

# Burma's 2010 Electoral Framework: Fundamentally Undemocratic

*A Legal and Human Rights Analysis*



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# **Burma's 2010 Electoral Framework: Fundamentally Undemocratic**

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### **I. OVERVIEW**

Burma's military regime, known as the State Peace and Development Council (SPDC), intends to hold national elections sometime this year, the first since 1990. The polls will be the fifth step in the so-called "Seven Step Roadmap to Democracy" (the Roadmap) announced by the SPDC in 2003. The first four steps related to the development of a new constitution, adopted in 2008, which perpetuates military control of the government. It was drafted with virtually no public participation and approved in a referendum orchestrated by the regime. The fifth step offers no prospect of establishing a government based on the will of the Burmese people.

Burma has been governed by the military for almost half a century. Throughout the country's modern history, ethnic conflict in its border areas has been a significant issue. Turmoil throughout the country increased dramatically in 1988 with student-led, broad-based, anti-government protests. Thousands were killed and many more fled to border areas or left the country. In response, the precursor to the SPDC, the State Law and Order Restoration Council (SLORC), took power.

Two years later, the SLORC held elections. In a hoped-for return to civilian rule, the people of Burma voted overwhelmingly for the National League for Democracy (NLD), the political party headed by Aung San Suu Kyi. But the SLORC refused to allow the NLD to take office and detained Suu Kyi, who has now spent 14 of the last 18 years imprisoned or under house arrest. (Burma holds at least 2,100 other political prisoners.)

Decades of poor management and corruption have created dire economic conditions, and turmoil has continued. During the 2007 "Saffron Revolution," the military regime brutally cracked down on demonstrations led by monks seeking a better economic situation and greater freedom. Border clashes between the regime and armed insurgent groups and continued repression of ethnic groups have led to significant instability.

The SPDC has presented the Roadmap process and the 2010 elections as important steps to lift Burma out of its desperate economic and social circumstances. But, contrary to the regime's expressed intention, the process thus far has merely reflected a concerted effort by the military to retain power rather than establish a government based on the will of the people. The constitution and the new election laws, issued on March 8, 2010, do not comply with even the most basic international standards.

The true nature of the electoral process has to be viewed in the larger context of the procedure that led to the development of Burma's constitution and the history of oppression by the military regime. The constitution drafting excluded participation by independent civil society leaders and opposition political figures, and the referendum by which it was approved was deeply flawed. Criticism of the draft constitution was prohibited, massive state resources were used to promote its passage, and there were no checks to ensure that the vote count reflected the votes cast.

The new election laws were developed by the military government and effectively prohibit longstanding opponents of the regime – political prisoners and any persons wishing to associate with political prisoners – from competing in the polls. The new National Election Commission lacks independence; the SPDC directly appointed its members with no public input.<sup>1</sup>

One of the new laws, on political party registration, has resulted in the silencing of many of the most prominent opposition voices. It required political parties to register or reregister in order to remain in existence and compete in the elections. But they could do so only if none of their members were currently imprisoned based on a court conviction. This requirement presented parties with a choice of either expelling prominent imprisoned leaders or declining to reregister. Under those circumstances, leading opposition groups, including the NLD, chose not to reregister and were required to shut down and disband as of May 7.

There have been allegations that the state is giving support to a political party with strong military ties – the Union Solidarity and Development Party (USDP). It grew out of the Union Solidarity and Development Association (USDA), a regime-created organization that has received substantial government support since 1993.<sup>2</sup> The USDA also has been associated with political violence and intimidation. The USDP registration application listed 27 ex-military officers among its members along with the sitting prime minister and other government ministers. The election laws prohibit civil servants from being members of political parties, but the election administrators declared that ministers were not civil servants.

These developments have occurred in a context of severe political repression: freedoms of expression and assembly have been sharply curtailed and the activities of political parties restricted. There is no independent judiciary to check government abuse of power, and media are prevented from reporting freely on the government and political process. Those who criticize the regime are often physically assaulted or imprisoned. Freedom House not only classifies Burma as “not free,” but gives it the lowest rating for both political rights and civil liberties. Human Rights Watch notes that the country’s human rights record continued to deteriorate in 2009.<sup>3</sup> The U.S. State Department’s 2009 Burma Country Report details numerous human rights violations.<sup>4</sup> The United Nations special rapporteur for human rights in Burma has called for a commission of inquiry to investigate crimes against humanity and war crimes committed by the military regime.<sup>5</sup>

The country also has among the worst records on corruption. Transparency International rates it 178<sup>th</sup> out of 180 countries for perceptions of public corruption.<sup>6</sup> The billions of dollars that Burma receives from natural gas sales alone could significantly improve the lives of its population. According to an investigation by Earthrights International,<sup>7</sup> the vast majority of the revenue is excluded from the government balance sheet, suggesting that it is being stolen by members of the regime or their allies.

In addition, the government has engaged in the systematic privatization of state assets through non-transparent sales to the military and its allies. Thus, in the run up to the vote, these groups are both building a war chest that will likely be used in the elections and for strengthening their hold on the levers of economic power.

Burma was once known as the “rice bowl of Asia” and had a highly educated population. Today, only half of the country’s children will complete primary school, making Burma one of the few places in the

world where the next generation of adults will be less educated than the current one.<sup>8</sup> Nearly 10 percent of Burmese children will die from preventable diseases before their 10<sup>th</sup> birthday. Some 90 percent of the population lives on 65 cents a day,<sup>9</sup> and 30 percent had incomes below the threshold necessary to provide for basic food and other needs,<sup>10</sup> according to a 2006 report by the United Nations Development Programme.

Little progress has been made to resolve the status of ethnic minorities, an issue that has plagued the nation since before it achieved independence from the British in 1947. Burma is estimated to have a population of approximately 57 million made up of over 100 ethnic groups.<sup>11</sup> The most predominant are the Burman (68 percent), Shan (9 percent), Karen (7 percent), Rakine (4 percent), Chinese (3 percent), Mon (2 percent) and Indian (2 percent).<sup>12</sup> One manifestation of this problem is the continuing armed clashes with minority groups along the country's borders. The regime has entered into ceasefire agreements with some of these groups and has been pressing them to become Border Guard Forces (BGFs) in the Burmese military. For those that refuse, the registration applications for their associated political parties have been put on hold, while the applications of those from compliant groups have been approved.

Representatives of numerous countries and international organizations have questioned the credibility of the upcoming elections. Among the comments:

- United Nations Special Rapporteur on Human Rights in Myanmar {Burma} said “[t]he Government of Myanmar {Burma} has not yet responded to pleas from inside and outside the country for conditions that allow credible elections.”<sup>13</sup>
- Kurt Campbell, U.S. assistant secretary of state for East Asian and Pacific affairs, stated that “what we have seen to date leads us to believe that these elections will lack international legitimacy.” He urged the regime “to take immediate steps to open the process in the time remaining before the elections.”<sup>14</sup>
- The European Parliament stated that it “condemns the holding of elections under completely undemocratic conditions and on the basis of rules which exclude the main democratic opposition party and deprive hundreds of thousands of Burmese citizens of their right to vote and stand for election, in a clear attempt to exclude the country's entire opposition from the ballot.”<sup>15</sup>

Concerns have also been expressed by the chair and four member states of the Association of Southeast Asian Nations (ASEAN), of which Burma is a member, as well as by the UN Secretary-General<sup>16</sup> and many other international figures.

Indeed, the 2010 electoral process in Burma fails to meet even the most basic international standards:

- *Government based on the will of the people.* Fundamentally, elections are intended to fulfill the mandate in the Universal Declaration of Human Rights that “the will of the people shall be the basis for the authority of the government.” In Burma, the constitution establishes a structure designed to perpetuate military rule.

- *Basic human rights.* The Universal Declaration of Human Rights guarantees freedom of expression, freedom of assembly and freedom of association, which are essential conditions for democratic elections.<sup>17</sup> These protections do not exist in Burma.
- *Freedom to stand for election.* The International Covenant on Civil and Political Rights states that citizens must have the right to stand for election.<sup>18</sup> Freedom to stand for election is circumscribed in Burma, both by the election laws and the detention of regime opponents.
- *Impartial election administration.* The UN Human Rights Committee has made clear that to conduct genuine elections there should be an independent electoral authority to manage elections fairly and impartially and that there should be independent scrutiny of the election process.<sup>19</sup> In Burma, the electoral administration was appointed unilaterally by the regime and has shown itself to heavily favor the regime and its allies.

In sum, there is no reason to believe that the elections as currently planned will comport with international standards. Nor are they likely to lead to greater openness. Nothing in the behavior of the regime over the past 20 years has signaled anything other than a commitment to hold power at any cost.

NDI has organized more than 150 international election observation delegations over the last 25 years. Many of these missions observed flawed elections, but in most of them there was at least the potential that the overall process could reflect the will of the people and lead to democratic change. The Declaration of Principles for International Election Observation, endorsed by over 30 organizations, maintains that organizations should not “send an international observation mission to a country under conditions that make it likely that its presence will be interpreted as giving legitimacy to a clearly undemocratic process...”<sup>20</sup> Given the circumstances, even if Burma’s law permitted international observers, NDI would not deploy them. The constitution effectively locks in the military as rulers of the country in perpetuity. The upcoming elections appear to be designed to gain international acceptance for an illegitimate process.

The key predicates that could allow for a credible and transparent process remain those consistently called for by Burma’s democracy activists and their supporters in the international community:

- The SPDC should move quickly to release political prisoners, including Aung San Suu Kyi and other NLD and opposition leaders, and enter into a serious dialogue with them on a democratic transition process.
- All political prisoners, including Aung San Suu Kyi, and ethnic minority groups must be allowed to participate in elections.
- All civil and political rights necessary for elections should be introduced and observed, including the freedoms of expression, association and assembly.
- A process should be crafted that would allow for review and amendment of contested elements in the constitution. This process should address specifically the role of the military and the treatment of ethnic minorities.

- The election laws and procedures should be revisited to allow adequate time for parties (including those that have chosen not to participate or are prevented from participating under the current rules) to organize and participate, and to ensure that the elections are administered by an independent commission appointed in consultation with the opposition.

If each of the recommendations described above is followed and the predicates for a meaningful election are established, unimpeded election observation by domestic and international actors should be permitted to increase confidence in the process.

## II. ANALYSIS

The following analysis outlines key impediments to meaningful elections in Burma at this time. These obstacles are embedded in the 2008 constitution, which, as described in detail in Section II.A below, enshrines fundamentally undemocratic principles. These flaws are also entrenched in the recently-enacted election laws, as described in Section II.B.

### A. CONSTITUTIONAL ISSUES

#### *The Process of Drafting the Constitution – Roadmap Steps 1 through 3*

The process that led to the drafting of the Burmese constitution prevented, and even punished, attempts at popular participation. The National Convention to draft the constitution was launched in 1993. The regime suggested the convention would include representatives elected in 1990. Some were included, but, over time, all were expelled or became disillusioned with the process. In late 1995, the NLD delegates walked out in protest and then were dismissed for non-attendance. In March 1996, the SPDC adjourned the convention and followed up with a law the same year that imposed a 20-year prison term for criticizing the National Convention process.

In 2004, the SPDC reconvened the National Convention with 1,100 hand-picked delegates, which prompted a statement from UN Secretary-General Kofi Annan that said:

It is the Secretary-General's judgment that the National Convention does not currently adhere to the recommendations made by successive resolutions of the General Assembly. The Secretary-General believes that unless and until the views of the National League for Democracy (NLD) and other political parties are sought and considered, the National Convention and the road map process will be incomplete and lack credibility.<sup>21</sup>

Despite that and other criticism from the international community, the NLD and many of Burma's ethnic minority groups, the National Convention process went forward. The regime completed the drafting in a closed process and on April 9, 2008, announced that a referendum on the constitution would be held on May 10, 2008. Copies of the constitution were then released for sale.

#### *The Referendum – Roadmap Step 4*

Eight days before the referendum Cyclone Nargis struck Burma, causing massive devastation. Nevertheless, the regime pressed on with the referendum and rejected international observation. There were widespread reports that ballot secrecy was violated, that voter lists were manipulated and that voters were threatened. In addition, criticism of the draft constitution was prohibited; massive state resources were used to promote its passage; and there were no checks to ensure that the vote count reflected the votes cast. At the conclusion of the process, the regime claimed that the constitution had been approved in a dramatic landslide, with 98 percent turnout and over 92 percent of the vote. The constitution is to go into effect after the 2010 vote and the formation of the new legislatures.

## *Substantive Issues with the Constitution*

At least three substantive aspects of the constitution fall well short of basic international standards for democratic practices.

### **Military Control of the Government**

A basic principle of the constitution is to enable “the Defense Services to be able to participate in the National political leadership of the State,” a clear sign of the framers’ intention to preserve the military’s central role in government.<sup>22</sup>

The constitution establishes three sets of legislative bodies – an upper and lower house for a national legislature and regional legislatures. Twenty-five percent of the seats in each of those bodies are reserved for appointed uniformed military; the rest are filled through election.<sup>23</sup> Thus, if allies of the military can secure one third of the elected seats – either through popular appeal, coercion, manipulation or appeal to ethnic identity – they would have a majority, which would allow them to dominate each of those bodies.\*

Political forces not in alliance with the military, by contrast, would need to win twice as many elected seats – a two-thirds majority of the elected seats – to exert similar control.

Moreover, the upper and lower houses of the national legislature together act as an electoral college to select the president,<sup>24</sup> who in turn appoints government ministers (subject to certain limitations described below) and the attorney general.<sup>25</sup> Thus, by controlling one third of the elected seats in the two national legislative bodies, the military and its allies can choose the president and, as a consequence, control the appointment of government ministers and the attorney general.

In other words, the constitution allows the election of a president and the appointment of a government to be determined by groups representing a minority of the vote, a clear violation of the Universal Declaration of Human Rights, which says, “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.”<sup>26</sup> Under the Burmese constitution, authority in the legislature and the ability to elect a president and guide the appointment of a government could be determined by groups representing a minority of the vote. Moreover, by setting up a system in which the uniformed military can be the swing vote in determining the majority in the legislature, the constitution turns the principle of civilian control over the military on its head, establishing almost certain military control over the civilian government.

In addition, other elements of the constitution make clear that any civilian government, even if it were not itself controlled by the military, is unlikely ever to exercise authority over Burma’s armed forces. Under Article 20(b), “The Defense Services has the right to independently administer and adjudicate all affairs of the armed forces.” The constitution defines “affairs of the armed forces” so broadly as to

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\* For example, there are 440 seats in the Pyithu Hluttaw (lower house). Of those, 25 percent, or 110 seats, are set aside for members of the military, who do not have to stand for election. The remaining 330 seats are filled through election. For allies of the military, a controlling majority could be achieved by securing 111 of the elected seats, which would give them a total of 221 seats (the 110 appointed military seats plus the 111 elected seats). Opponents of the military would need to win 221 of the 330 contested seats in order to have a majority.

provide nearly unlimited authority. Article 6(f) states that among the “Union’s consistent objectives” is for the defense services to participate in the national political leadership of the state. (The “Union” is the term used in the constitution to refer to the nation as a whole.) Article 20(e) further assigns the military the primary responsibility for “safeguarding the non-disintegration of the Union, the non-disintegration of national solidarity and the perpetuation of sovereignty.” In the past, the regime has frequently found a threat to “national solidarity” when people merely disagree with it, as in its crackdown on, and killing of peacefully protesting monks. The constitution gives it the power to take such measures in the future, without regard to any elected government.

Because the military’s responsibilities are so broadly and vaguely defined, a critical question is who will have the power to interpret their scope. The constitution says the military has the power to determine its own powers. Article 20(f) assigns the military primary responsibility “for safeguarding the constitution,” which gives it the final authority to determine the constitution’s meaning. This interpretation is reinforced by Article 46, which gives a tribunal established under the constitution power to declare legislative and executive actions unconstitutional, but it conspicuously omits the power to declare military actions unconstitutional.

Other provisions ensure military control over elements of public policy. Under Article 232(b)(ii), the commander-in-chief appoints the ministers for defense, home affairs and border affairs. The home affairs portfolio is especially ominous because it gives the defense services broad power over the daily lives of ordinary citizens and creates a military fiefdom that is not part of the civilian government in any meaningful sense. The commander-in-chief can name these ministers without interference from any nominally civilian official. The president may not reject the commander-in-chief’s names and must submit the list to the legislature,<sup>27</sup> which can reject it only if the names do not meet the formal qualifications for being a minister, such as age and residence.<sup>28</sup>

In addition, these ministers continue to serve in the military, where they take orders from the commander-in-chief, not from the president.<sup>29</sup> In other words, the commander-in-chief will be administering home affairs, immune from interference by any elected government.

The military also has sole jurisdiction over “military justice.” The decision of the commander-in-chief is final and conclusive.<sup>30</sup> At the same time, the constitution grants immunity from prosecution to the SPDC (and its predecessor, the SLORC) and any members thereof in respect to any actions taken in execution of their duties.<sup>31</sup>

In short, the constitution establishes a framework in which the military is granted immunity for past actions, full control over its own broadly-defined affairs, control over several key nominally civilian ministries and institutions, and almost certain effective control over any eventual nominal “civilian” government.

Furthermore, the constitutional amendment procedure, which requires a vote of more than 75 percent of the representatives in the legislature, demonstrates that the military intends to maintain its hold on power. With its 25 percent share of seats, it has a permanent veto on any change in the constitution.<sup>32</sup>

Against the backdrop of these power dynamics is the massive sell-off of state resources, characterized by the International Crisis Group as “a way to transfer state assets and economic rents to the military

(through holding companies it controls), regime proxy companies and other private business interests of existing leaders or their cronies.”<sup>33</sup> Providing these levers of economic power to the military could serve to insulate it from budget constraints that might be imposed by a government controlled by civilians, if one ever were to be formed.

Preserving a limited role for the military in a transition setting has occurred in a number of countries. In Indonesia, some seats were temporarily set aside in the legislature for the military as that country transitioned to democracy. In Chile, nine seats were reserved in the Senate for non-elected officials selected by the outgoing military regime. The idea behind those set-asides was to gain military buy-in for the transition. However, in both circumstances the military-controlled seats were set aside in limited numbers and, in the case of Indonesia, done so through the election law rather than the constitution, a mechanism that the independent legislature could amend. Moreover, the set-asides in Indonesia have, over a relatively short period of time, been eliminated entirely. The manner in which set asides are implemented in the Burma constitution sends a different message: that the military seeks to hold power indefinitely.

### **Limitations on Rights in the Constitution**

While the constitutional structure cedes the lion’s share of political power to the military, the most important civilian position in the constitutional structure is the president, who is considered the head of state.\* Much attention has focused on who could hold that position and particularly whether Aung San Suu Kyi could qualify. A number of reasons have been offered for why she could not qualify under the constitution: because she has not served in the military, because she is a political prisoner, because her husband was a British citizen and because her children are British citizens.

The constitution specifies that the president, vice presidents, their parents, their spouses and their spouses’ children may not “owe allegiance to a foreign power, not be subject of a foreign power or citizen of a foreign country.”<sup>34</sup> The provision appears to be aimed at barring the regime’s most serious political rival from ever challenging it, a situation that runs counter to a statement by the UN Human Rights Committee, which says any restriction on the right to run for office must be objective and reasonable.<sup>35</sup>

The constitution also requires that any president or vice president be “well acquainted with the affairs of the Union,” including military affairs,<sup>36</sup> a provision that could be interpreted as requiring that a president or vice president have served in the military. This, too, could prohibit Aung San Suu Kyi or any other woman from holding those positions, which would violate Burma’s legal obligations as a state party to the UN Convention on the Elimination of all Forms of Discrimination against Women.<sup>37</sup>

The constitution requires that the president and vice presidents be elected, presumably to the Hluttaw (People’s Assembly). But because prisoners cannot be members of parties or candidates, they cannot be elected, effectively disqualifying Aung San Suu Kyi, much of the leadership of the NLD and leaders of other opposition parties unless and until they are released.

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\*However, there are circumstances, including if a state of emergency is declared and the president issues a military administrative order under Article 413(b) or the commander-in-chief acts under Article 40(c) in which the commander-in-chief would effectively be the head of state.

The constitution also spells out important rights for citizens, including:

- To express and publish their opinions freely;
- To assemble peacefully without arms and hold processions;
- To form associations and organizations; and
- To develop their language, literature, culture they cherish, religion they profess, and customs without prejudice to the relations between one national race and another or among national races and to their faiths.<sup>38</sup>

But each of these rights is limited by the caveat that citizens are at liberty to exercise the rights “if not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquility.”<sup>39</sup> Another caveat is imposed on the right against arbitrary detention, which bars detention without remand to a magistrate within 24 hours “except matters on precautionary measures taken for the security of the Union or prevalence of law and order, peace and tranquility in accord with the law in the interest of the public, or the matters permitted according to existing law.”<sup>40</sup>

In other words, each of these rights is contingent on the regime’s interpretation of vague and overly broad laws. These include:

- The 1975 State Protection Law, which allows the pre-emptive arrest of people who may act in a manner that would endanger public peace and tranquility;
- The 1962 Printers and Publishers Registration Law, which requires prior approval for all printed material and registration and regulation of all printers;
- The 2004 Electronic Transaction Law, which restricts the use of electronic media, including e-mail, for communications deemed detrimental, for example, to community peace, tranquility or national solidarity; and
- Section 505(B) of the Penal Code, which makes it a crime to make a statement that could cause a person to commit an offense against public tranquility.

The constitution bars from voting members of religious orders, persons serving prison terms, persons determined to be of unsound mind, persons who remain insolvent and persons disqualified by the election law.<sup>41</sup> Traditionally, Burma’s 400,000 Buddhist monks, who have become increasingly political, have not been allowed to vote, a practice that is inconsistent with international standards. The option to choose to vote is protected in the International Covenant on Civil and Political Rights<sup>42</sup> that extends the right to vote to all citizens without unreasonable restriction and prohibits discrimination based on religion. Many societies bar voting by those who are incarcerated, but in Burma, with its more than 2,100 political prisoners, it has become a way to silence opposition voices.

## **Treatment of Ethnic Minorities**

Leading ethnic minority groups have rejected the new constitution, an indication that it has failed to advance ethnic reconciliation. They assert that it does not address their desire for federalism, does not give them the power to block decisions that go against their interests, and does not provide sufficient guarantees that the military will not resume attacks on them.

### ***Degree of Autonomy***

The constitution establishes a new level of government at the state or regional level, including in seven border states where ethnic minority populations are concentrated. These new governmental bodies could be a vehicle for greater participation by ethnic groups in local governance if the new bodies reflected a genuine devolution of power to minority groups, but there is little evidence to suggest that that will be the case.

The most powerful position in each of these governments will be the chief minister, who will be appointed by,<sup>43</sup> and responsible to<sup>44</sup> the president. State legislatures may reject a nominee for this powerful position only if he or she lacks the technical qualifications required by the constitution, such as age and residency.<sup>45</sup> The president, with the approval of the region or state Hluttaw, also selects the ministers in the state or regional government,<sup>46</sup> and, as at the national level, the military appoints 25 percent of the Hluttaw members.<sup>47</sup> Even if the state bodies were a check on central government authority, the military could dominate those bodies. That prospect is heightened given the fact that the military government has resettled to the “minority” states large numbers of ethnic Burmans who are likely to have greater loyalty to the regime than the local ethnic group.

Even if the central government did not dominate these state and regional governments, it is likely that it could override them. The constitution divides jurisdiction over different matters among the Union government and the states. The gem industry provides one example of the power imbalance. The constitution gives the Union broad power over “[m]inerals, mines, safety of mine workers, and environmental conservation and restoration,” as well as “[g]ems.”<sup>48</sup> By contrast, it gives the states power only over “[c]utting and polishing of gemstones within the . . . State.”<sup>49</sup> According to the constitution, all powers not specifically designated to the states belong to the Union,<sup>50</sup> and the central government has the power to void state law.<sup>51</sup> Such federal preemption is not uncommon but is also not consonant with the ethnic regions’ longstanding aspirations for increased autonomy.

### ***Role in the National Parliament***

The military appoints 25 percent of parliamentary seats. As a consequence, ethnic minority groups, particularly those at odds with the military, are unlikely ever to control the parliament. However, ethnic minority groups have sought mechanisms to ensure that their minority rights will be protected. Some have suggested that they should have the ability to block legislation in parliament that directly infringes on their rights. The legislative body where this could theoretically be possible is the upper house that is organized with equal representation amongst the seven ethnic minority states and the seven Burman-majority divisions. However, the resettlement of many Burmans to the ethnic minority states greatly reduces the control that the ethnic minorities will have over who is elected from those states to the upper house. This, combined with reserved seats for the military in the upper house, will leave ethnic

minorities with little influence over legislation. The constitutional structure makes it more difficult for minority ethnic groups to achieve the autonomy they have been seeking for decades, if not centuries. Indeed, even those who see an opportunity for ethnic minorities in a post-election setting acknowledge that the opportunity will be contingent on the largess or enlightened self-interest of the regime – two qualities that have not been demonstrated during the last 20 years.

### *Impact on Vulnerability of Ethnic Minorities to Attack by the Regime*

In the constitution, the army retains the power to attack ethnic minority populations as it deems necessary. Article 20(b) stipulates that the military is charged with “safeguarding the non-disintegration of the Union, the non-disintegration of National solidarity and the perpetuation of sovereignty.”<sup>52</sup> This phrase has a history: the junta has long claimed that ethnic minorities want to disintegrate the Union and that only armed force can stop them.

The run-up to the elections has already brought increased violence. The SPDC has demanded that ethnic resistance armies -- even those with ceasefire agreements -- become border guard units commanded by SPDC army officers. The regime has made no effort to reach a definitive political settlement with the groups in this period, arguing that such a resolution should be made by an elected government, not an interim one. Instead, the regime insists that the groups cede autonomy now and negotiate political terms later, demands that, not surprisingly, have been largely rejected.

The SPDC has attacked some of the smaller groups, resulting in another refugee crisis on Burma’s borders. The conflict will escalate exponentially if the regime attacks larger groups, such as the United Wa State Army and the Kachin Independence Army. It can provide little comfort to ethnic minorities that on Armed Forces Day, the military announced as one of its goals: “To work hard with the national people for successful completion of elections due to be held in accordance with the new constitution, **to crush** internal and external subversive elements through the strength and consolidated unity of the people to build a strong, patriotic Tatmadaw.”\* (*Emphasis added.*)

## **B. THE ELECTION LAW AND ADMINISTRATION**

By international standards, election laws should establish clear rules and procedures to ensure all citizens can participate freely, fairly and equally as voters and candidates, and that political parties and other interest groups can operate freely and effectively. Election laws, like constitutions, should be adopted through an open process involving public participation. They should be endorsed, or at least accepted, by the principal political actors across the political spectrum, and ideally, they should be finalized a year before elections, to ensure that candidates and voters have time to become familiar with procedures. Election laws and regulations also should be aimed at creating public confidence in the election process and should not be biased in favor of any group. They should prohibit the use of public resources for the benefit of a particular candidate or party, create an independent and impartial election commission, and establish procedures to ensure the integrity and transparency of all aspects of the electoral process, including, but not limited to, the registration of voters and candidates, the political campaign, the conduct of election day, and the counting and tabulation of results. The laws also should include the possibility for appeals to an independent judicial authority.

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\* Tatmadaw is the Burmese term for the armed forces.

On March 8, 2010, the SPDC issued five laws relating to the 2010 elections:

- Union Election Commission Law
- Political Parties Registration Law
- Pyithu Hluttaw (lower house) Election Law
- Amoyotha Hluttaw (upper house) Election Law
- Region Hluttaw or State Hluttaw Election Law

Unlike the drafting and review of the constitution, there was not even a pretense of seeking public input in their creation. They were simply decreed by the SPDC.

The Union Election Commission Law creates a national election commission – the Union Election Commission (UEC) -- with regional and local sub-commissions to administer the elections. The UEC chooses the date for the elections, prepares voter lists, delimits districts, hears electoral disputes and regulates political parties. In addition, registered parties must submit member lists to the UEC within 90 days of being registered. If a list is not submitted or is found to be deficient, the party registration will be revoked and the party disbanded.

It is not uncommon to assign such powers to an independent election commission, which in many countries would be composed of individuals who are expressly nonpartisan or represent a balance of major political parties. The law in Burma, however, does not make the commission independent and does not require that it act impartially or transparently.

The law specifies that the chairman and members shall be persons whom the SPDC “deems to have a good reputation among the people.”<sup>53</sup> In fact, the SPDC promptly named allies to the 17-member panel without input from any outside actors. For example, the appointed chairman and at least one other member are subject to European Union sanctions as a result of the 2009 trial in which Aung San Suu Kyi<sup>54</sup> was convicted for not promptly expelling an uninvited person who entered her house while she was under house arrest. The trial and conviction were widely condemned by the international community and seen as another step by the regime to sideline its most potent critic and potential alternative leader. Based on the commission’s composition, it is unlikely that its members will act independently and impartially.

The steps taken by the UEC thus far reflect a consistent favoritism to the regime that appointed it. For example, a UEC directive allowed political parties to publish materials without first presenting them to a censorship board, but only if they paid a deposit and pledged not to oppose the regime or insult or sow dissent in the military. Another UEC directive required parties to seek advance permission from the local commission for any gathering and to provide details on the time and place and the names and identifying information on speakers. The directive restricts themes that can be referenced and prohibits giving talks with the intention of tarnishing the image of the army, not respecting the constitution or claiming government personnel cannot properly perform their duties.

Much of the controversy surrounding the election laws has focused on the Political Parties Registration Law, which requires parties to register or reregister within specified deadlines and prohibits them from including as members prisoners who have been convicted by a court. Inclusion of such persons can result in the party being deregistered, which is viewed as another attempt to silence the opposition since leaders of many opposition political parties, including Aung San Suu Kyi, are considered to be in this category.

Some have argued that the technical terms of Aung San Suu Kyi's detention need not result in the NLD being deregistered if she were included. But that would require the UEC to find that despite the fact that she is held as a captive, and despite the fact that she was convicted by a court, she is not being held as the result of such a conviction. Given how she has been treated by Burma's courts, the composition and record of the UEC, and the obvious intention of the constitution and laws to prohibit her participation in politics, it seems implausible that the UEC would reach such a conclusion. Moreover, even if the Burmese authorities agreed to this legal interpretation, no such claim could be made on behalf of the thousands of other imprisoned opposition activists.

Since most leaders of major opposition parties have been held as prisoners of conscience for many years, it is clear that the Political Parties Registration Law is another attempt by the regime to prevent them from participating in the elections. When the registration law was announced, the NLD and other similarly situated parties faced a difficult choice. They could purge leaders who, through their sacrifices, represented the core values of the opposition or they could stand by that leadership and risk being excluded from a deeply flawed election process, but one that some argued could improve the status quo. Given this Hobsian choice, it is understandable that most of the largest established opposition parties in the 1990 election, including the NLD, chose not to reregister.

Another problem area in the Political Parties Registration Law is its provision subjecting parties to deregistration if they have direct or indirect contact with armed insurgent groups.<sup>55</sup> This could create issues for parties in border areas that may have contact with ceasefire groups. The regime itself has contacts with such groups as it attempts to win their approval to become Border Guard Forces incorporated into the national military. Those that refuse could be declared unlawful and any political party in contact with them could be deregistered. In other words, the regime can pressure the ceasefire groups by holding out the prospect that if they do not agree to become BGFs, their affiliated political parties may be barred from the political process.

In the event of deregistration, the law provides that party assets are turned over to the state. Further, there are non-refundable, significant costs to registration – \$300 per party and \$500 per candidate. These requirements were once considered deposits but have now been converted to fees, raising the stakes for deregistration and creating economic barriers to participation in the impoverished country.

In addition, the Political Parties Registration Law requires potential parties to pledge to “safeguard the constitution,” which leading opposition parties believe should be revised significantly. The law also says that party members must be free from foreign interference, which, in a new twist, includes “influence.” It is not clear what is meant by “influence,” but the term is vague and broad enough that it could be used arbitrarily to punish the sharing of information and ideas that is an essential element of democracy.

The three Hluttaw election laws also raise a number of problems and include provisions that are contrary to international standards. The laws do not protect the rights of candidates and parties to campaign freely. Persons may not be candidates unless they have lived in the country continuously for at least 10 years. This requirement forecloses candidacies by another major faction of the opposition leadership – those who, in the face of severe repression, were forced or chose to live in exile. Candidates can also be barred on the basis of suspicion that they have had contact with unlawful organizations, even if they have not been convicted of doing so. Decisions of the Union Election Commission cannot be appealed to a court. There is no provision for non-party or international election observers. Although votes will be counted at polling stations, the procedures for tabulating votes at the regional and national levels appear to lack transparency, opening the possibility that the results could be manipulated. In addition, not only does the constitution provide that 25 percent of the seats in the Hluttaw are reserved for Defense Services personnel appointed by the commander-in-chief, the Pyithu Hluttaw Election Law includes a provision that empowers the commander-in-chief to replace Defense Services personnel in the Hluttaw at will, even after they have been seated as members. These provisions demonstrate clear disregard for basic democratic standards.

Finally, the regime appears determined to void the results of the 1990 elections that elected Aung San Suu Kyi's party. The Pyithu Hluttaw Election Law, like the Union Election Commission Law, repeals the Multi-Party Democracy General Election Commission Law (SLORC Law No. 1/88) under which the 1990 elections were conducted.<sup>56</sup> But the Pyithu Hluttaw Election Law goes a step further, stating that "as the Multi-party Democracy General Election held under the law repealed by this Law is no longer consistent with the Constitution, the results of the said election shall be deemed to be invalidated automatically."<sup>57</sup> If a new government is seated based on 2010 elections, the change means that the results of the election in which the NLD was victorious would be expunged.

The UN Human Rights Council, in a resolution on Burma adopted on March 19, 2010, expressed concern that the newly-adopted electoral laws do not meet the expectations of the international community to ensure an inclusive political process. The council called on the government to ensure a free, transparent and fair electoral process that allows for the participation of all voters, all political parties and all other relevant stakeholders in a manner of their choosing.<sup>58</sup>

Other countries and multilateral institutions have criticized the pre-election environment, including the election laws. These include: Australia,<sup>59</sup> Canada,<sup>60</sup> Great Britain,<sup>61</sup> Indonesia,<sup>62</sup> the Philippines,<sup>63</sup> the United States<sup>64</sup> and the European Union.<sup>65</sup>

### **III. CONCLUSION**

Twenty years ago, the Burmese military refused to acknowledge the results of the 1990 election and jailed or forced into exile many of those who should have assumed elective office. The letter and spirit of the regime's Roadmap process, along with the election laws, seek to formally strike that election from the history books of the country. The new constitution does not provide a framework for the establishment of democratic civilian rule. Rather it is a document that is carefully crafted to ensure continued military control of the country's political life. The election process is clearly designed to guarantee a pre-determined outcome and, therefore, does not meet even the very minimum of international standards. Under these circumstances it would not be consistent with the Declaration of Principles for International Election Observation, for credible international organizations to deploy observers for the upcoming polls. Such presence by observers would be seen as giving legitimacy to a clearly undemocratic process. It is understandable and justifiable, therefore, that Burma's most credible and largest political party, which under the terms of the election law would have been forced to expel its leadership in order to reregister, has chosen not to participate as well.

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