

ANALYSIS OF THE 2008 SPDC CONSTITUTION FOR BURMA

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THE POWER OF THE BURMESE MILITARY UNDER THE 2008 SPDC CONSTITUTION

Burma's ruling junta, the SPDC, has decided to hold elections in 2010 to choose a civilian government under the 2008 constitution, which was adopted by force and fraud. Even if those elections are free and fair, however, they won't bring about civilian rule because the constitution does not provide for it--a partially civilian government, yes, but civilian rule, no. On casual reading, the constitution seems to provide for a transition to civilian rule, but closer reading reveals a blueprint for continued military rule. The constitution allows the Tatmadaw to keep however much control it likes.

International attention has focused most on the constitution's mandate that the Tatmadaw will appoint 25% of the various legislative bodies. But there's a much bigger problem: under the constitution, the Tatmadaw is not subject to civilian government, and it writes its own portfolio. It can do whatever it wants.

The Constitution guarantees the power of the Tatmadaw in its section on "Basic Principles"—a clear sign that the framers thought the role of the Defence Services to be fundamental. Article 20(b) provides that the military will run its own show without being answerable to anyone: "The Defence Services has [sic] the right to independently administer and adjudicate all affairs of the armed forces." The constitution defines the "affairs of the armed forces" so broadly as to encompass anything that the Tatmadaw might want to do. Article 6(f) provides that among the "Union's consistent objectives" is "enabling the Defence Services to participate in the National political leadership role of the State." Article 20(e) further assigns the Tatmadaw primary responsibility for "safeguarding the non-disintegration of the Union, the non-disintegration of National solidarity and the perpetuation of sovereignty." This regime has frequently found a threat to "National solidarity" when people merely disagree with it; it is prepared to slaughter peacefully protesting monks. There is no reason to think that after 2010, the Tatmadaw will think differently.

Because the Tatmadaw's responsibilities are so broadly and vaguely defined, the question of who will have the power to interpret their scope is critical. The constitution answers that question clearly: the Tatmadaw will have the power to determine the powers of the Tatmadaw. Article 20(f) assigns the Tatmadaw primary responsibility "for safeguarding the Constitution." But if the military is the principal protector of the constitution, then

the military will presumably have the final authority to determine its meaning, so as to know what to protect. And indeed, Article 46 implicitly confirms this conclusion: it gives the Constitutional Tribunal power to declare legislative and executive actions unconstitutional, but it conspicuously omits the power to declare military actions unconstitutional. In other words, the Tatmadaw has the final authority to interpret the scope of its own constitutional responsibilities. Most first year law students have read a famous portion of Bishop Hoadly's Sermon, preached before the King in 1717: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them."¹ And under the Burmese constitution, the Tatmadaw will be "truly the lawgiver," not the people elected in 2010.

The Constitution further ensures that the Tatmadaw will have the power to control the citizenry on a day-to-day basis. Under Article 232(b)(ii), the Commander-in-Chief will appoint the Ministers for Defence, Home Affairs, and Border Affairs. The military's control over home affairs is especially ominous because it gives the Defence Services broad power over the lives of ordinary citizens in their daily lives.

The military's control over Home Affairs (as well as Defence and Border Affairs) will constitute a military fiefdom, not part of the civilian government in any meaningful sense. The Commander-in-Chief will have power to name the ministers without interference from any civilian official. The President may not reject the Commander-in-Chief's names; he must submit the list to the legislature. See Article 232(c). The legislature may reject those names only if they do not meet the formal qualifications for being a minister, such as age and residence. See Article 232(d). Theoretically, the legislature could impeach those ministers under Article 233, but the Commander-in-Chief would merely re-appoint a new minister acceptable to him.

In addition, these ministers will continue to serve in the military, so they will be under orders from the Commander-in-Chief, not from the President. See Article 232(j)(ii). In other words, the Commander-in-Chief will be administering home affairs, immune from interference by the civilian government. Theoretically—again—the legislature might try to pass statutes controlling the Tatmadaw, but recall—again—that under Article 20(b), the Tatmadaw has the "right to independently administer and adjudicate all affairs of the armed forces."

The independent power of the Tatmadaw over ordinary citizens includes the power to impose military discipline on the entire population. Article 20 provides: "The Defence Services has the right to administer for participation of the entire people in Union security and defence." In other words, the military may forcibly enlist the whole citizenry into a militia so as to maintain internal "security." And, again, the civilian government has no control over the military's operations. After the elections, Burma will be a military dictatorship just as much as now.

¹ See Choper, Fallon, Kamisar, and Shiffrin, *Constitutional Law: Cases—Comments—Questions*, page 1 (Ninth Edition 2001).

In short, during normal times, the Tatmadaw has constitutional power to do anything it wants without interference from the civilian government. But if it ever tires of the civilian government, it can declare a state of emergency and send everyone else home. On this subject, the constitution uses a bait and switch approach: in one section, it creates a process for declaring a state of emergency in which the civilian government will have a role; but in another section, it specifies that the military may re-take power entirely on its own initiative. Thus, in Chapter XI, the constitution provides for the declaration of a state of emergency in which the military would assume all powers of government, see Article 419, but it would require presidential agreement before the fact, see Article 417, as well as legislative ratification afterwards, see Article 421. But in Chapter I on Basic Principles, Article 40(c) provides for a very different, alternative process in which the Commander-in-Chief can act at his own discretion: “If there arises a state of emergency that could cause disintegration of the Union, disintegration of national solidarity and loss of sovereign power or attempts therefore by wrongful forcible means such as insurgency or violence, *the Commander-in-Chief of the Defence Services has the right to take over and exercise State sovereign power in accord with the provisions of this Constitution.*” (emphasis supplied). To be sure, the Tatmadaw may seize power only if “national solidarity” is threatened, but as already shown, the military has unreviewable authority to decide whether such a threat exists.

In other words, the Tatmadaw can seize control just as it did in 1962, and this time it will be legal. The whole constitution is based on a “wait and see” strategy: if the civilian government does what the Tatmadaw wants, then it will be allowed to rule; if not, then not. This constitution is not a good faith gesture toward democracy; it’s a cynical attempt to buy off international pressure.

THE TREATMENT OF BURMESE ETHNIC MINORITIES UNDER THE 2008 SPDC CONSTITUTION

Burma’s troubles began in a constitutional crisis rooted in ethnic conflict. Before the British occupied the area now within the boundaries of Burma, it had never been a single, unified country. Upon independence, many ethnic minority people wanted independence from the Burmese government because they feared that the majority ethnic group, the Burmans, would try to dominate them as the Burman king had traditionally sought to do. Other ethnic minority people agreed to become part of the new country, but only because Aung San indicated that they could have substantial self-determination.

In the event, the minorities received neither independence from Burma nor meaningful self-determination within Burma. The civil war began when the Karen took up arms to struggle for control of their homeland, and eventually every major ethnic group formed its own resistance army. The military took control of Burma because it claimed that only the army could save the country from chaos. The army is committing daily atrocities against the civilian population in the ethnic areas. In other words, the war began with

ethnic conflict, and even once it becomes democratic, it will likely revert to war and military rule unless the constitution addresses the underlying reasons for the ethnic conflict.

The new constitution does not address those underlying reasons, and overwhelmingly the ethnic minorities have rejected it. Their objections are many, but three are particularly important.

First, they want federalism. Burma's ethnic minorities are concentrated in seven states lying on the country's borders. Devolution of power to these state governments will therefore entail devolution to the minorities. Federalism will get the minorities what they want, however, only if the minorities themselves are in control of the state governments and if those governments have power over those issues that are especially important to the minorities. The 2008 constitution provides for neither.

The most powerful official in the state governments will be the Chief Minister, who will be entirely controlled by the President of the Union. The President has the power to name the Chief Minister. See Article 261(b). The state legislature has the power to reject the president's nominee but only if the nominee lacks the constitutional qualifications to serve as Chief Minister, see 261(d), such as age and residency, see Articles 261(a) and 120.. In addition, "[t]he Chief Minister of the Region or State shall be responsible to the President," Article 262(1)(i), so the President may presumably remove him at will. In short, the Chief Minister will not be answerable to the citizens of the state; he will instead be a local agent of the central government.

In addition, the state governments will be very weak. The Constitution gives power over some matters to the Union government and over others to the states. The balance is utterly lop-sided in favor of central power. Schedule One of the Constitution lists the powers of the Union legislature; Schedule Two lists the powers of the state legislatures. It is not possible concisely to summarize these two lists because they are detailed. Some facts may, however, give a sense of the imbalance. In the official English version, the list of Union powers goes on for seven pages; the list of state powers for only three. The Constitution's division of power over the gem industry provides a useful focused example of the imbalance. On the one hand, Schedule One gives the Union broad power over "[m]inerals, mines, safety of mine workers, and environmental conservation and restoration," Schedule One, Article 6(c), as well as "[g]ems," *id.* at Article 6(d). By contrast, Schedule Two gives the states power over "[c]utting and polishing of gemstones within the . . . State." Schedule Two, Article 4(c). In addition, the Constitution gives the Union legislature residual legislative power: all powers not specifically enumerated in the Schedules belong to the Union. See Article 98. Finally, whenever legislation passed by a state legislature conflicts with legislation passed by the Union, the latter shall prevail. See Article 198(b). In other words, the central government has the power to void state law.

Second, the minorities want a super-proportional share of power in at least one major decision-making body in the central government so that they can protect themselves. In

particular, they desire that representation in the upper house of the legislature should be structured in the same way as the United States Senate: each state, regardless of population, would send the same number of representatives. Because the minorities tend to live in the less populated states, they would have super-proportional power.

This sort of arrangement is not anomalous in Burma: the 1947 Constitution provided for a Chamber of Nationalities in which the ethnic minorities received super-proportional power. Indeed, even the SPDC's 2008 Constitution provides that the seven states shall send equal numbers of representatives to the upper house. But the Constitution also provides that Burma's seven Regions—which are dominated by Burmans—will also send the same number of representatives. See Article 141(a). In addition, the military government has resettled large numbers of Burmans to the “minority” states, so it is quite unlikely that the minorities will actually control the election of all the representatives from those states. Finally, the military will appoint twenty-five percent of all the members of the upper house, even those coming from minority states. As a result, it is extremely unlikely that the minorities will have enough power in the upper house to have meaningful influence over legislation.

Third, the minorities want plausible guarantees that the military will not resume attacks on them. The 2008 Constitution promises the opposite. Article 20(b) provides that the civilian government shall have no power over the military within its domain: “The Defence Services has [sic] the right to independently administer and adjudicate all affairs of the armed forces.” The affairs of the armed forces include “safeguarding the non-disintegration of the Union, the non-disintegration of National solidarity and the perpetuation of sovereignty.” Article 20(e). This phrase has a history: the junta has long claimed that the ethnic minorities want to disintegrate the union and that only armed force can stop them. For that reason, the military has long cast itself as the only thing that can keep the country together. These provisions are therefore code: they mean that the army can do anything it wants to the minorities, just as it has been doing.

The run-up to the elections has already brought increased violence. The SPDC has demanded that the ethnic resistance armies, even those with ceasefire agreements, must become border guard units in the Tatmadaw, commanded by Burmese army officers. Overwhelmingly, the ceasefire groups have rejected those demands, and the SPDC has attacked some of the smaller groups, resulting in yet another refugee crisis on Burma's borders. The conflict will escalate exponentially if the regime attacks the larger groups such as the United Wa State Army and the Kachin Independence Army.