

**The Union Assembly shall not have the right to reject candidate for Chief Justice of the Union, submitted by the State President, unless there is concrete evidence to prove that the candidate fails to possess qualifications specified by the Constitution for Chief Justice of the Union, provided for in Article 301.**

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### **Article 301**

#### **Qualifications for Chief Justice and Justices of the Supreme Court of the Union**

Chief Justice of the Union and the Justices of the Supreme Court of the Union shall have the following qualifications:

- (a) Not younger than 50 years and not older than 70 years of age;
- (b) Possess the qualifications specified for members of the People's Assembly, with the exception of the provision for age;
- (c) Not being persons not eligible to be candidate in election to People's Assembly, specified in article 121;
- (d) (1) Having served a minimum of five years as a Region or State High Court Judge; or  
(2) Having served a minimum of ten years as a judicial officer or law officer in an office with a status not lower than the Region or State level; or  
(3) Having worked for a minimum of 20 years as an advocate; or  
(4) A person assumed by the **State** President as a legal expert of prominent reputation.
- (e) Being loyal to the **State** and the citizens;
- (f) Not being a political party member;
- (g) Not being an Assembly Member.

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#### Analysis on Removal of Chief Justice

##### **1947 Constitution**

- (1) The removal of the chief justice must be informed formally with the signature of one-fourth of the parliament members.
- (2) The charge on the chief justice must be taken into consideration only when half of the parliament members who attend the meeting approve it.

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**SPDC's 2008 Constitution**  
**Removal of Chief Justice**

Article 302 (1)

The Chief Justice of the Union or a Judge of the Supreme Court of the Union can be impeached by the State President or members of the People's Assembly or members of the National Assembly for any of the following:

- (1) breach of allegiance to the State,
- (2) violation of any of the provisions of the Constitution,
- (3) moral turpitude,
- (4) being disqualified for the post of the Chief Justice of the Union or a Judge of the Supreme Court of the Union under the Constitution prescribed in Article 301.
- (5) In efficient discharge of duties assigned to him in accord with the law.

**Comment:**

Executive review has replaced the practice of judicial review.

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Executive

Two Types of Governments

1. The Parliamentary System (the executive body led by the Prime minister)
2. The Presidential system (the executive body led by the President).

1. The Parliamentary System

- (a) The party which won the majority seats in the parliament forms the cabinet.
- (b) The Prime minister cannot be elected by direct popular vote.

## 2. The Presidential System

- (a) The candidate who won the majority votes in the presidential election forms the government.
- (b) The President is mainly elected by direct popular vote.

### Comment

Except the United States, 33 countries in the third world which practiced the Presidential system finally ended up in chaos.

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### Presidential System and Problems in Burma

There are three major problems:

#### 1. Nationality;

(Since the President is to be elected directly by popular vote, then the President will usually be from among the Burman nationality, that constitute a majority population in Burma.)

#### 2. Electoral System;

"First Past The Post" or "Winner All" system will reject a polity within which political negotiation can take place.

#### 3. The size of political party;

(The political party which is founded on the base of a particular ethnic nationality would never become a influential national party.)

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## A Fabricated Electoral System: A Trick to the People

The Presidential Election body will comprise three groups:-

- (1) the group of elected representatives of the National Assembly
- (2) the group of elected representatives of the People's Assembly
- (3) the group of military personnel representatives.

Each group shall elect a Vice-Presidents.

Out of these three Vice-Presidents, one will become the President and the other will become the Vice-Presidents.

**With this fabricated electoral system, the military representative, sent by the Chief of Staff of Defense Forces, will become either the President or the Vice-President of the State.**

The military personnel will be appointed as Union Ministers or Deputy Ministers in the defense, security/home affairs and border affairs ministries.