

## **Pinning hope on a hopeless constitution**

Sunday 20 September 2009, by [THI Awzar](#) (Date first published: 18 September 2009).

Last year, amid the death and debris in the wake of Cyclone Nargis, Burma got a new Constitution. Now people inside and outside the country are readying themselves for a general election of some sort, followed by the opening of a new Parliament, which is when the charter will take effect.

The ballot is expected in 2010, although so far no details have emerged of how it will be run. The regime could yet give any number of excuses to postpone it if Senior General Than Shwe or his astrologers decide the time is not right.

Some analysts - including former diplomats and others who move in their circles - see hope for change in the 2008 Constitution and the anticipated elections. Their argument is that even though the parliamentary system will be under military control, it will still provide space for people that have not had a chance to participate in government for the last few decades.

One way or another, they say, power will be more diffused and that will create opportunities. And like it or not, they figure, the junta's electoral circus is the only one in town.

But, in a statement to the U.N. Human Rights Council this month, the Asian Legal Resource Center has given a starkly different opinion. The Hong Kong-based group has argued that in its current form the 2008 charter cannot be called a constitution at all, let alone one that will permit people in Burma to shape their future.

The center makes its point by highlighting five aspects of the Constitution. First, the document commits to separating the branches of government "to the extent possible." The group observes that this is not a qualified guarantee of judicial independence, as some persons have misunderstood it, but exactly the opposite. It is a promise of non-independence. It is the inverting of a norm into a statement of fact: that Burma's courts are not and will not operate other than as appendages of the executive.

Second, the army, not the judiciary, is assigned primary responsibility for defense of the Constitution. Just how it is supposed to do this is not explained anywhere. Its relationship with a new constitutional tribunal, which has the role of interpreting the charter, also is not explained.

Third, the center notes that the armed forces, not the judiciary, are also assigned responsibility for upholding the rule of law in the country. Proponents of the Constitution appear to have overlooked or ignored the absurdity of this clause and what it implies.

Fourth, the Constitution sets up an executive president with power over the appointment and dismissal of senior judges, rather than an independent judicial body for that purpose, again with obvious consequences.

Fifth, not only are the statements of rights in the charter farcical and at every point qualified, but they also undermine rights established in the ordinary criminal law. For instance, the right to come before a judge within 24 hours of arrest is in the new Constitution perverted through a clause that this right does not apply in 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.”

This type of ridiculous caveat again completely negates the supposed right to which it is attached.

The center concludes that the so-called 2008 Constitution fails as a supreme law because it neither provides the normative grounds for a coherent legal system nor protects the rights of citizens, let alone outlining the means to ensure that the charter’s terms are effected.

Sri Lankan lawyer Basil Fernando has written that the passing in 1978 of a new Constitution in his country moved the state completely outside the orbit of constitutionalism and into a legal black hole in which anything became possible, and in which the conflicts that gripped the island for the last decades thrived.

Burma has been in its own black hole for even longer, most of the time without a constitution at all. In searching for a way out, some commentators have misled themselves into thinking that the mere existence of one will pull the country back into a constitutional orbit of some sort, no matter how distant. This is a mistake.

Whereas the charter’s authors have allotted legislative seats to the army in mimicry of Soeharto’s Indonesia, perhaps they copied its executive presidency from Sri Lanka, where since 1978 the dictatorial powers conferred upon the president have worked very well to destroy parliamentary democracy and undermine the courts.

In Burma democracy was destroyed and the courts defeated long ago, and so the Constitution’s concern is not with how to achieve what has already been done but with how to set in place arrangements to keep things as they are while giving some appearance to the contrary.

This will require a certain amount of juggling and the making of some compromises. But there is little point in nursing naive hopes that within the Constitution’s frame for the new government there will be some genuine opportunities for change. People with hope for Burma’s future should go pin it elsewhere.

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**P.S.**

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